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DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

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By A. C. FREEMAN.

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CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

**LITTLE ROCK AND HOT SPRINGS WESTERN RAIL-
ROAD COMPANY v. NEWMAN.**

[73 Ark. 1, 83 S. W. 653.]

PUBLIC STREET—Obstruction.—No Private Action on account of an act obstructing a public and common right will lie for damages of the same kind as those sustained by the general public, even though the inconvenience and injury to the plaintiff are greater in degree than to other members of the public; but an action will lie for peculiar or special damage of a kind different from that suffered by the general public, even though such damage is small, or though not confined to the plaintiff but also suffered by many others. (p. 18.)

PUBLIC STREET—Obstruction, Private Action for.—One whose property does not abut on that part of a street where a railroad track is laid, the railroad not preventing travel in the street nor barring access to his premises, cannot recover damages therefor. (p. 20.)

Dodge & Johnson, for the appellant.

¹ RIDDICK, J. Z. T. Raulston was the owner of certain town lots in the city of Hot Springs and a tract of land in the country upon which he lived. The defendant, the Little Rock and Hot Springs Western ² Railroad Company, constructed its railroad across Border street, where it intersected with Valley street, and along Valley street across Grand avenue to where Valley street intersects with Market street, and also constructed a sidetrack on a portion of Elm street. The property of Raulston does not abut on any portion of these streets where the railroad is built in the streets. A portion of his property is in the country some distance from the tracks of the railroad above referred to. One lot abuts on Grand avenue, some hundred or two feet from where the railroad crosses that avenue on a level with the street. Other of his lots abut on Hale street, which is not touched by the railroad, and three lots abut on Valley street, some two blocks, or about

six hundred feet, from where the railroad first touches that street. Raulston brought an action against the company to recover fifteen hundred dollars damages, which he alleges were caused to his property by reason of the fact that the defendant had constructed its tracks across and along the streets named.

The company filed an answer, denying that plaintiff had been damaged, or that it was in any way liable for the injury alleged. On the trial the circuit court held that the proof did not show any injury to the land in the country, but submitted to the jury the question of injury to the town lots, which returned a verdict in favor of plaintiff for the sum of one hundred and fifty dollars.

The defendant appealed. After the judgment below the plaintiff died, and the action has been revived in the name of H. C. Newman, his administrator.

³ This is an action by an owner of town lots in the city of Hot Springs against the defendant company to recover damages for an injury which plaintiff claims was caused to his property by the act of defendant in constructing its railroad along and across certain streets of the city.

The rule of law governing cases of this kind is that no private action on account of an act obstructing a public and common right will lie for damages of the same kind as those sustained by the general public, even though the inconvenience and injury to the plaintiff be greater in degree than to other members of the public; but an action will lie for peculiar or special damage of a kind different from that suffered by the general public, even though such damage be small, or though it be not confined to plaintiff, but be suffered by many others: Note by Bennett to *Fritz v. Hobson*, 19 Am. Law Reg. 615-637; *Hot Springs R. R. Co. v. Williamson*, 45 Ark. 433. The rule seems to be well settled, and the trouble in deciding this class of cases comes in the application of it, and in determining what constitutes a special injury and what is not. In the case of *Ricket v. Directors of Metropolitan Ry. Co.*, L. R. 2 Eng. & Ir. App. (H. L.) 175, where the majority of the judges were of the opinion that no cause of action was shown, Lord Westbury dissented, and delivered an opinion in which he maintained the right of the plaintiff to recover. In that opinion, after stating that he entirely concurred with the view that in order to recover the plaintiff must show, not a general injury, but a special damage to the prop-

erty owned by him, he undertook to illustrate the difference between a special and general damage. "Thus," he said, "if a public highway be diverted or crossed on a level by a railway, the inconvenience of having to wait whilst trains pass is common to all the public; and the benefit which it is considered results to the public from the railway is the only compensation. Persons dwelling in the neighborhood may sustain this inconvenience more frequently than the rest of the public; but, if the inconvenience is to be regarded as compensated by the public convenience, it cannot be converted into a ground for compensation by reason of certain persons having to sustain the inconvenience more frequently than the rest of their fellow subjects."

⁴ Now, in this case, none of plaintiff's property abutted on that part of the street upon which the tracks were constructed. The railroad did not block the streets upon which it was constructed or prevent travel upon them. The access to plaintiff's property was not taken away or rendered less convenient, though it is possible, as he claims, that, by reason of the fact that one end of the street upon which some of his lots abutted was occupied by the railroad, some travel was diverted from that end of the street upon which his property was located. But notwithstanding the tracks of the company, the street, as before stated, was still open for travel and used by the public, and access to the property of plaintiff could be had, not only by it, but by a number of other streets, some of which had been improved and rendered much more suitable for travel than the street on which the tracks were laid, even before the railroad was placed there.

The evidence leaves it very doubtful as to whether this diversion of travel was occasioned by the railroad or by the improvement of other streets in the city which would naturally tend to deflect travel from an unimproved street, whether occupied by the tracks of a railroad or not.

If a railroad is constructed across the highway leading from the home of one who lives in the country to the town or city to which his business requires that he must often go, it is very natural that he should feel that the danger of delay or accident to which he may thus be at times subjected renders his property less desirable as a home, while as a matter of fact its market value may be actually increased by the construction of the railroad. If he suffers an injury in such a case, it is general, and not special. If one owning a home in the country

could recover damages in such a case, the man who owns a home in the city and has often to visit the country might on the same principle claim damages to his home in the city, and so there would be no end to such claims, for the injury is common to the whole public, whether in the town or country. It would be impracticable to allow damages in such cases, and so the law holds that no recovery can be had. The circuit court so decided in this case as to the place owned by the plaintiff in the country. But the evidence convinces us that the same rule must be applied to the town lots.

⁶ The supreme court of Illinois, in discussing a claim for damages to property on account of the vacation of certain streets and alleys, said: "Here plaintiff's lot is not adjacent to the street and alleys vacated. It is in another block. The access and egress from his lot are not affected by the vacating ordinance passed by the city. The street in front and the alley in the rear of his property remain open as before, affording the same access to and egress from it. The inconvenience that would be occasioned to plaintiff in going from the street in front of his house to a particular part of the city on account of vacating and closing up certain streets and alleys in another block is of the same kind of damage that would be sustained by all persons in the city that might have occasion to go that way; and although the inconvenience he may suffer may be greater in degree than to any other persons, that fact would not give him a right of action": *City of East St. Louis v. O'Flynn*, 119 Ill. 204, 59 Am. Rep. 795, 10 N. E. 397.

In a well-considered case recently decided by the supreme court of Michigan the same conclusion was reached that the plaintiff could recover no damages on account of the closing of a street upon which his property did not abut, and the closure of which did not affect the means of ingress and egress to his property. In that case the court said that "it cannot be doubted that there has been some resulting disadvantage occasioned by the closing of that portion of the street"; but the court, after a full review of the authorities held that the injury was not special to plaintiff, but one which he suffered in common with the general public, and that no recovery could be had: *Buhl v. Union Depot Co.*, 98 Mich. 596, 57 N. W. 829.

The two cases referred to were much stronger in favor of the plaintiff than this case, for in those cases the streets were completely closed at the place of the obstruction. But here, as before stated, the street along which the defendant constructed

its tracks are still open for business and used by the public as well as by the company.

In conclusion, it seems to us that plaintiff failed to make out a case for any damages. It has been held that a mere diversion of travel is not sufficient to entitle one to damages: *Buhl v. Union Depot Co.*, 98 Mich. 599, 57 N. W. 829. But we need not discuss that point, for the evidence here falls short of showing that defendant caused any ⁶ diversion of travel from the street on which the property of plaintiff was located. It seems to us a matter of pure conjecture as to whether the diversion complained of was caused by the act of defendant or by the act of the city in improving certain other streets and making them more suitable for travel than the one upon which the store and other property of plaintiff was located. But if any inconvenience or injury was sustained, it was, as before stated, not special, but of the kind suffered by the public in general, and for which no recovery can be had.

Judgment reversed, and cause remanded for new trial.

To Entitle a Private Person to maintain an action for damages resulting from the obstruction of a public highway, or a suit in equity to prevent such obstruction, he must have sustained damages differing not merely in degree, but in kind, from the damages sustained by the general public: Tilly v. Mitchell etc. Co., 121 Wis. 1, 105 Am. St. Rep. 1007. See, however, Cereghino v. Oregon Short Line R. R. Co., 26 Utah, 467, 99 Am. St. Rep. 843; O'Brien v. Central Iron etc. Co., 158 Ind. 218, 92 Am. St. Rep. 305; De Geofroy v. Merchants' etc. Ry. Co., 179 Mo. 698, 101 Am. St. Rep. 524.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY v. COOLIDGE.

[73 Ark. 112, 83 S. W. 333.]

CONNECTING CARRIERS—Presumption of Negligence.—

When an initial carrier receives freight in good order, the law presumes that each successive carrier between the first and last receives it in good order; and this presumption, working through to the last carrier, who delivers it in bad order, leaves the responsibility upon him, unless he can show that the damage occurred prior to his receiving the freight. (p. 23.)

INITIAL CARRIER—Delay in Forwarding Perishables.—An unreasonable delay by an initial carrier in delivering such perishable freight as potatoes to the next carrier in the line of transportation, when the weather is warm, in consequence of which they heat and rot, is negligence. (p. 24.)

CONNECTING CARRIERS—Concurring Negligence.—Where two connecting carriers are both guilty of an efficient and proximate

cause of injury to goods shipped over their lines, either or both may be held responsible therefor. (p. 24.)

CARRIERS—Damages for Delay of Shipment.—The measure of damages for a delay in transporting perishable goods is the difference between their value when and where they should have been delivered and their value when they were delivered, with interest. (p. 25.)

CARRIERS.—Contracts Respecting the Liabilities imposed on carriers by law are valid only when fair and reasonable, and upon a consideration, usually a reduced rate of freight. (p. 25.)

Dodge & Johnson, for the appellant.

E. C. Horner and Rose, Hemingway & Rose, for the appellee.

¹¹⁴ HILL, C. J. The evidence fairly establishes these facts: On the evening of June 10, 1896, Coolidge delivered at Lexa, Arkansas, a car of potatoes, in good order, to appellant railroad for shipment over its line to St. Louis, thence by connecting carriers to the consignee in Chicago. The time which should have been consumed in the trip was two days, of which eight hours should be allowed the Chicago and Alton Railway, the connecting carrier at St. Louis, to deliver in Chicago. The time actually consumed was about sixty-five hours, instead of forty, from Lexa to St. Louis, and about fifteen, instead of eight, from St. Louis to Chicago, and then about a day lost in Chicago in delivery after arrival. The car, while in appellant's control, took a side trip from Wynne to Memphis and return, which the evidence shows contributed to the delay, although contended otherwise by the appellant. The potatoes were heated and rotten when delivered to the consignee, who lost a sale of seventy-five cents a bushel on account of this condition. That price was the fair market price at Chicago at the time they should have arrived. The consignee put men into the car, and saved what he could from the lot, and peddled out the salable potatoes, realizing ninety-seven dollars for the carload. This suit is for what they would have brought, had it not been for this damage to them. They cost at Lexa thirty cents per bushel, and were there properly packed into the car. There was no evidence of the condition of the potatoes from the time they left Lexa in good order till they reached the consignee rotten and heated.

There is evidence that delay in transportation of potatoes at that season of the year causes them to heat and rot; that the weather was very warm, and that the time consumed in the unnecessary trip from Wynne to Memphis and return would increase the likelihood of damage to the potatoes.

1. In the absence of evidence locating the damage to goods in transit over several connecting lines, a prima facie presumption arises that the last carrier is the negligent one: *St. Louis Southwestern Ry. Co. v. Birdwell*, 72 Ark. 502, 82 S. W. 835; *Moore v. New York etc. R. R. Co.*, 173 Mass. 335, 73 Am. St. Rep. 298, 52 N. E. 816; 14 Am. & Eng. Ry. Cas., N. S., 210; *Cote v. New York etc. R. R. Co.*, 182 Mass. 290, 94 Am. St. Rep. 656, 65 N. E. 400; *Faison v. Alabama etc. Ry. Co.*, 69 Miss. 569, 30 Am. St. Rep. 577, 17 South. 37; *Savannah etc. Ry. Co. v. Harris*, 26 Fla. 148, 23 Am. St. Rep. 551, 7 South. 544; *Texas etc. Ry. Co. v. Brown* (Tex. Civ. App.), 37 ¹¹⁵ S. W. 785; *Gulf etc. Ry. Co. v. Edloff*, 89 Tex. 454, 34 S. W. 414; *Laughlin v. Chicago etc. Ry. Co.*, 28 Wis. 204, 9 Am. Rep. 493; *Smith v. New York etc. Ry. Co.*, 43 Barb. 225. When the initial carrier receives the goods in good order, the law presumes that each successive carrier intermediate between the initial and last carrier receives them in good order; and this presumption, working through to the last carrier who delivers them in bad order, leaves the responsibility upon him unless he can show by evidence that the damage occurred prior to his receiving them: *Louisville etc. Ry. Co. v. Jones*, 100 Ala. 263, 14 South. 114; *Savannah etc. Ry. Co. v. Harris*, 26 Fla. 148, 23 Am. St. Rep. 551, 7 South. 544; *Hutchinson on Carriers*, sec. 761; 6 Am. & Eng. Ency. of Law, 2d ed., p. 752. All of these authorities declare this presumption only arises in the absence of evidence, and its purpose is to cast the burden of proof upon the party having the knowledge or means of knowledge to ascertain the truth. The appellant invokes the presumption as a defense here. If the evidence is sufficient to show negligence in the appellant as the initial carrier which caused the injury, then the presumption is overcome.

The difficulty in this case is in determining whether the injury was caused by the delay of the initial or the last carrier, or both. The Georgia court announced this rule in regard to perishable goods: "Unreasonable delay in forwarding fruit would be negligence, because prolonging the time within which, by the operation of natural laws, decay will be produced, and therefore such negligence would contribute to causing the damage": *Forrester v. Georgia R. R. etc. Co.*, 92 Ga. 699, 19 S. E. 811. In a Massachusetts case where a carrier contracted to deliver apples to a connecting carrier by a fixed time, and negligently delayed delivering them, and they froze in the possession of the connecting carrier, the court said: "If

the freezing had occurred on defendant's line, it cannot be doubted that the law would regard the delay as the proximate cause of the damage; it is none the less so because it happened on a connecting line. The damage was not caused by any extraordinary event subsequently occurring, but was caused by the event which was, according to common experience, naturally and reasonably to be expected, a change of temperature": *Fox v. Boston etc. Ry. Co.*, 148 Mass. 220, 19 N. E. 222, 1 L. R. A. 702. In the absence of a contract fixing the time for delivery to the connecting carrier, the law fixes a reasonable time, and what is a reasonable time must be determined from the ¹¹⁶ length of the journey, the usual time, the weather, the nature of goods transported, etc.: *Hutchinson on Carriers*, sec. 329.

Under these authorities, which are consonant to reason and justice, the evidence is sufficient to hold the initial carrier was guilty of a negligent act—the delay in transportation of this class of goods in the season when weather conditions naturally produce delay—which caused, in whole or in part, the condition in which they reached the consignee. It is evident that the last carrier was equally or more negligent than the initial carrier, but that does not change the rule, and merely renders each or both liable when the act of either is an efficient and proximate cause of the injury. "This rule obtains, although it is impossible to determine in what proportion each of the wrongdoers contributed to the injury; although the act alone of the party sued might have caused the entire injury; and although, if his acts had not concurred in producing the wrong, the same damages would have resulted from the act of the other": 1 *Thompson on Negligence*, sec. 76.

This court, in *City Electric St. Ry. Co. v. Conery*, 61 Ark. 381, 54 Am. St. Rep. 262, 33 S. W. 426, 31 L. R. A. 570, announced this rule, as stated in the syllabus: "The concurring negligence of two parties makes both liable to a third party injured thereby, if the injury would not have occurred from the negligence of one of them only." It is impossible from this evidence, and likely from any evidence, to ascertain that the injury was caused solely by one of the carriers, and, finding both guilty of an efficient and proximate cause therefore, either or both must be held, unless the party guilty of such negligence can show, and does show, that its negligence did not produce, in whole or in part, that result which follows naturally and proximately from the negligent act.

2. The appellant claims that the verdict is excessive. That depends on the measure of damages; shall it be taken to be at Chicago at the time the goods were due there, or shall it be controlled by the bill of lading, which stipulates that the value of the same at point of shipment shall determine the measure in the event of loss of the goods? Conceding, without deciding, that loss of goods includes loss in value, does the contract control? It cannot be disputed that, in the absence of this contract, the legal liability would be for the price at Chicago at the time the ¹¹⁷ potatoes were due there: *St. Louis etc. Ry. Co. v. Mudford*, 48 Ark. 502, 3 S. W. 814; *St. Louis etc. Ry. Co. v. Phelps*, 46 Ark. 485; *East Tennessee etc. Ry. Co. v. Johnson*, 85 Ga. 497, 11 S. E. 809; *Fox v. Boston etc. Ry. Co.*, 148 Mass. 220, 19 N. E. 222, 1 L. R. A. 702; *Hutchinson on Carriers*, sec. 767; *Ray on Imposed Duties of Freight Carriers*, p. 1036.

Contracts restricting the liabilities imposed on carriers by law are only valid when fair and reasonable and upon a consideration, usually a reduced rate of freight, in consideration of the release from given legal liabilities: *Railway Co. v. Cravens*, 57 Ark. 112, 38 Am. St. Rep. 230, 20 S. W. 803, 18 L. R. A. 527; *Railway Co. v. Spann*, 57 Ark. 127, 20 S. W. 914. This rule is applied to contracts fixing a given value in case of loss: *St. Louis etc. Ry. Co. v. Lesser*, 46 Ark. 236; *St. Louis etc. Ry. Co. v. Weakley*, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. 134; *Zouch v. Chesapeake etc. Ry. Co.*, 36 W. Va. 524, 15 S. E. 185, 17 L. R. A. 116; *Ray on Imposed Duties of Freight Carriers*, sec. 13. These principles and authorities control, and without a consideration this clause of the contract is void. Applying the Chicago price as the measure, deducting the ninety-seven dollars for the damaged goods, allowing six per cent interest from date of due delivery, and the verdict is a trifle less than it might be. The judgment is affirmed.

McCulloch, J., did not participate.

The Liability of an Initial Carrier for the torts and negligence of connecting lines is discussed in the recent monographic note to *Pennsylvania Co. v. Loftis*, 106 Am. St. Rep. 604-612, and the subsequent case of *Eckert v. Pennsylvania R. R. Co.*, 211 Pa. St. 267, 107 Am. St. Rep. 571. And the burden of proof as between connecting carriers to show who is at fault for a loss or injury is discussed in the extended note to *Beede v. Wisconsin Cent. Ry. Co.*, 101 Am. St. Rep. 392-399, and the subsequent case of *Fisher v. Boston etc. R. R. Co.*, 99 Me. 338, 105 Am. St. Rep. 283.

COOKSEY v. MUTUAL LIFE INSURANCE COMPANY.

[73 Ark. 117, 83 S. W. 317.]

LIFE INSURANCE—When Becomes Effective.—If a person applies for life insurance and pays an amount equal to the first premium, but the application and the receipt for the money paid stipulate that the insurance is to become effective only when the application is approved and the policy issued, the transaction does not amount to an agreement for preliminary or temporary insurance. (p. 27.)

E. B. Hall, for the appellant.

Rose, Hemingway & Rose, for the appellee.

¹¹⁸ McCULLOCH, J. George Cooksey, as administrator of the estate of his brother, Thomas Cooksey, sued the Mutual Life Insurance Company of New York upon an alleged contract of insurance executed by that company upon the life of said Thomas Cooksey.

It is not claimed that a policy of insurance was issued to Thomas Cooksey by the company, but the following facts are asserted and shown by the record: On November 27, 1900, Thomas Cooksey made application to appellee for insurance ¹¹⁹ through one Carothers, who was a soliciting agent acting under appellee's general agent for the state of Arkansas. The application signed by Cooksey was made upon a printed form containing the following clause:

"I have paid \$..... to the subscribing soliciting agent, who has furnished me with a binding receipt therefor, signed by the secretary of the company, making the insurance in force from this date, provided this application shall be approved, and the policy duly signed by the secretary at the head office of the company and issued." The solicitor, Carothers, executed to Thomas Cooksey a receipt in the following form:

"Received of Thos. Cooksey the sum of \$45.96, to be appropriated as first annual premium on the following insurance when the same shall be delivered to the said Thos. Cooksey, to wit: \$1,500 on the 20-year distribution plan in the Mutual Life Insurance Company of New York, as applied for on the 27th day of November, 1900, and approved by Dr. A. Dunlap, medical examiner; provided, that said sum is to be refunded in case said company shall decline to issue said insurance as applied for. Neil Carothers, Agent."

The applicant was examined on the same date by a physician selected by the solicitor, who recommended acceptance of the application. It was proved at the trial that the application was received at the office of the general agent in Little Rock on December 3, 1900, and forwarded to the home office in New York, where it was received on December 7th; that the medical examination was approved by the physician in charge of the medical department, and referred to the inspector of risks, who on December 10th wrote the general agent at Little Rock, directing him to obtain further information concerning the occupation of the applicant. Thomas Cooksey died on December 14, 1900, and there is nothing in the record to show any communication between him and the company or its agents after the date of the application.

The court below directed a verdict for the defendant, which was rendered, and judgment entered accordingly, and the plaintiff appealed.

It is not an unfamiliar custom among life insurance companies in the operation of the business, upon receipt of an application for insurance, to enter into a contract with the applicant ¹²⁰ in the shape of a so-called "binding receipt" for temporary insurance pending the consideration of the application, to last until the policy be issued or the application rejected, and such contracts are upheld and enforced when the applicant dies before the issuance of a policy or final rejection of the application. It is held, too, that such contracts may rest in parol. Counsel for appellant insists that such a preliminary contract for temporary insurance was entered into in this instance, but we do not think so. On the contrary, the clause in the application and the receipt given by the solicitor, which are to be read together, stipulate expressly that the insurance shall become effective only when the "application shall be approved and the policy duly signed by the secretary at the head office of the company and issued." It constituted no agreement at all for preliminary or temporary insurance: *Mohrstadt v. Mutual Life Ins. Co.*, 115 Fed. 81, 52 C. C. A. 675; *Steinle v. New York Life Ins. Co.*, 81 Fed. 489, 26 C. C. A. 491.

Appellant's counsel insists that the court erred in directing a verdict; but we think the testimony, taken as a whole, does not tend to establish any material fact in his favor, and is not sufficient to make a case to be submitted to a jury.

Affirmed.

When an Insurance Contract is complete is the subject of a monographic note to *New York Life Ins. Co. v. Babcock*, 69 Am. St. Rep. 143-153. If the application for accident insurance provides that the contract shall be complete when received at the insurer's office and accepted by its secretary, the application accompanied by the premium and their acceptance by the insurer forms the contract of insurance until the policy is issued and received: *Robinson v. United States Ben. Soc.*, 132 Mich. 695, 102 Am. St. Rep. 436. See, too, *Fidelity Mut. Life Assn. v. Harris*, 94 Tex. 25, 86 Am. St. Rep. 813. But if the application for life insurance stipulates that the insurer incurs no liability until the policy is issued and delivered, there can be no recovery in the absence of such issuance and delivery, although the first premium is paid: *Chamberlain v. Prudential Ins. Co.*, 109 Wis. 4, 83 Am. St. Rep. 851. See, also, *Sommers v. Mutual Life Ins. Co.*, 12 Wyo. 369, 107 Am. St. Rep. 952.

CALDWELL v. STATE.

[73 Ark. 139, 83 S. W. 929.]

SEDUCTION.—*The Crime of Seduction was unknown to the common law.* (p. 28.)

INDICTMENT—Charging in Language of Statute.—If a statute does not set out the facts constituting an offense, or if the language of the statute is so general as to include cases which, though within the terms, are not within the spirit or meaning of the act, it is not sufficient to charge the offense in the words of the statute; but if a statute creates an offense and sets out the acts which constitute the crime, it is sufficient for an indictment to charge the offense in the language of the statute. (p. 29.)

SEDUCTION—Indictment—Allegation of Chastity.—If a statute creating the crime of seduction makes no reference to the chastity of the woman, the state is not required to allege and prove her chastity as an element of the crime. (p. 31.)

W. S. Wright, for the appellant.

George W. Murphy, attorney general, for the appellee.

¹⁴⁰ **RIDDICK, J.** This is an appeal from a judgment convicting the defendant of the crime of seduction. The first contention on the part of the defendant is that the indictment is fatally defective, for the reason that it fails to allege that the seduced woman was of previous chaste character. This raises a question on which there is some conflict in our decisions, and we have given careful attention to the arguments of counsel thereon, and will now state our conclusions and some of the reasons therefor.

The crime of seduction was unknown to the common law. It rests alone on the statute which in this state provides that

"any person who shall be convicted of obtaining carnal knowledge of any female by virtue of any feigned or pretended marriage, or of any false or feigned express promise of marriage, ¹⁴¹ shall, on conviction, be imprisoned not exceeding two years in the penitentiary and fined in any sum not exceeding five thousand dollars": Sandel & Hill's Digest, sec. 1900.

It will be noticed that, though this statute purports to set out the facts constituting the crime, it makes no reference to the chastity of the female whose character is involved. Now, where a statute does not set out the facts constituting the offense, or where the language of the statute is so general as to include cases which, though within the terms, are not within the spirit or meaning of the act, it will not be sufficient to charge the offense in the words of the statute, but where a statute creates an offense, and, as this statute does, sets out the facts which constitute the crime, it is sufficient for an indictment under such statute to charge the offense in the language of the statute: 10 Ency. of Pl. & Pr., pp. 483, 487, and cases cited.

In drawing indictments under a statute which creates and defines the offense it is, says Mr. Bishop, best, with rare exceptions, to follow the exact words of the statute, for "thus all doubt will be avoided, and simply the proof demanded by the law, and no more, will be called for by the indictment": 1 Bishop's New Criminal Procedure, sec. 612. Speaking specially of indictments for the crime of seduction, he says: "In general, it is sufficient to charge this offense in the words of the statute, adding the time and place and the names of persons": Bishop on Statutory Crimes, sec. 645. These rules are elementary, and have been repeatedly announced in the decisions of this court: *Bodenhamer v. State*, 60 Ark. 10, 28 S. W. 507; *Putman v. State*, 49 Ark. 449, 5 S. W. 715; *Cheaney v. State*, 36 Ark. 74.

The statute in question here sets out the specific facts which constitute the offense, and the indictment follows the language of the statute, and is sufficiently certain as to time, place and the persons concerned. The indictment would therefore seem on general principles to be sufficient. It is almost an exact copy of the indictment held to be good in *Cheaney v. State*. 36 Ark. 74, where Chief Justice English, in disposing of the question as to its sufficiency, said: "The indictment alleges, in form substantially good, all the material facts requisite to constitute the crime of seduction by false express promise

of marriage under the statute, and the demurrer to it was properly overruled."

¹⁴² This ruling of the court has since been consistently adhered to up to the very recent decision of *Walton v. State*, 71 Ark. 398, 75 S. W. 1. In that case there was evidence tending to show that the woman involved was not of previous chaste character, and the court, following the decision in *Polk v. State*, 40 Ark. 486, 48 Am. Rep. 17, held that the circuit court erred in refusing to instruct the jury that if they believed that evidence to be true, they should acquit. On that point the opinion in the *Walton* case is in harmony with the previous decisions of this court, and, judged by them, undoubtedly correct. But the opinion of the court in that case went further, and also held that the indictment was insufficient because it did not allege that the seduced woman was of previous chaste character. Now, it will be seen by reference to the opinion that this ruling was based entirely on the previous decision in the *Polk* case, the effect of which the court took to be that the character of the female is involved in every case of seduction, and that her previous chaste character is an element of the offense which must be alleged and proved. But, though some expressions of Mr. Justice Smith, who delivered the opinion in the *Polk* case, seem to go to that extent, yet a close reading of the opinion will show that no such question was decided. The sufficiency of the indictment was challenged in that case, but the court overruled the contention, and held the indictment to be sufficient. The indictment is not set out in the report of the case, but as the language of the opinion is somewhat ambiguous, we have examined the indictment as it appears in the record on file with the clerk, and find that it is almost an exact copy of the indictment in the *Cheaney* case, from which the indictment here is copied. As the indictment in *Polk v. State* was held to be sufficient, though it makes no reference to the previous chastity of the woman, it is plain that the court did not mean to hold that the previous chastity of the woman was an element of the offense such as must be alleged in the indictment.

This is apparent also from the fact that, though the court held in that case that the purpose of the statute was to protect the chastity of virtuous women, and that no conviction could be had when the prosecutrix was a prostitute or woman of easy virtue, it said that in the absence of evidence the chastity of the woman would be presumed. "No evidence," said the court. "is required to establish it in the first in-

stance, and the burden ¹⁴³ is on the defendant, if he would assail it, notwithstanding the presumption of his innocence." Now, it is plain that this would not be correct if it was necessary to allege in the indictment that the woman was of previous chaste character, for, if it was necessary to allege chastity, it would be necessary to prove it. Material allegations of that kind in an indictment for felony cannot be proved by presumption, for the defendant is presumed to be innocent until the contrary is shown by proof of the allegations in the indictment. This rule is well established: *McArthur v. State*, 59 Ark. 431, 27 S. W. 628; *West v. State*, 1 Wis. 187 (209); *State v. McDaniel*, 84 N. C. 803; *Zabriskie v. State*, 43 N. J. L. 640, 39 Am. Rep. 610; *Commonwealth v. Whittaker*, 131 Mass. 224; *State v. Wenz*, 41 Minn. 196, 42 N. W. 933.

But the statement that the burden to show want of chastity rests on the defendant is entirely correct under a statute such as we have here, which makes no reference to the chastity of the woman, and does not require that the state should allege and prove such chastity as an element of the crime, but leaves it for the defendant to prove want of chastity, if he so desires: *State v. Curran*, 51 Iowa, 112, 49 N. W. 1006.

It is never necessary that an indictment should set out or negative mere matters of defense, for it would be impracticable to cover all such matters. For instance, it is not necessary to allege in an indictment for murder that the defendant was sane at the time the act was committed, though it is always understood and implied in statutes prescribing punishments for such crimes that the party accused must have been sane at the time the crime was committed. It is unnecessary to make such an allegation, for the law assumes that men are sane and responsible for their acts, and leaves the burden of showing to the contrary upon those charged with violating it. And so this statute assumes that women are chaste, and imposes on the defendant charged with seduction the burden of showing to the contrary: *Perry v. State*, 37 Ark. 54; *Dean v. State*, 37 Ark. 57.

This is the theory on which not only the *Polk* and *Cheaney* cases were decided, but also the recent case of *Puckett v. State*, 71 Ark. 62, 70 S. W. 1041, where we held that, if there was no evidence tending to show want of chastity, it was not error for the trial court to refuse to instruct the jury that if on the whole case they had a reasonable doubt whether the woman was of previous chaste ¹⁴⁴ character they should acquit. This decision was clearly wrong if the contention of

counsel for appellant is correct, that the burden is on the state to allege and prove previous chaste character, for if that was so, a failure to make such proof would acquit the defendant.

To adopt the contention of counsel for appellant on this point would be, as we have shown, contrary to the general rule governing indictments for statutory offenses, and also contrary to all the decisions of this court on the point in question, with the exception of the Walton case only. As we have said, the judgment of reversal rendered in that case rested mainly on the right of the defendant to show want of chastity as a defense, and in that respect was in accord with our previous decisions, but what was said as to the sufficiency of the indictment was based on what seems to us now a misconception as to the extent of the decision in *Polk v. State*, 4 Ark. 482, 48 Am. Rep. 17, a misconception which, in view of the language of that decision, it seems to me was quite natural, and which was shared in not only by all the members of the court that decided the case, but by the counsel for both the state and defendant as well. In fact, that was one of those cases which are never very safe as precedents, where there was little or no controversy about the law of the case. That being so, we cannot regard what was said there as authority sufficient to justify us in disregarding, not only all the former decisions, but the plain language of the statute as well. Our conclusion on this point is that on the weight of authority, as well as on correct principles of criminal pleading, the indictment in this case sets out all the facts required by our statute to make a *prima facie* case against the defendant, and is sufficient: *Cheaney v. State*, 36 Ark. 74; *State v. Curran*, 51 Iowa, 112, 49 N. W. 1006; *State v. Conkright*, 58 Iowa, 338, 12 N. W. 283; *People v. Fowler*, 88 Cal. 136, 25 Pac. 1110; *Bishop on Statutory Crimes*, sec. 645.

There are many other exceptions saved, but, after due consideration thereof, we are of the opinion that no ground for reversal is shown. The evidence fully sustains the charge, and makes out a clear and convincing case of guilt on the part of the defendant. The prosecuting witness, Dora Reeves, and the defendant lived in the same neighborhood, and were friends. When he commenced to pay special attention to her she was about nineteen and he twenty-three or twenty-four years of age. Soon afterward, on the ¹⁴⁵ 30th of September, 1898, he asked her to marry him, and she consented. In December following, by virtue of repeated prom-

ises that he would marry her, he induced her to submit to sexual intercourse with him; but when the day set for their marriage arrived, he declined to marry her on the ground that he was not ready. Finding that she was pregnant as the result of her intercourse with the defendant, the prosecuting witness and her mother both pleaded with the defendant to induce him to perform his promise and marry the seduced girl, but in vain. He refused, and she gave birth in September, 1900, to a child, and this prosecution was commenced by the state.

The defendant, who took the stand as a witness in his own behalf, admitted that he had promised to marry the defendant, and the only excuse he gave for not keeping his promise was that she had refused to marry him, and had given him a written statement to that effect. She denied that she had refused to marry him or had given him such a writing. As to whether she had signed such a writing, the evidence is conflicting, but it shows beyond question that the failure to marry came through no fault of the woman, but on account of the defendant's refusal to keep his promise. He had made up his mind not to marry her, and in order to shield himself from prosecution he either forged the writing he introduced in evidence, or in some way induced her to sign it. The evidence justified the jury in finding that the defendant deliberately paid court to this young woman, and made her a false promise of marriage in order to obtain her consent to sexual intercourse. The defense set up that she had refused to marry him after she had become pregnant is contradicted by the evidence, and is so unreasonable that we are not surprised that the jury rejected it. Two juries of different counties have found against the defendant, and after a consideration of the whole case we are of the opinion that there was no prejudicial error, and that the judgment should be affirmed, and it is so ordered.

Battle, J., dissents.

The Crime of Seduction is discussed in the monographic notes to *State v. Carron*, 87 Am. Dec. 405-411; *Bradshaw v. Jones*, 76 Am. St. Rep. 670-682. A reference to page 678 of this last note will show that a previous chaste character is regarded as one of the essential ingredients of the crime. Yet if the statute does not make previous chastity an essential element of the offense, the state need not aver nor prove it: *Ferguson v. State*, 71 Miss. 805, 42 Am. St. Rep. 492. See, however, the note to *Bradshaw v. Jones*, 76 Am. St. Rep. 680-682. As to the sufficiency in general of indictments charging offenses in the language of the statute, see *State v. Doran*, 99 Me. 329, 105 Am. St. Rep. 278, and cases cited in the cross-reference note thereto.

GRIMES v. LUSTER.

[73 Ark. 266, 84 S. W. 223.]

HOMESTEAD—Widow and Minor Children.—The constitution of Arkansas contemplates that a widow may acquire a homestead in her own right which will inure to her minor children after her death. (p. 35.)

HOMESTEAD—Widow.—The Marriage of a widow and her residence with her husband on a homestead previously acquired by her do not affect the homestead nor its devolution to her children. (p. 35.)

HOMESTEADS—Minors cannot Enjoy Two.—If a man dies possessed of a homestead and leaving a minor child, and his widow acquires another homestead in her own right, marries again, and then dies, the child may claim either homestead but cannot enjoy both. (p. 36.)

HOMESTEADS.—If a Minor Succeeds to Two Homesteads, he cannot select, waive or abandon either, and it becomes the duty of his guardian, under the superintending control of the court, to make a selection for him. (p. 36.)

Neill & Neill and Arthur Neill, for the appellant.

Lyman F. Reeder and Yancey & Casey, for the appellee.

²⁰⁷ HILL, C. J. Hugh Grimes died, leaving a widow and four children. He had a homestead at Newport. After his death his widow acquired a homestead at Batesville. She impressed it with all the characteristics of a homestead, married again, lived thereupon till her death, and left the appellant, Harry, and three other children, all of whom were over twenty-one years of age except Harry. Mark Luster acquired the interests of the other children, and took possession of the Batesville property, and Harry Grimes brought this suit, alleging that he was entitled to possession of all of it until he was twenty-one years of age and the rents and profits therefrom until he reached that age. Luster answered, admitting that Harry owned the fourth interest, denied his homestead rights, denied his mother had impressed it as a homestead, and asserted the homestead rights of Harry were in the Newport property, and no other.

The plaintiff was defeated of recovery on the ground that he had homestead rights in the Newport property, and could not have two homesteads. At least, there was an instruction of the court authorizing the defeat of his action on that ground, and for the purposes of this appeal, it must be treated as an efficient, if not the only, ground for a judgment against him.

Section 6, article 9, of the constitution, as construed in *Wilmoth v. Gossett*, 71 Ark. 594, 76 S. W. 1073, contemplates that a widow may acquire a homestead in her own right, and that such homestead of the widow shall inure to the minor children after the death of the parent is provided for in section 10 of said article: *Thompson v. King*, 54 Ark. 9, 14 S. W. 925.

In *Thompson v. King*, 54 Ark. 11, 14 S. W. 925, and *Littell v. Jones*, 56 Ark. 139, 19 S. W. 497, it is held that there may be a homestead estate in a married woman, and that the husband living thereupon with her does not change its status as her homestead, and as such it passes to her children, exactly as the father's homestead does. Therefore the subsequent marriage of Mrs. Grimes and residence on ²⁰⁸ her homestead with her second husband did not affect the homestead acquired by her, nor its devolution to her children.

Did the fact that Harry Grimes had an existing homestead right in his father's homestead at Newport defeat his homestead right thus descended to him from his mother in the Batesville property? It is insisted that, as a minor cannot waive his right or abandon his homestead, therefore against his will (and probably interest) the Newport property is his homestead, and he can acquire no homestead interest in the Batesville property. This presumption of nonwaiver is for the protection of the minor's estate: *Booth v. Goodwin*, 29 Ark. 633.

As heretofore seen, from the provisions of the constitution, as construed by the decisions of this court, the minor acquired a right to his mother's homestead. That right cannot be defeated by these presumptions in his favor, and it must either be held that he has two homesteads, or that the selection of one relinquishes the other; for it is plain that two homestead rights have descended to him. Much can be said in favor of the existence of the two homesteads. They are acquired from different parents; each can be held against the debts of the parent from whom acquired; and under the constitution of 1874, occupancy is not necessary by minors to preserve the right of homestead: Const. 1874, art. 9, sec. 6; *Sparkman v. Roberts*, 61 Ark. 26, 31 S. W. 742.

However, it is manifest that two homesteads were not intended or contemplated. "The protection of the family from dependence and want is the object of all homestead laws": *Harbison v. Vaughn*, 42 Ark. 539. "One of the objects of the constitution is to secure to the widow and orphan the family roof tree as a fixed home during the widowhood or life of the

widow and minority of the children": *Garibaldi v. Jones*, 48 Ark. 230, 2 S. W. 844. "Looking to the ultimate purpose of such provisions—the protection of the debtor's family against the vicissitudes of fortune": *Wood v. Mayfield*, 41 Ark. 94.

The beneficence of these provisions extend in favor of the children to the homestead of either parent. So long as the family circle is not broken by the death of either parent, there can be but one homestead; and it matters not whether that is the homestead of the father or mother: *Thompson v. King*, 54 Ark. 9, 14 S. W. 925; *Wilmoth v. Gossett*, 71 Ark. 549, 76 S. W. 1073. And as heretofore shown, ²⁶⁹ successive homestead rights may be inherited by minors in cases like this one at bar where the widow acquires a homestead during her widowhood in her own right, but both cannot be enjoyed at one and the same time. Such an enjoyment would present an anomaly, and one not to be tolerated because contrary to the spirit and letter of the homestead exemption. It was so ruled in regard to the widow's homestead in *Garibaldi v. Jones*, 48 Ark. 230, 2 S. W. 844.

The homestead right acquired from the mother by operation of law subsequent to the right acquired from the father should not be allowed to defeat the minor's interest in the father's homestead, any more than the right in the father's homestead should defeat that acquired from the mother. Therefore, it is seen that the minor acquires two inconsistent rights. By reason of his incapacity he cannot waive, select or abandon either voluntarily. It then becomes the duty of his guardian under the superintending control of the probate court, or any court having jurisdiction in a proper suit between the parties in interest, to select the homestead. Section 3588 of *Sandel & Hill's Digest* gives ample authority to the guardian of the estate, and section 5645 gives the circuit court ample authority to dismiss actions brought by others than guardians, when not to the benefit of the minor. The duty of the guardian in the management of the homestead is set forth in *Booth v. Goodwin*, 29 Ark. 633.

In *Littell v. Jones*, 56 Ark. 139, 19 S. W. 497, an action was brought by next friend of minors to select and set apart to them a homestead in a tract of two hundred and forty acres, and to require a creditor holding a mortgage upon the whole to be limited to the part not selected as homestead. The selection was held proper to be made, and the mortgage, which was subject to their rights, enforced only against the surplus over

the homestead. The principle of selecting one of two homesteads is not different from segregating a homestead out of an area larger than the homestead limit. The rule allowing a debtor to select a homestead has long been in force in this state: Tomlinson v. Swinney, 22 Ark. 400, 76 Am. Dec. 432; Sentell v. Armour, 35 Ark. 49; Greenwood v. Maddox, 27 Ark. 648; Sparks v. Day, 61 Ark. 570, 54 Am. St. Rep. 279, 33 S. W. 1073; Wilks v. Vaughan, 73 Ark. 174, 83 S. W. 913. An exchange may be made of homesteads: Moore v. Granger, 30 Ark. 574; Campbell v. Jones, 52 Ark. 493, 12 S. W. 1016, 6 L. R. A. 783. And a segregation ²⁷⁰ from the homestead may be made letting the segregated part out of the exemption: Curtis v. Des Jardins, 55 Ark. 126, 17 S. W. 709.

Therefore, it is entirely consonant with decisions of this court and the policy of the homestead law to hold that, where two homestead rights accrue to a minor, a selection can be made of one to the exclusion of the other. Such selection cannot be made by the minor, for he is incapable of this, just as he is incapable of managing and controlling his other property and rights. There are appropriate methods to make the selection and preserve that interest which it is to the advantage of the minor to preserve. In this case the disability of minority has been removed, and hence there is no occasion for a guardian or next friend to take the initiative.

It is said that the property claimed exceeds the maximum area of an urban homestead. If it does, the selection can be made as indicated in Littell v. Jones, 56 Ark. 139, 19 S. W. 497. Sparks v. Day, 61 Ark. 570, 54 Am. St. Rep. 279, 33 S. W. 1073, and Wilks v. Vaughan, 73 Ark. 174, 83 S. W. 913.

Reversed and remanded with directions for further proceedings in conformity herewith.

McCulloch, J., concurs in judgment.

A Person cannot have Two Homesteads at the same time: See Rouse v. Caton, 168 Mo. 288, 90 Am. St. Rep. 456, and cases cited in the cross-reference note thereto.

A Widow may Acquire a Homestead: See the monographic note to Wike v. Garner, 70 Am. St. Rep. 112, on who is the head of a family.

SUPREME LODGE OF KNIGHTS OF PYTHIAS v.
BRADLEY.

[73 Ark. 274, 83 S. W. 1055.]

INSURANCE—Death in Violation of Law.—Where one brings on a personal encounter with another, but abandons it, and, while in good faith retreating to avoid further difficulty, is killed by his adversary, the death is not within the meaning of an insurance policy, exempting against liability for a death in violation or attempted violation of any criminal law. (p. 41.)

Pugh & Wiley, for the appellant.

Robert E. Craig, for the appellee.

275 HILL, C. J. On January, 1901, at the entrance of the courthouse in Hamburg, Charles O. Morscheimer shot and killed Charles H. Bradley.

The appellee is the widow of Bradley, and the beneficiary in a policy for one thousand dollars in the appellant's order, a fraternal insurance association. The facts, as reflected through the verdict of the jury, were: Ill-feeling over a trivial matter existed between Bradley and Morscheimer, at least on Bradley's part. On the morning of the tragedy they came face to face at the north entrance of the courthouse, as Morscheimer was entering, and Bradley leaving, the building. Some words passed, and Bradley struck Morscheimer on the ear with a piece of iron held in his hand. Morscheimer staggered or stepped back a few paces, drew his pistol, and commenced firing on Bradley. The first shot, or one of the first shots, passed through the right breast, and came out of the fleshy part of the arm near the shoulder joint, and was not a fatal wound, and did not cause the death. Immediately upon Morscheimer opening fire, Bradley turned and ran back into the courthouse, and fell into the arms of the sheriff, as he was attempting to enter the sheriff's office, twenty-four feet south of the entrance where the rencounter began. He had received a fatal wound in the back, entering below the right shoulder blade and ranging diagonally through the body to the left side, and not coming out. He expired almost immediately. Appellee insists from the nature of the wound that it was received just as Bradley was turning into the sheriff's office from the hall in which he was running. Whether that contention is sustained or not, it was evidently received after

he turned and fled from the rencounter. The verdict necessarily implies it, and the evidence fairly establishes it.

The contract of insurance contained the following clause: "If the death of any member of the endowment rank heretofore admitted into the first, second, third or fourth classes, or hereafter admitted, shall result from suicide, either voluntary or involuntary, whether such member shall be sane or insane at the time, or if such death shall be caused or superinduced by the use of intoxicating liquors, narcotics or opiates, or in consequence of a duel, or at the hands of justice, or in violation or attempted ²⁷⁰ violation of any criminal law, then the amount to be paid on such member's certificate shall be a sum only in proportion to the whole amount as the matured life expectancy is to the entire expectancy at date of admission to the endowment rank."

The court gave the following instructions: "4. Even though you believe from the evidence that Bradley assaulted Morscheimer and brought on the rencounter between himself and Morscheimer, yet if you further believe from the evidence that at the time Bradley was killed he had in good faith abandoned the rencounter, and was in good faith retreating to avoid further difficulty with Morscheimer, then he was not, at the time he was killed, violating or attempting to violate any criminal law, and your verdict will be for plaintiff for amount sued for."

The court refused to give the following instruction asked by appellant: "5. The jury are instructed that if they believe from the evidence in this case that C. H. Bradley, on the morning of January 1, 1901, made an assault on Charley Morscheimer with a weapon with which he was capable of inflicting great bodily harm on him, and that, as a result of said assault, said Bradley was killed, it makes no difference whether he was trying to escape, or was continuing the assault, when he received the mortal wound, if the assault and the shooting were parts of the same difficulty."

The jury rendered a verdict for the plaintiff for one thousand dollars and interest. Judgment was entered thereupon. Appellant saved its exceptions, and brought the case here.

If the fourth instruction above set out was the law, and the requested fifth instruction not the law, there is no error prejudicial to appellant; otherwise there is.

Is a death received while retreating from a personal difficulty (and not retreating for the purpose of gaining a vantage ground to renew it), where the rencounter is begun by

an assault by the deceased upon his slayer with a weapon capable of inflicting great bodily harm or ²⁷⁷ death, according to its use, a death within the meaning of an insurance clause exempting against liability for a death "in violation or attempted violation of any criminal law"?†

Instruction numbered four said it was not, and the appellant asked instruction numbered five that it be declared within the exemption. The cases on this exact question are not numerous, but they are well considered, and come from courts of high standing. The following authorities sustain the instructions given by the circuit court: *Harper v. Phoenix Ins. Co.*, 19 Mo. 506, reiterated in *Overton v. St. Louis etc. Ins. Co.*, 39 Mo. 122, 90 Am. Dec. 455; *Cluff v. Mutual Benefit Life Ins. Co.*, 13 Allen (Mass.), 308, reaffirmed in *Cluff v. Mutual Benefit Life Ins. Co.*, 99 Mass. 318, and *Bradley v. Mutual Benefit Life Ins. Co.*, 45 N. Y. 422, 6 Am. Rep. 115.

It is insisted that, if there is a causative connection between the assault and the death, then the death is the proximate result of the assault. Such reasoning contains the fallacy that an assault will be repelled with more than lawful force. Such is often, perhaps usually, the rule where blood is hot, and the strength sufficient, or the weapon handy enough. But such is not the result naturally to be expected under the law. An assault calls for a repulsion of it by just such force as necessary to overcome it, and more than that is unlawful, and unlawful consequences are not to be presumed to follow the act. When Bradley attacked Morscheimer with a piece of iron, then Morscheimer was justified in overcoming that attack, and, if necessary to overcome it, in taking Bradley's life, and a death resulting while so lawfully resisting the attack would be the natural result expected to flow from such attack, and there would be a causative connection between the assault and the death; in other words, the attack would then be the proximate cause of the death. Cases applying the doctrine of causative connection between an unlawful act and the death, the latter being held to be within the consequences flowing from the unlawful act, are cited: *Bloom v. Franklin Life Ins. Co.*, 97 Ind. 478, 49 Am. Rep. 469; *Murray v. New York Life Ins. Co.*, 96 N. Y. 614, 48 Am. Rep. 658, and others of kindred nature in appellant's brief.

The doctrine of the cases referred to as sustaining this instruction does not impinge upon the established principles announced in those relied upon by appellant. For instance, take

²⁷⁸ the case of a husband killing the paramour of his wife; if caught in the act of adultery, the paramour dies "in violation of law"; if killed subsequently, he dies as the natural result of his unlawful act, in consequence of it, and as a consequence naturally to be expected, and this is true whether killed an hour or a year after the adultery, and yet it is held, and properly so, that the paramour is not killed "in violation of law," within the meaning of an insurance contract: *Goetzman v. Connecticut Mut. L. Ins. Co.*, 3 Hun (N. Y.), 515.

There must be a line drawn somewhere between consequences proximately, and those remotely, flowing from an unlawful assault; and the safe place to draw that line is where the law draws the line of lawful resistance to the unlawful assault. In a similar case to this one the court of appeals of New York, through Mr. Justice Rapallo, said: "So long as the evidence falls short of establishing that the homicide was legally justifiable, I can see no safe rule by which the court could be guided in deciding that the provocation proved was the cause of the killing, and in withdrawing that question from the consideration of the jury": *Bradley v. Mutual Benefit Life Ins. Co.*, 45 N. Y. 422, 6 Am. Rep. 115. In this case Bradley fled from the conflict, and received his death wound in the back while escaping. Clearly, Morscheimer was not legally justified in taking Bradley's life then, and his act in so doing was unlawful. Therefore, the first violation of the law by Bradley was not the proximate cause of his death, but the subsequent unlawful act of Morscheimer in shooting his retreating assailant was the proximate cause. Therefore the instruction was correct, and the judgment is affirmed.

Battle and McCulloch, JJ., dissenting.

For Authorities Bearing upon the Principal Case, see the monographic note to Conboy v. Railway Officials etc. Assn., 60 Am. St. Rep. 164, 165.

STILLWELL v. PAEPCKE-LEICHT LUMBER COMPANY.

[73 Ark. 432, 84 S. W. 483.]

DAMAGES—Liquidated Damages or Penalty.—Where a contract fixes the amount of damages for a breach of its terms, and the actual damages from a breach would be uncertain and difficult of proof, while the damages fixed appear reasonable, the amount stipulated will be regarded as liquidated damages, rather than a penalty, and therefore enforceable. (p. 45.)

DAMAGES—Liquidated Damages or Penalty.—If a stipulation in a contract to forfeit a fixed sum for a breach of its terms is uncertain, and the sum fixed seems unreasonable, the amount stipulated will be regarded as a penalty, rather than liquidated damages, and therefore not enforceable further than the actual damages sustained. (p. 45.)

DAMAGES—Liquidated Damages and Penalty.—A stipulation in a contract to forfeit a certain sum for a breach of its terms cannot be separated, and a part discarded as a penalty, and the remainder treated as liquidated damages. (p. 45.)

DAMAGES for Breach of Contract to Remove Timber.—The measure of damages for a failure to cut, remove and pay for all the timber on certain land within a specified time, is the difference between the market value of the timber left standing on the land and the contract price at the time of the breach. (p. 46.)

DAMAGES for Conversion of Logs—Evidence.—In an action for the conversion of logs, the defendant may testify concerning the difference between the value of the logs when floating in the water and when lodged in the sand, as such testimony tends to show their value when converted. (p. 46.)

Gibson & Park and X. J. Pindall, for the appellants.

F. M. Rogers, for the appellee.

⁴³³ McCULLOCH, J. Appellant, who was the owner of a tract of timber land, entered into a written contract with appellee's assignor, the Speer-Box Lumber Company, for the sale of all the cottonwood timber of certain size suitable for sawlogs.

The material part of the contract reads as follows: "That the parties of the first part, for and in consideration of the covenants on the part of the party of the second part hereinafter contained and set forth, do covenant and agree to and with the said party of the second part to pay the party of the second part one hundred dollars as a forfeit at the time this contract is signed, and then to cut and put into the Arkansas river all cottonwood timber suitable for sawlogs and measuring eighteen inches in diameter and over thirty-two feet from the ground, on the land of the party of the second part, comprised

in fractional sections 12 and 13, township 8 south, range 3 west, and fractional sections 7, 17, 18, 19 and 20, township 8 south, 2 west, all in Desha county, Arkansas, and south of the Arkansas river. And the parties of the first part further agree not to run any of the timber until it is paid for at the rate of forty-five (45) cents per thousand feet. . . . And the parties of the first part further agree to board the said sealer free of charge, and to pay the same, one dollar. And it is further understood and agreed that the logging shall be conducted in such way as not to interfere with the farming interests of said lands, and all of said timber shall be removed on or before December 1, 1899. And in case the parties of the first part shall fail in any part of their agreement as set forth in this contract, then they shall forfeit the above one hundred dollars, which shall at once become the property of the party of the second part, and they shall also forfeit all the rights under this contract and quit ^{land} and leave said land, and also leave all timber that has not been run. And the party of the second part agrees to sell said cottonwood timber, when it has been scaled at the rate of forty-five cents per thousand feet, and in the last settlement, if the parties of the first part have fulfilled in every particular their part of this contract, to account to them for the above one hundred dollars, or by crediting on the last logs or timber. It is understood that the timber shall remain the property of the party of the second part until paid for, independent of any claim of the parties of the first."

The contract was assigned by the Speer-Box Lumber Company to appellee, and the latter assumed the performance of the contract, and, pursuant thereto, cut a large quantity of timber, all of which was removed from the land and paid for, except four hundred and sixteen thousand feet. Of this amount sixteen thousand and fifty-two feet remained lying in the woods on December 1, 1899, and the remainder had been hauled, and was in the Arkansas river, and by a sudden rise in the river was broken loose from its moorings and floated off. Appellee's agents caught the greater part of it lower down the river, and tied it up, and later the appellant took possession and sold it. Appellee offered to pay for the balance of the timber which had been cut and had not been paid for, after deducting the sum of one hundred dollars named in the contract, but coupled with the offer a stipulation that the sum so offered should be accepted by appellant in full, which offer appellant refused, and appellee commenced this suit for

the conversion of the timber. Appellant answered, denying the conversion, and claiming that appellee had failed to comply with the contract, either by cutting all the timber or by paying for the part cut, and also made a counterclaim against appellee for damages in the sum of one thousand dollars on account of such failure to perform the contract.

There was conflict in the testimony as to whether appellee cut all the timber on the land. Appellee's witnesses testified that all the merchantable timber was cut; and appellant and his witnesses testified that a large quantity of the timber, about six hundred thousand feet, remained standing, and that appellee had cut only the choicest and most accessible portions. Appellant offered to testify concerning his damage by reason of the failure of appellee to take all the timber under the contract, but the court refused to permit it, and appellant excepted. He also offered to prove ⁴³⁵ the value of timber which he converted lying on the land when he found it, and its value floating in the river, but the court refused to permit it, and he excepted.

The court, of its own motion, instructed the jury as follows, to which appellant excepted: "2. If you find at the time of the conversion of the timber by defendant the plaintiff had forfeited its contract, the plaintiff would be entitled in the action to recover the value of the timber less the amount due defendant under said contract for said timber. 3. The court instructs the jury that if they find from the evidence in this case that the plaintiff forfeited its contract, then the defendant would be entitled to retain the one hundred dollars put up as a forfeiture under the terms of the contract."

The jury returned a verdict for the plaintiff for two hundred and sixty-eight dollars, and the defendant, upon the overruling of his motion for new trial, appealed.

The court, in its instructions to the jury, treated the sum of one hundred dollars named in the contract and designated a forfeit as liquidated damages for nonperformance of the contract by appellee, and limited the damages of appellant to that amount. The contract provides that "in case the party of the first part shall fail in any part of the agreement as set forth in this contract, they shall forfeit the above one hundred dollars, which shall at once become the property of the party of the second part, and they shall also forfeit all the rights under this contract, and quit and leave said land, and also leave all timber that has not been run." Was this a provision for a penalty, or a stipulation for damages? If the

former, it is not enforceable; but if the latter, it is enforceable, and both parties are concluded by it.

This question is one generally somewhat difficult of solution, and there is no fixed rule by which all cases may be governed, as each case is established by its own particular facts. There are, however, some general rules well established by which a test may be applied. These are pointed out by Judge Mansfield in *Nilson* ⁴³⁶ v. *Jonesboro*, 57 Ark. 168, 20 S. W. 1093, and we refer to the tests therein laid down and the authorities cited in support of them. Usually the surest test of liquidated damages is where the actual damages caused by the breach would be uncertain and difficult of proof, and the sum stipulated appears to be reasonable compensation for the injury occasioned by the failure to perform the contract. The purpose in permitting such stipulation for damages as compensation is to render certain and definite that which appears to be uncertain and not easily susceptible of proof. But the damages so stipulated for must be such as to amount to compensation only, and not so excessive or unreasonable as to amount purely to a penalty, without being confined to the elements of fair compensation: 19 Am. & Eng. Ency. of Law, p. 399; *Jaquith v. Hudson*, 5 Mich. 123; *Willson v. Baltimore*, 83 Md. 203, 55 Am. St. Rep. 339, 34 Atl. 774; *Gower v. Carter*, 3 Iowa, 244, 66 Am. Dec. 71; *Monmouth Park Assn. v. Wallis Iron Works*, 55 N. J. L. 132, 39 Am. St. Rep. 626, 26 Atl. 140, 19 L. R. A. 456.

The stipulation in the contract under consideration in this case is wholly lacking in the elements of certainty necessary to indicate an agreement for liquidated damages, and its uncertainty stamps it as a stipulation for a penalty. By its terms, the amount to be paid by the obligor in the event of his failure to perform the contract depended upon his ability and disposition to remove from the land the timber cut down before the expiration of the time allowed. If he removed all that he had cut, the other party would get nothing more than the one hundred dollars for his damage, though he may have failed in the greater part of his contract, whereas, on the other hand, by reason of some accident or misfortune, he might be unable to remove a large quantity of the timber cut down and hauled to the river, and thereby forfeit it, though he had performed the greater part of his contract. For these reasons, the stipulation was manifestly a penalty. This being true, no forfeiture, either of the timber in the river taken by appellant, or the one hundred dollars, could

be enforced, further than the actual damage sustained: 1 Sutherland on Damages, sec. 283; Glasscock v. Rosengrant, 55 Ark. 376, 18 S. W. 379; Watts v. Camors, 115 U. S. 353, 6 Sup. Ct. Rep. 91, 29 L. ed. 406.

Nor could the stipulation be separated, and a part discarded as a penalty, and the remainder treated as liquidated damages. This being true, the court should have permitted proof as to the ⁴³⁷ actual damage sustained by the appellant by reason of appellee's failure to perform the contract in refusing or failing to take all the timber on the land if that be proved. The measure of damages in that event would be the difference between the market value of the timber left standing on the land and the contract price at the time of the breach. The court erred in refusing to allow appellant to prove such actual damages, as well as in its instruction to the jury on that question.

The appellant should also have been permitted to testify concerning the difference between the value of the logs converted, when floating in the water and when lodged in the sand, as such testimony tended to establish the value in the condition when converted.

For the errors indicated the cause must be reversed, and remanded for a new trial, and it is so ordered.

AGREEMENTS PURPORTING TO LIQUIDATE DAMAGES.*

- I. Liquidated Damages or Penalty.**
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 - b. History and Development of Law, 48.
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- II. Tests and Rules of Interpretation.**
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 - f. Contracts not to Follow Business or Calling, 59.
 - g. Leases of Property, 60.
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***REFERENCES TO MONOGRAPHIC NOTES.**

Liquidated damages or penalties: 1 Am. Dec. 331-340; 30 Am. Rep. 28-36.
 Agreement for higher rate of interest after default: 91 Am. St. Rep. 584-589.

I. Liquidated Damages or Penalty.

a. **In General.**—It is competent for the parties to a contract, in order to avoid all future controversy as to the amount of damages which may result from a breach of its terms, to agree and fix upon a certain definite sum as that which shall be paid to the party injured by the party in default, at least in those cases where the actual damages will be difficult of ascertainment, or the amount stipulated is not unreasonably large. Damages so ascertained in advance are denominated liquidated damages. In the interpretation of such contracts, however, courts keep in mind the fundamental principle that the law of damages contemplates compensation or exact reimbursement for losses sustained from wrongful conduct. Therefore, while within limits not easily defined the law will enforce an agreement for liquidated damages, yet it requires as a condition to such enforcement that the intention of the parties to that effect shall be clearly apparent from their words or manifestly deducible from the circumstances or subject matter of the contract. The most perplexing questions arise, in respect to this class of agreements, as to whether the parties intend to afford a fair and reasonable compensation for an injury occasioned by a breach of their engagement, or whether they intend to provide a penalty for the purpose of stimulating prompt and due performance, to be suffered without regard to actual loss from a default: See *Harper v. Savannah etc. R. R. Co.*, 69 Ala. 529; *Allison v. Dunwoody*, 100 Ga. 51, 28 S. E. 651; *Taylor v. Times Newspaper Co.*, 83 Minn. 523, 85 Am. St. Rep. 473, 86 N. W. 760; *O'Keefe v. Dyer*, 20 Mont. 477, 52 Pac. 196; *Peekskill etc. R. R. Co. v. Peekskill*, 47 N. Y. Supp. 305, 21 App. Div. 94; *Jennings v. McCormick*, 25 Wash. 427, 65 Pac. 764; *Sun Printing etc. Assn. v. Moore*, 183 U. S. 642, 22 Sup. Ct. Rep. 240, 46 L. ed. 366.

The question whether a contract provides for liquidated damages or for a penalty for nonperformance is of great practical importance. For if the contract is found to provide for liquidated damages, the amount stipulated may be recovered, in case of a breach, without proof of actual loss: *Stanley v. Montgomery*, 102 Ind. 102, 26 N. E. 213; *Sanford v. First Nat. Bank*, 94 Iowa, 680, 63 N. W. 459; *American Copper etc. Works v. Galland-Burke Brewing etc. Co.*, 30 Wash. 178, 70 Pac. 236; while if it is found to provide a penalty, only such damages are recoverable as are actually incurred and proved (*Willson v. Mayor*, 83 Md. 203, 55 Am. St. Rep. 339, 34 Atl. 774; *Johnson v. Cook*, 24 Wash. 474, 64 Pac. 729), which may, however, exceed the amount stipulated for: *Morrill v. Weeks*, 70 N. H. 178, 46 Atl. 32; *Noyes v. Phillips*, 60 N. Y. 408; *Graham v. Bickham*, 2 Yeates, 32, 1 Am. Dec. 328. And in case the damages are held to be liquidated, the sum fixed is the limit of recovery, notwithstanding the actual loss may be greater: *Chicago etc. Ry. Co. v. McEwen* (Ind. App.), 71 N. E. 926; *Pettis v. Bloomer*, 21 How. Pr. 317; *Morrison v. Ashburn*

(Tex. Civ. App.), 21 S. W. 993; *Jackson v. Hunt*, 76 Vt. 284, 56 Atl. 1010; *Welch v. McDonald*, 85 Va. 500, 8 S. E. 711.

b. History and Development of Law.—At the common law, where the parties to a contract had stipulated for the payment of a sum certain for the nonperformance of the contract, courts of law left them where they had placed themselves, and enforced the provision of the contract as to the damages with the same rigidity that they did any other provisions of the contract, and the only defense was a release under seal. Then the only relief available was in a court of equity, where the wronged party was permitted to exact only the actual damages suffered. So many difficulties arose in consequence of the harsh rule of the common-law courts that by the statutes of 8 & 9 William III, chapter 11, the practice in courts of law was changed so as to authorize a recovery of the actual damages, instead of the whole penalty, thereby avoiding a necessity of a resort to a court of equity. Notwithstanding these statutory provisions, however, the right to stipulate the damages is still recognized by the courts in proper cases; and courts of equity will not grant relief if the agreement is really for liquidated damages, and not for a penalty: *May v. Crawford*, 150 Mo. 504, 51 S. W. 693; *Whitefield v. Levy*, 35 N. J. L. 149; *Sun Printing etc. Assn. v. Moore*, 183 U. S. 642, 22 Sup. Ct. Rep. 240, 46 L. ed. 366; *Brooks v. Wichita*, 114 Fed. 297, 52 C. C. A. 209.

c. Present Attitude of Courts Against Liquidated Damages.—While the law, in a proper case, permits the parties to a contract to fix in advance the amount to be paid as damages in the event of a breach, still it is now generally recognized that courts, when called upon to interpret and enforce such contracts, will look into the question and ascertain whether liquidated damages are really stipulated for or whether a penalty is prescribed. Just compensation for a breach of contract is what the law aims at; but contracts of this nature often specify a sum much in excess of the actual damages, and therefore their enforcement works a hardship upon the party in default. Hence it is that courts usually manifest a disposition to favor a construction which excludes the idea of liquidated damages and thus to limit a recovery to the amount of loss actually sustained. In doubtful cases the sum stipulated in the contract will be declared a penalty rather than liquidated damages: *Amanda etc. Min. Co. v. People's Min. etc. Co.*, 28 Colo. 251, 64 Pac. 218; *Hennessy v. Metzger*, 152 Ill. 505, 43 Am. St. Rep. 267, 38 N. E. 1058; *Foley v. McKeegan*, 4 Iowa, 1, 66 Am. Dec. 107; *Day Bros. Lumber Co. v. Isow*, 23 Ky. Law Rep. 80, 62 S. W. 516; *Willson v. Mayor*, 83 Md. 203, 55 Am. St. Rep. 339, 34 Atl. 774; *Williston v. Mathews*, 55 Minn. 422, 56 N. W. 1112; *O'Keefe v. Dyer*, 20 Mont. 477, 52 Pac. 196; *Davis v. Gillett*, 52 N. H. 126; *Monmouth Park Assn. v. Wallis Iron Works*, 55 N. J. L. 132, 39 Am. St. Rep. 626, 26 Atl. 140, 19 L. R. A. 456; *Keck v. Bieber*, 148 Pa. St. 645, 33 Am. St. Rep. 846, 24 Atl. 170; *Eakin v. Scott*, 70 Tex. 442, 7 S. W. 777.

So strong is the inclination of courts toward holding that contracts of this kind provide for a penalty rather than for liquidated damages, and are therefore not enforceable, that the intention of the parties is not regarded as all-controlling in determining the construction to be put upon their contract, but the subject matter and surroundings of the contract will control the intention when equity absolutely demands it: *Jaquith v. Hudson*, 5 Mich. 123; *Condon v. Kemper*, 47 Kan. 126, 27 Pac. 829, 13 L. R. A. 671; *Moore v. Colt*, 127 Pa. St. 289, 14 Am. St. Rep. 845, 18 Atl. 8; *Half v. O'Connor* (Tex. Civ. App.), 37 S. W. 238; *Gay Mfg. Co. v. Camp*, 65 Fed. 794, 13 C. C. A. 137. "Though the intention of the parties seems clear and manifest that a breach shall operate as a complete forfeiture of the entire sum named in the agreement, the court will decline to lend its assistance to enforce the payment of an amount which is grossly excessive, unreasonable, and unjust, and will treat the stipulation as in the nature of a penalty, and will award only such damages as the injured party may have actually sustained": *Sanders v. Carter*, 91 Ga. 450, 17 S. E. 345. "For under the modern common law, especially as interpreted in the United States, parties may not stipulate absolutely for a price for the breach of some immaterial or trivial part of their contract. Such stipulation is theoretically against the policy of the law as declared by the courts, which have established a supervision of agreements by a long course of precedents and acquiescence by the people therein": *May v. Crawford*, 142 Mo. 390, 44 S. W. 260.

"As a general rule parties are allowed to make such contracts as they please, including contracts to liquidate and fix beforehand the amount of damages for a breach of such contracts; but the courts have always exercised a certain power of control over contracts to liquidate damages, so as to keep them in harmony with the fundamental general rule that compensation shall be commensurate with the extent of the injury. Thus, although parties in express and explicit terms provide that the sum agreed to be paid shall be liquidated damages, and not a penalty, the courts have held, notwithstanding such expression of intent, that the sum was a penalty": *New Britain v. New Britain Tel. Co.*, 74 Conn. 326, 50 Atl. 881, 1015.

"Many courts hold that the intention of the parties must govern, but say that if the damages stipulated to be paid, received, or recovered on the breach of the contract are out of proportion to the actual damages that might be sustained, then the parties could not in fact have intended liquidated damages, but merely a penalty, whatever their language might be. Other courts hold that it makes no difference what the intention of the parties might be; that the nature of the contract itself must govern, and if the amount stipulated to be paid, received, or recovered is out of all proportion to the actual damages that might be sustained, then such amount must be treated as a penalty, whatever may have been the intention of

the parties; that in fact, and in the very nature of things, such amount would be a penalty, and could not be anything else; that the parties could not, by misnaming the amount and calling it liquidated damages, make it such": *Condon v. Kemper*, 47 Kan. 126, 27 Pac. 829, 13 L. A. R. 671.

It must be confessed, however, that there is a present tendency on the part of some courts to enforce agreements for liquidated damages, notwithstanding their unconscionable character. These courts put forward, as the basis of their action, the theory that courts sit to enforce agreements as made, and not to make new ones or relieve parties from improvident ones of their own making: *Guerin v. Stacey*, 175 Mass. 595, 56 N. E. 892; *Pastor v. Solomon*, 55 N. Y. Supp. 956, 26 Misc. Rep. 125; *Knox Rock Blasting Co. v. Grafton Stone Co.*, 64 Ohio St. 361, 60 N. E. 563; *Sun Printing etc. Assn. v. Moore*, 183 U. S. 642, 22 Sup. Ct. Rep. 240, 46 L. ed. 366. It is quite possible, we think, that courts, in adopting this view of the law and thus lending their aid to the enforcement of harsh and improvident agreements, may mistake their true functions and province, and forget that what the law styles a penalty is a penalty, regardless of what the parties to an engagement may say, think, or intend.

II. Tests and Rules of Interpretation.

a. *In General.*—There are three principal tests usually employed by courts to determine whether a contract provides for liquidated damages and is therefore enforceable, or whether it provides for a penalty and is therefore unenforceable: 1. The language used; 2. The subject matter of the contract; and 3. The intention of the parties. The language employed is least to be relied on; the subject matter of the contract and the intention of the parties are the controlling considerations: *May v. Crawford*, 150 Mo. 504, 51 S. W. 693. The court will consider the nature of the contract, the terms of the entire instrument, the subject matter, the ease or difficulty of measuring a breach in damages, the magnitude of the sum stipulated, the consequences naturally resulting from a breach, and the particular circumstances surrounding the transaction, thus permitting each case, so far as possible, to stand on its own merits and peculiarities: *Keeble v. Keeble*, 85 Ala. 552, 5 South. 149; *Burrill v. Daggett*, 77 Me. 545, 1 Atl. 677; *Mathews v. Sharp*, 99 Pa. St. 560; *Keck v. Bieber*, 148 Pa. St. 645, 33 Am. St. Rep. 846, 24 Atl. 170.

b. *Intention of Parties.*—In determining whether a contract provides for liquidated damages or for a penalty, the first inquiry is the intention of the parties; and if, from the language of the instrument, the nature of the contract, the situation of the parties, and the circumstances surrounding the transaction, it appears in clear and unmistakable terms that the parties intended to liquidate the damages for a future breach of their contract, their agreement to this effect will generally be given effect and enforced: *Henderson v. Murphree*, 109 Ala. 556, 20 South. 45; *Sutton v. Howard*, 33 Ga. 536; *Beeves v.*

Stipp, 91 Ill. 609; Sanford v. First Nat. Bank, 94 Iowa, 680, 63 N. W. 459; Morrill v. Weeks, 70 N. H. 178, 46 Atl. 32; El Reno v. Cullinane, 4 Okla. 457, 46 Pac. 510; Keck v. Bieber, 148 Pa. St. 645, 33 Am. St. Rep. 846, 24 Atl. 170; Williams v. Vance, 9 S. C. 344, 30 Am. Rep. 26; Santa Fe St. Ry. Co. v. Schultz (Tex. Civ. App.), 83 S. W. 39. However, as has been pointed out in a preceding paragraph, courts are disinclined to interpret contracts as providing for liquidated damages, but lean toward interpreting them as providing for a penalty; and so strong is this inclination on the part of some, though not all, of the courts, that they have held that the intention of the parties is not absolutely controlling, and they accordingly have declined to enforce contracts which fix the damages at exorbitant sums, irrespective of the apparent intention of the parties.

c. Language Employed.—In determining whether a contract provides for liquidated damages or for a penalty, courts will of course consider the language employed by the parties in expressing their agreement. But the language employed is not conclusive on the courts. They will look to the nature and subject matter of the contract, the situation of the parties, and all the surrounding facts and circumstances which throw light upon the question. Contracts employing the term "liquidated damages" are often held to provide a penalty, and contracts employing the word "penalty" are sometimes held to provide for liquidated damages: *Hennessey v. Metzger*, 152 Ill. 505, 43 Am. St. Rep. 267, 38 N. E. 1058; *Foley v. McKeegan*, 4 Iowa, 1, 66 Am. Dec. 107; *Keeley v. Fejervary*, 111 Iowa, 693, 83 N. W. 791; *Hahn v. Hortzman*, 75 Ky. (12 Bush) 249; *Bagley v. Peddie*, 16 N. Y. 469, 69 Am. Dec. 713; *Tode v. Gross*, 127 N. Y. 480, 24 Am. St. Rep. 475, 28 N. E. 469, 13 L. R. A. 652; *Disosway v. Edwards*, 134 N. C. 254, 46 S. E. 501; *Kunkel v. Wherry*, 189 Pa. St. 193, 69 Am. St. Rep. 802, 42 Atl. 112; *Railroad v. Cabinet Co.*, 104 Tenn. 568, 73 Am. St. Rep. 933, 58 S. W. 303, 50 L. R. A. 729; *Willson v. Love*, [1896] 1 Q. B. D. 626.

d. Uncertainty of Actual Damages.—In determining whether an agreement which purports to liquidate the damages for its breach will be enforced by the courts, the certainty or uncertainty of the actual damages which a breach will occasion is a most important matter for consideration. When the nature of an engagement is such that upon a breach thereof the damages will be uncertain and difficult of proof, and the parties have beforehand expressly agreed upon an amount of damages which is not greatly disproportionate to the presumable loss, their expressed intention will be carried out as an agreement for liquidated damages: *Watts v. Sheppard*, 2 Ala. 425; *Pogue v. Kaweah Power etc. Co.*, 138 Cal. 664, 72 Pac. 144; *New Britain v. New Britain*, 74 Conn. 326, 50 Atl. 881, 1015; *Hennessey v. Metzger*, 152 Ill. 505, 43 Am. St. Rep. 267, 38 N. E. 1058; *Pinkney v. Weaver*, 216 Ill. 185, 74 N. E. 714; *McCullough v. Moore*, 111 Ill. App. 545; *Hamilton v. Overton*, 6 Blackf. 206, 38 Am. Dec. 136; *Studabaker v. White*, 31 Ind. 211, 99 Am. Dec. 628; *Maxwell v. Allen*,

78 Me. 32, 57 Am. Rep. 783, 2 Atl. 386; *Garst v. Harris*, 177 Mass. 72, 58 N. E. 174; *Calbeck v. Ford* (Mich.), 103 N. W. 516; *Taylor v. Times Newspaper Co.*, 83 Minn. 523, 85 Am. St. Rep. 473, 86 N. W. 760; *Monmouth Park Assn. v. Wallis Iron Works*, 55 N. J. L. 132, 39 Am. St. Rep. 626, 26 Atl. 140, 19 L. R. A. 456; *Cotheal v. Talmadge*, 9 N. Y. 551, 61 Am. Dec. 716; *Peekskill R. R. Co. v. Peekskill*, 47 N. Y. Supp. 305, 21 App. Div. 94, 165 N. Y. 628, 59 N. E. 1128; *Grasselli v. Lowden*, 11 Ohio St. 349; *Waggoner v. Cox*, 40 Ohio St. 539; *Lipscomb v. Seegers*, 19 S. C. 425; *Santa Fe St. Ry. Co. v. Schutz* (Tex. Civ. App.), 83 S. W. 39; *Harris v. Miller*, 11 Fed. 118, 6 Saw. 319; *Nielson v. Read*, 12 Fed. 441; *Charleston Fruit Co. v. Bond*, 26 Fed. 18; *Sun Printing etc. Assn. v. Moore*, 183 U. S. 642, 22 Sup. Ct. Rep. 240, 46 L. ed. 366.

But where the engagement is of such a nature that the damages from a breach of its terms are certain and susceptible of ready ascertainment, then the courts are strongly disposed to treat the sum named in the contract as a penalty and not enforceable, especially when it is greatly in excess of the probable loss. In such a case, therefore, the injured party is required to prove the loss he alleges: *Mansur etc. Implement Co.*, 136 Ala. 597, 33 South. 818; *Stewart v. Grier*, 7 Houst. 378, 32 Atl. 328; *Lee v. Overstreet*, 44 Ga. 507; *Tierman v. Hinman*, 16 Ill. 400; *St. Louis etc. Ry. Co. v. Shoemaker*, 27 Kan. 677; *Hahn v. Horstman*, 75 Ky. (12 Bush) 249; *Mason v. Callender*, 2 Minn. 350, 72 Am. Dec. 102; *Hill v. Wertheimer-Swarts Shoe Co.*, 150 Mo. 483, 51 S. W. 702; *Fitzpatrick v. Cottingham*, 14 Wis. 219; *White v. Arleth*, 1 Bond, 319, Fed. Cas. No. 17,536; notes to *Graham v. Bickham*, 1 Am. Dec. 331-340; *Williams v. Vance*, 30 Am. Rep. 28-36. This salutary rule has found a very definite expression in the statutory law of some states: *Pacific Factor Co. v. Adler*, 90 Cal. 110, 25 Am. St. Rep. 102, 27 Pac. 36; *Dennineck v. West Gallatin Irr. Co.*, 28 Mont. 255, 72 Pac. 618.

a. Magnitude of Sum Stipulated.—Another aspect of contracts of this character which attracts the attention of courts is the magnitude of the sum fixed by the parties in their agreement for liquidated damages, and its proportion to the amount of loss which may reasonably be presumed to result from a breach. It is competent for the parties to a contract, especially when the loss from a breach thereof will not be readily ascertainable, to fix a reasonable sum as the amount which shall be paid to the injured party by the party who makes default; and such an engagement will be enforced by the courts. But if the sum stipulated is so large as to be out of all proportion to the probable or presumptive loss, and is therefore not a fair measure of the damages actually sustained, the courts generally decline to enforce the engagement, but pronounce the sum a penalty and require the injured party to prove his loss: *Nash v. Hermosilla*, 9 Cal. 584, 70 Am. Dec. 676; *Doane v. Chicago City Ry. Co.*, 51 Ill. App. 353; *Bolster v. Post*, 57 Iowa, 698, 11 N. W. 637; *Condon v. Kemper*, 47 Kan. 126, 27 Pac. 829, 13 L. R. A. 671; *Davis*

v. Freeman, 10 Mich. 188; Morse v. Rathburn, 42 Mo. 594, 97 Am. Dec. 359; Menges v. Milton Piano Co., 96 Mo. App. 283, 70 S. W. 250; Gillilan v. Rollins, 41 Neb. 540, 59 N. W. 893; Lee v. Carroll Normal School (Neb.), 96 N. W. 65; Dunn v. Morgenthau, 76 N. Y. Supp. 827, 73 App. Div. 147, 175 N. Y. 518, 67 N. E. 1081; Henderson v. Causler, 65 N. C. 542; Bradstreet v. Baker, 14 R. I. 546; Copeland v. Holloman (Tex. Civ. App.), 51 S. W. 257; Taylor v. The Marcella, 1 Woods, 302, Fed. Cas. No. 13,797.

While it is true that the majority of courts refuse to lend their assistance to the enforcement of this class of agreements when an exorbitant sum is fixed as the measure of damages and the engagement thereby becomes unconscionable and works hardship, nevertheless there is, as has been indicated in the opening pages of this note, a disposition on the part of some courts to hold the parties to their agreement and enforce it as made.

f. Circumstances of Case.—In determining whether a contract which purports to fix in advance the damages for a breach of its terms provides for liquidated damages or for a penalty, the courts consider the facts under which the contract was made and the circumstances surrounding the transaction, thereby allowing each case, so far as possible, to stand upon its own merits and peculiarities; so that, while courts will, to a greater or less extent, be guided by the general tests and rules of interpretation laid down in the preceding paragraphs, they will, after all, examine each case in the light of the facts and circumstances peculiar to it: Keeble v. Keeble, 85 Ala. 552, 5 South. 149; California Steam Navigation Co. v. Wright, 6 Cal. 259, 65 Am. Dec. 511; Duffy v. Shockey, 11 Ind. 70, 71 Am. Dec. 348; Taylor v. Times Newspaper Co., 83 Minn. 523, 85 Am. St. Rep. 473, 86 N. W. 760; Curry v. Larer, 7 Pa. St. 470, 49 Am. Dec. 486; Gay Mfg. Co. v. Camp, 65 Fed. 794, 13 C. C. A. 137.

III. Character and Form of Agreement.

a. Stipulations Against Delay.

1. In General.—In contracts for the performance of work it frequently is stipulated that a fixed sum of money shall be paid for any delay in the completion of the undertaking beyond a certain day. Stipulations of this class are often attacked as providing for a penalty. But if it is certain that some damages will result in the event of a delay in the performance of an agreement, where such damages are insusceptible of exact ascertainment, or are based on matters to a considerable extent uncertain, and where the amount stipulated for is not out of all proportion to the probable loss, an agreement to pay a sum certain for each day, week, or other definite period of delay beyond the time fixed in the contract for its fulfillment is a valid and enforceable contract for the measurement of damages, and not an agreement for a penalty for nonperformance: Pressed Steel Car Co. v. Eastern Ry. Co., 121 Fed. 609, 57 C. C. A. 635; Watts v. Shepard, 2 Ala. 425; O'Brien v. Anniston Pipe-Works, 93 Ala. 582, 9

South. 415; *Lennon v. Smith*, 14 Daly, 520, 1 N. Y. Supp. 97; *Dunn v. Morgenthau*, 76 N. Y. Supp. 827, 73 App. Div. 147, 175 N. Y. 518, 67 N. E. 1081. This principle is applicable to the performance of construction work on a vessel: *Curtis v. Brewer*, 34 Mass. (17 Pick.) 513; *Manistee Iron Works v. Shores Lumber Co.*, 92 Wis. 21, 65 N. W. 863. However, the general rule is, that damages should be purely compensatory. Thus, a clause in a contract for the erection of a tomb, which calls for its completion within a specified time, under a forfeiture of ten dollars a day for every day's delay beyond that time, provides for a penalty: *Muldoon v. Lynch*, 66 Cal. 536, 6 Pac. 417.

2. In Construction of Railways.—Where a contract for the construction of a street railway in a town provides that, upon a failure to complete it within a certain time, the railway company shall pay the town five hundred dollars, that amount is recoverable as liquidated damages if the road is not completed by the time specified: *Nilson v. Jonesboro*, 57 Ark. 168, 20 S. W. 1093. See, too, *Indianola v. Gulf etc. Ry.*, 56 Tex. 594; "Completion of Public Utilities," post. And a provision in a contract for the construction of a railway bridge that, if the bridge is not completed by a certain date, the sum of one thousand dollars a week shall thereafter be deducted from the contract price of the work, is a provision for liquidated damages: *Texas etc. Ry. Co. v. Rust*, 19 Fed. 239. So, a stipulation in a contract for grading a railroad, that a certain per cent of the contract price for the work shall be retained and forfeited if the work is not completed within a certain time or in a certain manner, will, owing to the uncertainty of the actual loss, be enforced as an agreement to liquidate the damages: *Wolf v. Des Moines etc. Ry. Co.*, 64 Iowa, 380, 20 N. W. 481; *Elizabethtown etc. R. R. Co. v. Geoghegan*, 72 Ky. (9 Bush) 56; *Geiger v. Western Md. R. R. Co.*, 41 Md. 4; *Faunce v. Gilmore*, 16 Pa. St. 469, 55 Am. Dec. 519. Compare, however, *Savannah etc. R. R. Co. v. Callahan*, 56 Ga. 331.

3. In Erection of Buildings.—If a contract for erecting a building names the day on which the work shall be completed, and declares that in case of a delay after that date the contractor shall be charged a certain lump sum or a specified amount for each day's delay after the date fixed for the completion, the sum named, if reasonable, will usually be deemed liquidated damages, for the actual loss from a delay is difficult of determination: *Lincoln v. Little Rock Granite Co.*, 56 Ark. 405, 19 S. W. 1056; *Young v. Gaut*, 69 Ark. 114, 61 S. W. 372; *Downey v. O'Donnell*, 86 Ill. 49; *Hennessy v. Metzger*, 152 Ill. 505, 43 Am. St. Rep. 267, 38 N. E. 1058; *McCullough v. Moore*, 111 Ill. App. 545; *Kelly v. Fejervary*, 111 Iowa, 693, 83 N. W. 791; *Hall v. Crowley*, 87 Mass. (5 Allen) 304, 81 Am. Dec. 745; *Ramlose v. Dollman*, 100 Mo. App. 347, 73 S. W. 917; *Monmouth Park Assn. v. Wallis Iron Works*, 55 N. J. L. 132, 39 Am. St. Rep. 626, 26 Atl. 190, 19 L. R. A. 456; *Ward v. Hudson River Bldg. Co.*, 125 N. Y. 230,

26 N. E. 256; Kunkel v. Wherry, 189 Pa. St. 198, 69 Am. St. Rep. 802, 42 Atl. 112; Worrell v. McClintaghan, 5 Strob. 115; Carter v. Kaufman, 67 S. C. 456, 45 S. E. 1017; Brown Iron Co. v. Norwood (Tex. Civ. App.), 69 S. W. 253; Drumheller v. American Surety Co., 30 Wash. 530, 71 Pac. 25. Such agreements, however, will be regarded as providing for a penalty, and therefore not enforceable, when the amount fixed is out of all proportion to the amount of the loss occasioned by the delay as measured by the value of the building for use or renting during the delay: Coen v. Birchard, 124 Iowa, 394, 100 N. W. 48; Small v. Burke, 86 N. Y. Supp. 1066, 92 App. Div. 338; Zimmerman v. Conrad (Mo. App.), 74 S. W. 139; Clements v. Schuykill etc. R. R. Co., 132 Pa. St. 445, 19 Atl. 274; Jennings v. Willer (Tex. Civ. App.), 32 S. W. 24; Wagner v. Cawker, 112 Wis. 532, 88 N. W. 599; Chicago House-wrecking Co. v. United States, 106 Fed. 385, 45 C. C. A. 343, 53 L. R. A. 122. The fact, too, that the damages are not difficult of calculation is an important factor in inducing courts to hold such contracts unenforceable as providing penalties: See Patent Brick Co. v. Moore, 75 Cal. 205, 16 Pac. 890; Brennan v. Clark, 29 Neb. 385, 45 N. W. 472; Chicago House-wrecking Co. v. United States, 106 Fed. 385, 45 C. C. A. 343, 53 L. R. A. 122.

It has been held that a stipulation in a contract to build a dwelling or residence which fixes the damages at ten dollars a day for each day's delay in completing the building after specified date, will be given effect as an agreement for liquidated damages: De Graff v. Wickham, 89 Iowa, 720, 52 N. W. 503, 57 N. W. 420; Collier v. Betterton, 87 Tex. 440, 29 S. W. 467; Reichenbach v. Sage, 13 Wash. 364, 52 Am. St. Rep. 51, 43 Pac. 354. But the better rule is, perhaps, that such a stipulation, in the absence of unusual circumstances, will be regarded providing a penalty, and hence not enforceable: Wheedon v. American Bonding etc. Co., 128 N. C. 69, 38 S. E. 255; Seim v. Krause, 13 S. Dak. 530, 83 N. W. 583. See, also, Denver Land etc. Co. v. Rosenfeld Const. Co., 19 Colo. 539, 36 Pac. 146. A stipulation fixing the damages at ten dollars a day for any delay in completing a business building is held to provide for a penalty in Connelly v. Priest, 72 Mo. App. 673; and so is a stipulation, in Cochran v. People's Ry. Co., 113-Mo. 359, 21 S. W. 6, fixing the damages at fifty dollars a day for a delay in completing an office building for a railway company. In Curtis v. Van Bergh, 161 N. Y. 47, 55 N. E. 398, stipulation for that amount, in the case of a building for manufacturers, is held, under the circumstances of the case, enforceable. An agreement fixing the damages at twenty-five dollars a day for any delays in erecting a hotel is held enforceable in Mills v. Paul (Tex. Civ. App.), 30 S. W. 558. And an agreement for twenty dollars a day for each day's delay in finishing a hospital is held to provide for liquidated damages in Davis v. La Crosse Hospital Assn., 121 Wis. 579, 99 N. W. 351. Fifty dollars a day, stipu-

lated as the damages for delay in constructing a church, is held to be recoverable in *Bird v. Rector etc. St. John's Church*, 154 Ind. 138, 56 N. E. 129. See, too, *Trustees of Congregational Church v. Walbrath*, 27 Mich. 232. So, an agreement for the manufacture and delivery of church pews, providing for a forfeiture of ten dollars a day for delay after a specified date, is held enforceable as a contract to liquidate damages: *Illinois Cent. R. R. Co. v. Southern Seating etc. Co.*, 104 Tenn. 568, 78 Am. St. Rep. 933, 58 S. W. 303, 50 L. R. A. 729. And an agreement to furnish a courtroom, providing ten dollars a day as liquidated damages for every day's delay, is held enforceable in *Harris County v. Donaldson*, 20 Tex. Civ. App. 9, 48 S. W. 791.

4. **In Completion of Public Utilities.**—In contracts between municipalities, acting in their governmental capacities, and quasi public corporations for the rendition of a public service, stipulations purporting to fix in advance the amount of damages for a failure to fulfill the terms of the agreement within a specified time, receive a more favorable consideration and are more likely to be enforced by the courts than are similar stipulations in contracts between private individuals: *Springwell's Township v. Detroit etc. Ry. (Mich.)*, 103 N. W. 700, in which case it is held that a provision in a bond for the payment of ten thousand dollars by a railway company in case it failed to keep its engagements is held to provide for liquidated damages. To the same effect see *Whiting v. New Baltimore*, 127 Mich. 66, 86 N. W. 403. Consult, also, "Construction of Railways," ante, 54. And if a telephone corporation deposits with a city a sum of money as a guaranty that its system will be in operation by a certain date, the deposit to be forfeited in case the system is not in operation within that time, the entire amount, and not merely such a part as would compensate the city, is forfeited by a noncompliance by the company with the terms of its agreement: *Detroit v. People's Tel. Co. (Mich.)*, 98 N. W. 745. Agreements liquidating the damages for a failure to install an electric light system within a specified time, are enforced in *Salem v. Anson*, 40 Or. 339, 91 Am. St. Rep. 485, 67 Pac. 190, 56 L. R. A. 169; *Brooks v. Wichita*, 114 Fed. 297, 52 C. C. A. 209; and agreements liquidating the damages for a failure to complete a public bridge or building are enforced in *Malone v. Philadelphia*, 147 Pa. St. 416, 23 Atl. 628; *Heard v. Dooly County*, 101 Ga. 619, 28 S. E. 986. A provision in a contract for the construction of a sewer to the effect that for each day's delay in the completion of the work beyond a certain date the city may retain a specified sum, or that the contractor shall pay the city a specified sum, is enforceable as providing for liquidated damages, at least when the amount named is not unreasonable: *Lawson v. Marshall*, 133 Mich. 250, 95 N. W. 78; *Thorn etc. Cement Co. v. Citizens' Bank*, 158 Mo. 272, 59 S. W. 109.

b. **Contracts Containing Several Provisions.**—Where a contract contains a number of stipulations of varying degrees of importance,

a single lump sum made payable for a breach, and applicable alike to important and unimportant covenants, will prima facie be treated as a penalty rather than liquidated damages, regardless of what name is given it by the parties: *Watts v. Sheppard*, 2 Ala. 425; *Nash v. Hermosilla*, 9 Cal. 584, 70 Am. Dec. 676; *Smith v. Newell*, 37 Fla. 147, 20 South. 249; *Swift v. Crow*, 17 Ga. 609; *Heard v. Bowers*, 40 Mass. (23 Pick.) 455; *Foley v. McKeegan*, 4 Iowa, 1, 66 Am. Dec. 107; *Daily v. Litchfield*, 10 Mich. 29; *Whitefield v. Levy*, 35 N. J. L. 149; *Hoagland v. Segur*, 38 N. J. L. 230; *Monmouth Park Assn. v. Warren*, 55 N. J. L. 598, 27 Atl. 932; *Staples v. Parker*, 41 Barb. 648; *Curry v. Larer*, 7 Pa. St. 470, 49 Am. Dec. 486; *Keck v. Bieber*, 148 Pa. St. 645, 33 Am. St. Rep. 846, 24 Atl. 170; *Everett Land Co. v. Money*, 16 Wash. 552, 48 Pac. 243; *Madison v. American Sanitary Engineering Co.*, 118 Wis. 486, 95 N. W. 1097; *Wilson v. Love*, [1896] 1 Q. B. D. 626.

Yet a stipulation in a contract fixing the amount of damages in advance for a breach thereof will be sustained and enforced, notwithstanding the contract binds the promisor to do several things of varying degrees of importance, and does not discriminate between them in specifying the damages, if all the covenants are of an uncertain nature in respect to the amount of injury a breach will cause: *Chose v. Allen*, 79 Mass. (13 Gray) 42; *Guerin v. Stacey*, 175 Mass. 595, 56 N. E. 892; *Cothel v. Talmadge*, 9 N. Y. 551, 61 Am. Dec. 716; *Bagley v. Peddie*, 16 N. Y. 469, 69 Am. Dec. 713; *Wallis v. Smith*, 21 Ch. Div. 243; except in case of a great disproportion between the sum stipulated and the actual loss: *Watts v. Sheppard*, 2 Ala. 425; *Congregational Church v. Walrath*, 27 Mich. 232; *Carter v. Strom*, 41 Minn. 522, 43 N. W. 394; *Morse v. Rathburn*, 42 Mo. 594, 97 Am. Dec. 359; *Emery v. Boyle*, 200 Pa. St. 249, 49 Atl. 779. See, however, on the question of disproportion, *Clement v. Cash*, 21 N. Y. 253.

But where a contract, specifying one fixed sum as the measure of damages for a breach thereof, contains several stipulations, some of which are of such a character that the damages from a breach thereof, are readily ascertainable, while some of them are such that it would be difficult to estimate the loss which would result from a breach, the provision for damages being applicable to a breach of any or all of the stipulations, the contract will generally be deemed to provide for a penalty rather than for liquidated damages, especially when the different stipulations are widely varying in importance, a breach of certain ones involving a trifling loss as compared with a breach of others: *McPherson v. Robertson*, 82 Ala. 459, 2 South. 333; *Trower v. Elder*, 77 Ill. 452; *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582, 54 N. E. 987; *Carter v. Strom*, 41 Minn. 522, 43 N. W. 394; *Long v. Towl*, 42 Mo. 545, 97 Am. Dec. 355; *State v. Dodd*, 45 N. J. L. 525; *Morris v. McCoy*, 7 Nev. 399; *Thorougood v. Walker*, 47 N. C. (2 Jones) 15; *Wilhelm v. Eaves*, 21 Or. 194, 27 Pac. 1053, 14 L. R. A. 297; *Berry v. Wisdom*, 3 Ohio St.

241; *Charleston Fruit Co. v. Bond*, 26 Fed. 18; *East Moline Co. v. Weir Plow Co.*, 95 Fed. 250. And, with greater reason, if the breach of each stipulation is susceptible of accurate valuation, the sum mentioned as the measure of damages for a breach will be construed as a penalty, instead of liquidated damages, and the recovery limited to the actual loss: *People v. Central Pac. R. R. Co.*, 76 Cal. 29, 18 Pac. 90; *St. Louis etc. Ry. Co. v. Shoemaker*, 27 Kan. 677.

But whatever conclusion may be arrived at, the court will not divide the contract and interpret it as providing a penalty in respect to certain provisions and liquidated damages in respect to others: See the principal case, *ante*, p. 42; *Steer v. Brown*, 106 Ill. App. 361; *State v. Dodd*, 45 N. J. L. 525; *Madison v. American Sanitary Engineering Co.*, 118 Wis. 480, 95 N. W. 1097.

c. **Contracts Involving Money Deposit.**—Where one of the parties to an agreement deposits a certain sum of money to be forfeited or paid to the other if he fails to keep the terms of his agreement, this sum, if reasonable, will be regarded as liquidated damages, where the actual damages are uncertain, speculative, or difficult of computation: *Sanders v. Carter*, 91 Ga. 450, 17 S. E. 345; *Sanford v. First Nat. Bank*, 94 Iowa, 680, 63 N. W. 459. Agreements of this kind are enforceable as between a vendor and vendee of real estate (*Woodbury v. Turner*, 96 Ky. 459, 29 S. W. 295; *Garcia v. Pennsylvania Furnace Co.*, 186 Mass. 405, 71 N. E. 793; *Moore v. Durnam*, 63 N. J. Eq. 96, 51 Atl. 449), and as between a seller and buyer of personal property: *Millar v. Smith*, 28 Tex. Civ. App. 386, 67 S. W. 429. See, however, *Willson v. Mayor*, 83 Md. 203, 55 Am. St. Rep. 339, 34 Atl. 774.

A person to whom is awarded a contract to furnish a city with certain articles of personalty may recover a certified check deposited with the city under a provision of law requiring all bidders to make such deposit, and providing that if the successful bidder shall enter into contract with bond without delay, his deposit shall be returned when, without fault on his part, such successful bidder to whom the contract is awarded is unable to procure a surety on his bond, and for this reason the contract is subsequently awarded by the city to another bidder for a much smaller sum than the former bid. In such a case, the deposit is regarded as a penalty, and not as liquidated damages: *Willson v. Mayor*, 83 Md. 203, 55 Am. St. Rep. 339, 34 Atl. 774. See, too, *Lindsey v. Rockwell County*, 10 Tex. Civ. App. 225, 30 S. W. 380.

d. **Contracts for Payment of Money.**—In case of a contract for the payment of money simply, a stipulation to pay a fixed sum in default of performance will be regarded as an agreement for a penalty and not as a covenant for liquidated damages. This rule is based on the principle that damages for the breach of such contracts are fixed and liquidated by the law, and require no liquidation by the parties: *Kuhn v. Myers*, 37 Iowa, 351; *Morris v. Tillson*, 81 Ill. 607; *Sessions v. Richmond*, 1 B. I. 298; *Fitzpatrick v. Cottingham*, 14 Wis.

219. Where the parties to a contract stipulate for the payment of large sum on default in the payment of a smaller sum, the stipulation is for a penalty and not for liquidated damages: *Kimball v. Doggett*, 62 Ill. App. 528; *Mason v. Callender*, 2 Minn. 350, 72 Am. Dec. 102; *Morris v. McCoy*, 7 Nev. 399; *Cairnes v. Knight*, 17 Ohio St. 68; *Everett Land Co. v. Money*, 16 Wash. 552, 48 Pac. 243. But where the larger sum is the actual debt, and the smaller one has been agreed upon as a release if paid under stated conditions, the neglect to comply with the easier terms gives the creditor the right to compel the payment of the larger sum: *Waggoner v. Cox*, 40 Ohio St. 539; *Goodyear Shoe etc. Co. v. Selz*, 157 Ill. 186, 41 N. E. 625.

a. *Contracts of Employment.*—The sudden breaking off of a contract for personal services by either party involves such difficulties concerning the actual loss as renders a reasonable agreement for stipulated damages appropriate and valid. Therefore, if a contract for personal services stipulates that if the employé shall leave the service without giving two weeks' notice of his intention so to do, he shall forfeit a specified sum, which may be deducted from the wages due him, the stipulation is valid, especially when the circumstances and nature of the employment are such that it will be difficult to calculate with any certainty the actual loss consequent upon an abandonment of the service without previous notice: *Tennessee Mfg. Co. v. James*, 91 Tenn. 154, 30 Am. St. Rep. 865, 18 S. W. 262, 15 L. R. A. 211. See, to the same effect, *Pierce v. Whittlesey*, 58 Conn. 104, 19 Atl. 513, 7 L. R. A. 286; *Wilson v. Godkin* (Mich.), 98 N. W. 985; *Louis v. Brown*, 7 Or. 326; *Walsh v. Fisher*, 102 Wis. 172, 78 N. W. 437; *Jackson v. Hunt*, 76 Vt. 284, 56 Atl. 1010. A stipulation, however, that if an employé abandons the employment without giving three days' notice he shall forfeit, as liquidated damages, all the moneys then due him, provides for a penalty: *Schmieder v. Kingsley*, 26 N. Y. Supp. 31, 6 Misc. Rep. 107. If a contract at a specified weekly salary provides that the employer may cancel the contract on giving one week's notice and paying one week's additional salary, and declares that in consideration of such additional week's salary the employé agrees to accept such notice of cancellation at any time, and the employer, by refusing to permit the employé to perform services, in effect, discharges him without any actual notice or any payment, the damages of the employé are deemed liquidated and fixed at two weeks' salary: *Watson v. Russell*, 149 N. Y. 388, 44 N. E. 161. In *Borley v. McDonald*, 69 Vt. 309, 38 Atl. 60, a clause in an insurance agent's contract of employment that if he, within one year after the termination of his employment, solicits any insurance then held by the employer from any person, he shall forfeit as liquidated damages to the employer the sum of five hundred dollars, is sustained, as a provision for liquidation of damages.

f. *Contracts not to Follow Business or Calling.*—Where a person binds himself in a certain sum not to carry on a particular business

within a certain territory for a specified time, the sum mentioned, whether denominated a forfeiture, penalty, or liquidated damages, will usually be deemed liquidated damages, if not disproportionate to the actual damages likely to flow from a breach of the agreement, since the actual damages in such cases are uncertain and difficult to determine: *Streeter v. Rush*, 25 Cal. 67; *Franz v. Bieler*, 126 Cal. 176, 56 Pac. 249, 58 Pac. 466; *Potter v. Ahrens*, 110 Cal. 674, 43 Pac. 388; *Newman v. Wolfson*, 69 Ga. 764; *Boyce v. Watson*, 52 Ill. App. 361; *Applegate v. Jacoby*, 39 Ky. (9 Dana), 206; *Goldman v. Goldman*, 51 La. Ann. 761, 25 South. 555; *Holbrook v. Tobey*, 66 Me. 410, 22 Am. Rep. 581; *Augusta Steam Laundry v. Debow*, 98 Me. 496, 57 Atl. 845; *Pierce v. Fuller*, 8 Mass. 223, 5 Am. Dec. 102; *Cushing v. Drew*, 97 Mass. 445; *Jaquith v. Hudson*, 5 Mich. 123; *Robinson v. Centenary etc. Soc.*, 68 N. J. L. 723, 54 Atl. 416; *Breck v. Ringler*, 59 Hun, 623, 13 N. Y. Supp. 501; *Kelso v. Reid*, 145 Pa. St. 606, 27 Am. St. Rep. 716, 23 Atl. 323; *Muse v. Swayne*, 70 Tenn. (2 Lea) 251, 31 Am. Rep. 607; *Tobler v. Austin*, 22 Tex. Civ. App. 99, 53 S. W. 706; *Rucker v. Campbell* (Tex. Civ. App.), 79 S. W. 627; *Barry v. Harris*, 49 Vt. 392. Most of the contracts of this time are entered into, as is well understood, upon the sale of a business.

Such agreements, however, are sometimes construed to provide for a penalty: See *Moore v. Colt*, 127 Pa. St. 289, 14 Am. St. Rep. 845, 18 Atl. 8, 4 L. R. A. 389. And it may be stated as a general rule that if it is practicable to ascertain the actual damages, and if the amount stipulated is exorbitant, the court will construe the amount a penalty, rather than as liquidated damages (*Radloff v. Haase*, 196 Ill. 365, 63 N. E. 729; *Heatwale v. Gorrell*, 35 Kan. 692, 12 Pac. 135; *Disosway v. Edwards*, 134 N. C. 254, 46 S. E. 501), and hence only actual damages can be recovered for a breach of the contract.

Where a certain sum has been agreed upon as damages for the violation of an agreement restraining one of the parties thereto from following his trade or practicing his profession in a specified locality or for a certain time, it is usually considered as liquidated damages and not a penalty: *McCurry v. Gibson*, 108 Ala. 451, 54 Am. St. Rep. 177, 18 South. 806; *Miller v. Elliott*, 1 Ind. 484, 50 Am. Dec. 475; *Mott v. Mott*, 11 Barb. 127; *Liotta v. Abruzzo*, 81 N. Y. Supp. 877, 82 App. Div. 429. Such agreements, however, may be so drawn or entered into as to provide for a penalty: *Smith v. Bergengren*, 153 Mass. 236, 26 N. E. 690, 10 L. R. A. 768; *Wilkinson v. Colley*, 164 Pa. St. 35, 30 Atl. 286, 26 L. R. A. 114. A provision in a contract between a theatrical manager and actors for a penalty of five hundred dollars if they perform in a rival theater is enforced as providing liquidated damages in *Pastor v. Solomon*, 54 N. Y. Supp. 575, 25 Misc. Rep. 322; 55 N. Y. Supp. 956, 26 Misc. Rep. 125.

g. Leases of Property.—A stipulation in a lease for the payment of a fixed sum to the lessor in case of a breach of the conditions of the lease by the lessee will be regarded as an agreement for liquidated damages, and therefore enforceable, if such clearly appears to

be the intention of the parties, and the actual damages are uncertain and not susceptible of being ascertained by any known and satisfactory rule, and the sum stipulated does not appear excessive or unreasonable: *Leary v. Laffin*, 101 Mass. 334; *Longobardi v. Yuliano*, 67 N. Y. Supp. 902, 33 Misc. Rep. 472; *Powell v. Burroughs*, 54 Pa. St. 329. Stipulations for a fixed lump sum as the measure of damages if the property is not surrendered to the lessor by a certain day are within this rule: *Penie v. Weber*, 47 Ill. 41. So are stipulations for the payment of a certain sum for each day the lessee holds over: *Poppers v. Meagher*, 148 Ill. 192, 35 N. E. 805. Where a coal lease provides that the lessee shall not mine less than a specified number of tons each year, and shall pay a royalty on such number whether mined or not, the provision is for liquidated damages, and the lessee, on abandoning the lease before his term expires, is liable for the sum stipulated: *Martin v. Berwind-White Coal Min. Co.*, 114 Fed. 553. The breach of a contract by a sublessee to drill oil wells and develop the property may be the subject of liquidated damages: *Escondido Oil etc. Co. v. Glaser*, 144 Cal. 494, 77 Pac. 1040. See, too, *Gibson v. Oliver*, 158 Pa. St. 277, 27 Atl. 961. And a sum agreed to be paid by a lessee to his sublessee, as liquidated damages, in case the sublessee is ousted by the acts of the lessee before the expiration of the lease, will be construed as liquidated damages, rather than a penalty: *Guerin v. Stacy*, 175 Mass. 595, 56 N. E. 892.

But provisions in leases purporting to liquidate the damages arising from a breach thereof are treated as agreements for liquidated damages only in those cases where from the nature of the transaction the actual damages are insusceptible of accurate measurement, or where the sum stipulated is not out of all proportion to any damages which could possibly rise from a breach. In cases where these general features do not exist, the tendency of the courts is to treat the stipulation not as providing for liquidated damages, but in the nature of a penalty, and hence not enforceable: *Caesar v. Robinson*, 174 N. Y. 492, 67 N. E. 58; *Schreiber v. Cohen*, 77 N. Y. Supp. 1081, 33 Misc. Rep. 546; *Gay Mfg. Co. v. Camp*, 67 Fed. 794, 13 C. C. A. 137. Thus, a clause in a lease to the effect that the lessee shall pay one thousand dollars in case of a breach of his contract is not enforceable when it does not appear that the actual damages would be extremely difficult to fix or impracticable to estimate: *Jack v. Sinsheimer*, 125 Cal. 563, 58 Pac. 130.

h. Conveyances of Real Estate.—In a contract for the sale of real estate the parties may fix a sum as liquidated damages for a breach of the agreement, and their stipulation to this effect will be given effect, if the amount is not unconscionable or disproportionate to the probable actual damages, especially when the actual damages are uncertain and difficult of calculation: *Aikman v. Sanborn* (Cal.), 52 Pac. 729; *Tingley v. Cutter*, 7 Conn. 291; *Pinkney v. Weaver*, 216 Ill. 185, 74 N. E. 714; *Maxwell v. Allen*, 78 Me. 32, 57 Am. Rep. 783, 2 Atl. 386; *Womack v. Coleman*, 89 Minn. 17, 93 N. W. 663; *Wester-*

man v. Means, 12 Pa. St. 97; Streeper v. Williams, 48 Pa. St. 450; Talkin v. Anderson (Tex.), 19 S. W. 852. If, however, the damages are susceptible of accurate computation, a stipulation by which an amount disproportionate or greatly in excess of such legal damages is to be paid or retained, will not be enforced: *Eva v. McMahon*, 77 Cal. 467, 19 Pac. 872; *Lytle v. Scottish American Mtg. Co. (Ga.)*, 50 S. E. 402; *Hahn v. Horstman*, 75 Ky. (12 Bush) 249; *Dennis v. Cummins*, 3 Johns. Cas. 297, 2 Am. Dec. 160; *Monroe v. South (Tex. Civ. App.)*, 64 S. W. 1014; *McIntosh v. Johnson*, 8 Utah, 359, 31 Pac. 450.

If a contract to convey real property provides that in case either party fails to comply with its terms he shall forfeit and pay to the other a stipulated sum, which does not appear exorbitant or unconscionable, and the actual damages are uncertain and doubtful, the provision will be enforced as an agreement to liquidate damages: *Gabblers v. Linder*, 76 Ill. 157; *Burk v. Dunn*, 55 Ill. App. 25; *Morse v. Rathburn*, 42 Mo. 594, 97 Am. Dec. 359; *Dobbs v. Turner (Tex. Civ. App.)*, 70 S. W. 458. Provisions that in case the vendee makes default in his payments, the vendor may rescind the contract and retain the payments already made as liquidated damages, have been enforced: *Keefe v. Fairfield*, 184 Mass. 334, 68 N. E. 342; *Barnes v. Clement*, 8 S. Dak. 421, 66 N. W. 810. Such provisions, however, are not necessarily conclusive upon the court, and their enforcement may be denied; *Drew v. Pedlar*, 87 Cal. 443, 22 Am. St. Rep. 257, 25 Pac. 749; *Easton v. Cressey*, 100 Cal. 75, 34 Pac. 622; *Sherburne v. Hirst*, 121 Fed. 998; *Foley v. McKeegan*, 4 Iowa, 1, 66 Am. Dec. 107. See, too, *Scofield v. Tompkins*, 95 Ill. 190, 35 Am. Rep. 160; *Barnes v. Clement*, 12 S. Dak. 270, 81 N. W. 301.

Where the vendee of land adjoining a town agrees, as part of the consideration, to extend through it certain streets, and executes a bond to the effect that if he does not so extend them he will be bound in the "penal sum of two hundred and fifty dollars, the same to be recovered as liquidated damages," the sum named is recoverable as liquidated damages: *Jaqua v. Headington*, 114 Ind. 309, 16 N. E. 527. The failure of a vendor to discharge on record a mortgage on the property conveyed may be made the subject of an agreement for liquidated damages, since the actual damages are uncertain: *Fasler v. Beard*, 39 Minn. 32, 38 N. W. 755. And a stipulation that in case of a default on the part of a vendor his vendee may have the use of the land for one year may be given effect as a provision for liquidated damages: *Lorins v. Abbott*, 49 Neb. 214, 68 N. W. 486.

1. Sales of Personal Property.—In contracts for the sale of personal property the parties may fix a definite sum as the measure of damages for a breach of the agreement, and it will be regarded and enforced by the courts as liquidated damages, in a case where the actual damages are uncertain and conjectural and the amount stipulated for is not disproportionate to the probable damages: *Fisk v. Fowler*, 10 Cal. 512; *Wolf Creek etc. Coal Co. v. Schultz*, 71 Pa.

St. 180; *Yetter v. Hudson*, 57 Tex. 604; *Pierce v. Jung*, 10 Wis. 30; *Davis v. Alpha Portland Cement Co.*, 134 Fed. 274. But if the damages which result from the breach are not difficult or impracticable of determination, or if the amount agreed upon by the parties is exorbitant, then the agreement will usually be deemed as providing a penalty, and therefore only the actual damages proved can be recorded: *Greenleaf v. Stockton etc. Agr. Works*, 78 Cal. 606, 21 Pac. 369; *Squires v. Elwood*, 33 Neb. 126, 49 N. W. 939; *Spencer v. Tilden*, 5 Cow. 144; *Mansur etc. Imp. Co. v. Willett*, 10 Okla. 383, 61 Pac. 1066; *Shreve v. Brereton*, 51 Pa. St. 175; *Nichols v. Haines*, 98 Fed. 692, 39 C. C. A. 235.

A clause in a contract for the sale of grain bags that the seller shall pay to the buyer three cents for each grain bag which he fails to deliver on demand is held unenforceable in *Pacific Factor Co. v. Adler*, 90 Cal. 110, 25 Am. St. Rep. 102, 27 Pac. 36. And a provision in a contract for the sale of cattle that the seller shall pay the buyer a certain amount per head for any shortage in the number contracted for is held unenforceable in *Home Land etc. Co. v. McNamara*, 111 Fed. 822, 49 C. C. A. 642, the actual damages being susceptible of ready ascertainment. There were statutes in both this and the preceding case which influenced the decision of the court. In *Williams v. Vance*, 9 S. C. 344, 30 Am. Rep. 26, where A agreed to consign and ship to B and C five hundred bales of cotton, to be sold by them as factors on commission, and to pay as liquidated damages two dollars a bale for every bale less than five hundred which he might fail to consign and ship, the two dollars a bale were held liquidated damages. This decision is approved in the somewhat similar case of *Mondamin Meadows Dairy Co. v. Brudi*, 163 Ind. 642, 72 N. E. 643.

A contract for the sale of ties to a railway company which provides that the company shall return ten per cent of the monthly payments as the ties are delivered "as agreed compensation for damages" in case the whole number are not delivered, provides for a penalty rather than for liquidated damages: *Gulf etc. Ry. Co. v. Ward* (Tex. Civ. App.), 34 S. W. 328. To the same effect see *Jeminson v. Gray*, 29 Iowa, 537. If a contract for cutting and delivering logs provides that the party receiving them shall retain fifty cents per thousand feet from the periodical payments until the full performance of the contract by the other party, the amount thus reserved is a penalty or security for the performance of the agreement, and not liquidated damages: *Stony Creek Lumber Co. v. Fields*, 102 Va. 1, 45 S. E. 797. See, too, *Keralake v. McInnis*, 113 Wis. 659, 89 N. W. 895.

A clause in a contract for the sale of personal property, allowing the buyer a certain sum per day as liquidated damages for each day's delay in delivery after a designated date, is enforceable: *American Copper etc. Co. v. Galland-Burke Brewing etc. Co.*, 30 Wash. 178, 70 Pac. 236. So, in a contract for the sale of logs, a clause to the effect that fifteen cents per hundred feet shall be deducted from the

purchase price of such logs as are not delivered by a certain day, is enforceable as liquidated damages, since it would be impracticable to determine the exact damage to each log from exposure in case of a failure to deliver it within the time fixed: *Kilbourne v. Burt etc. Lumber Co.*, 111 Ky. 693, 64 S. W. 631, 55 L. R. A. 275. In a contract for the manufacture and delivery of machinery by a certain date, the parties may liquidate in advance the damages for a breach thereof, by providing that for each day's delay after the date named in completing his contract the seller shall pay a fixed sum: *Hardie-Tynes Foundry etc. Co. v. Glen Allen Oil Mill (Miss.)*, 36 South. 262; *Wheeling etc. Foundry Co. v. Wheeling Steel etc. Co. (W. Va.)*, 51 S. E. 129; *Wood v. Niagara Falls Paper Co.*, 121 Fed. 818, 58 C. A. 256.

AMERICAN SODA FOUNTAIN COMPANY v. FUTRALL.

[73 Ark. 464, 84 S. W. 505.]

TROVER—Conversion of Mortgaged Chattel.—Where the mortgagor of a soda fountain trades it in part payment for a new one to a person having notice of the mortgage, the new fountain is impressed with an equitable lien in favor of the mortgagee to the extent of the value of the old one. (p. 65.)

REPLEVIN—Equitable Lien as Defense.—The defendant in replevin may interpose the defense of an equitable lien on the property, and have the case transferred to equity for a determination of the issue. (p. 66.)

TROVER.—The Measure of Liability for converting a chattel is its value at the time and place of the conversion. (p. 66.)

L. W. Gregg, for the appellant.

E. B. Hall and E. S. McDaniel, for the appellee.

464 HILL, C. J. Futrall loaned Nix three hundred dollars, and Nix gave him his notes, and secured them by a chattel mortgage on a soda fountain and other personal property. The chattel mortgage was filed, and Futrall went to Europe, and during his absence Nix traded the soda fountain to appellant in part payment of a new one. Appellant had actual, as well as constructive, notice of the mortgage on the fountain, and in the face of it took the fountain at a valuation of three hundred dollars, and shipped it to its factory in Boston, Massachusetts, and sent Nix the new fountain. Nix executed notes to appellant for balance of purchase price of the new fountain, in which it was stipulated that the title to it was reserved until the purchase money

was fully paid. Default was made by Nix in payments to Futrall and to appellant. Futrall foreclosed his mortgage, bought in the other personal property, and there was a residue of over two hundred dollars due him from Nix. Futrall took possession of the ⁴⁶⁵ new fountain with the mortgaged chattels, and appellant replevied it from him in a suit brought against him and Nix. Pending this suit, appellant sold the new fountain, and held its proceeds. Futrall answered, in substance, setting forth the foregoing facts, and alleged that he had, by reason of the conversions by appellant of the fountain on which he had a lien, and the substitution of the new one for it, a special ownership in the new one; and that he was damaged to the extent of the residue of his debt, alleging the old fountain to be of sufficient value to pay the remainder of his debt. This defense was met by a demurrer, which was overruled, and the court thereupon transferred the case to chancery, in which forum it was tried.

The evidence conflicted as to the value of the old fountain. Appellant's testimony placed it at twenty-five dollars and appellee's at two hundred dollars and upward.

The court gave judgment for Futrall for two hundred dollars, the value it attached to the old fountain, and appellant brought the case here.

⁴⁶⁶ Three errors are alleged to have been committed, viz.: 1. Overruling the demurrer to defendant's answer; 2. Transferring the case from law to equity; and 3. Finding the value of the old fountain at two hundred dollars.

1. The old fountain was converted to appellant's use in the face of the mortgage resting upon it, and its value to the extent of three hundred dollars, the agreed price thereof, went into the new fountain, the subject of this suit. These facts constituted a trust *ex maleficio*, and impressed the property with an equitable lien to the extent of the value of the old fountain: *Humphreys v. Butler*, 51 Ark. 351, 11 S. W. 479; 2 *Pomeroy's Equity Jurisprudence*, secs. 1051, 1053; 2 *Story's Equity Jurisprudence*, secs. 1255, 1258.

2. When sued at law, a defendant must interpose all the defenses which he has, legal or equitable; and when one is purely of equitable cognizance, that issue must be determined in chancery: *Daniel v. Garner*, 71 Ark. 484, 76 S. W. 1063. That was the case here. The facts did not constitute a special ownership as claimed by Futrall, but did present an equitable lien against the property. Equity enforces these trusts *ex maleficio* against the property acquired with converted prop-

erty or its proceeds, although there may be an action at law for damages: 2 Pomeroy's Equity Jurisprudence, sec. 1053. That an equitable defense may be interposed to a replevin suit is settled: Ames Iron Works v. Rea, 56 Ark. 450, 19 S. W. 1063; Johnson v. St. Louis Butchers' Supply Co., 60 Ark. 387, 30 S. W. 429.

3. There was ample evidence to support the chancellor's finding that the fountain was worth two hundred dollars. The testimony relied upon by appellant to establish its value at twenty-five dollars was given by workmen in appellant's factory in Massachusetts. Conceding their greater knowledge of the value of the fountain and each part of it, yet their testimony is as to its value and condition in Massachusetts. It was converted at Fayetteville, Arkansas, and its value then and there fixes the measure of liability. Finding no error in the decree, it is affirmed.

The Conversion of Mortgaged Chattels by a sale thereof by the mortgagor is discussed in the note to Bolling v. Kirby, 24 Am. St. Rep. 816; and the subsequent cases of Dean v. Cushman, 95 Me. 454, 85 Am. St. Rep. 425; Flood v. Butzbach, 114 Mich. 613, 68 Am. St. Rep. 501.

When Replevin or claim and delivery is sustainable is the subject of a monographic note to Sinnott v. Feiock, 80 Am. St. Rep. 741-767.

HAMMONS v. STATE.

[73 Ark. 495, 84 S. W. 718.]

EVIDENCE.—The Statements of One Accused of crime, made to the sheriff voluntarily and without any inducement, are admissible in evidence. (p. 67.)

EVIDENCE—Letter from Husband to Wife.—Where a man confined in jail writes an incriminatory letter to his wife, which, instead of being delivered to her, and without her connivance, falls into the hands of a third person, it is admissible against him. (pp. 69, 70.)

W. P. Strait, for the appellant.

George W. Murphy, attorney general, for the appellee.

⁴⁹⁶ HILL, C. J. The appellant was indicted for the crime of rape committed on his stepmother, a child of eleven years of age. He was convicted, and sentenced to the death penalty, and obtained an appeal to this court.

The alleged errors will be considered in the order presented.

1. The indictment was sufficient. The form thereof was approved in *Downs v. State*, 60 Ark. 521, 31 S. W. 149, and the demurrer thereto was properly overruled.

2. The evidence amply sustains the verdict. The testimony of the child was direct and positive, and strongly corroborated. The defense attempted to prove that the child had knowledge of sexual intercourse, consented to it, and in fact was the soliciting party. The purpose of this evidence was to overcome the presumption of want of capacity to consent, and to prove an appreciative consent; thereby to reduce the crime to carnal abuse. The evidence of the physician, who examined the child, of her immaturity and injury inflicted by the sexual act, rendered this defense, which was supported alone ⁴⁹⁷ by the defendant's oath, incredible. There was also evidence on the part of the defendant that the child was over twelve. The trial court fully charged the jury as to the law governing if the child was over twelve, and no exceptions are taken to that part of it. The evidence was conclusive, however, that the child was under twelve. That offered by the state, part of that by the defendant, and the record of the marriage of her parents, place this question beyond reasonable doubt. The state's evidence, if true (and it comes here accredited by a jury who heard and saw this child, and who believed her), establishes that this crime was cruelly committed, and by the one person to whom the child had a right to look for protection, not ruin—her mother's husband.

3. The objection to the testimony of the sheriff as to statements made to him by the appellant is not tenable. The statements are not important of themselves, and, even if they were, the uncontradicted testimony of Sheriff White is that they were freely and voluntarily made, and not through any inducements held out by him: *Meyer v. State*, 19 Ark. 156; *Youngblood v. State*, 35 Ark. 35.

4. Instruction No. 1 is correct as far as it goes, and, taken in connection with No. 4 given at the instance of the appellant, covers the law of rape of children between ten and twelve years of age as declared in *Coates v. State*, 50 Ark. 330, 7 S. W. 304.

⁴⁹⁸ 5. The last and only serious question in the case is as to the admissibility of a letter written by appellant to his wife. The history of it is as follows: While in jail, appellant was visited by a negro, and he requested the negro to carry the letter to his wife, and the negro promised to do so. He

took it to the place where Mrs. Hammons lived, and, meeting her father at the gate, gave it to him, asking him to deliver it to Mrs. Hammons. The father says that he told the negro he would not let Mrs. Hammons see it, and in fact she did not, as he carried it to an uncle of the injured child, who introduced it in evidence. There is no evidence connecting Mrs. Hammons in any way with the delivery of the letter to the witness. The letter is highly incriminatory. In it the appellant repeatedly admits his crime, and appeals to his wife and injured child (to whom it is jointly addressed) to save him from the gallows by changing their statements and preventing the physicians from testifying. Was the letter competent evidence, or was it a privileged communication? This exact point, the admissibility of letters passing between husband and wife and offered by a third person, has frequently been before the courts, and the decisions are conflicting. Even those holding to the same view of the question sometimes present different reasons for the ruling. The following decisions are against the competency of the evidence, holding it privileged: *Mercer v. State*, 40 Fla. 216, 74 Am. St. Rep. 135, 24 South. 154; *Wilkerson v. State*, 91 Ga. 729, 44 Am. St. Rep. 63, 17 S. E. 990; *Scott v. Commonwealth*, 94 Ky. 511, 42 Am. St. Rep. 371, 23 S. W. 219; *Selden v. State*, 74 Wis. 271, 17 Am. St. Rep. 144, 42 N. W. 218; *Bowman v. Patrick*, 32 Fed. 368; *Liggett v. Glenn*, 51 Fed. 381, 2 C. C. A. 286. The last case was not between husband and wife, but attorney and client, but the reasoning of it applies to the privilege between husband and wife as fully as between attorney and client.

The following authorities declare the letter admissible and not privileged in hands of the third person: *Buffington v. State*, 20 Kan. 599, 27 Am. Rep. 193; *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89; *State v. Ulrich*, 110 Mo. 350, 19 S. W. 656; *People v. Hayes*, 140 N. Y. 484, 37 Am. St. Rep. 372, 35 N. E. 951, 23 L. R. A. 830; *State v. Mathers*, 64 Vt. 101, 33 Am. St. Rep. 921, 23 Atl. 590, 15 L. R. A. 268; *Lloyd v. Pennie*, 50 Fed. 4; Ohio cases (not accessible in the library) cited in note at page 97 of 23 Am. & Eng. Ency. of Law, 2d ed. In *Mahner v. Linck*, 70 Mo. App. 380, the court of appeals evidently overlooked the fact that the supreme court in *Ulrich's* ⁴⁹⁹ case, *supra*, had cited approvingly the *Buffington* and *Hoyt* cases, and held that generally such letters were not admissible, but said that they would be when accompanied with evidence that they had not been procured by the connivance of the wife, which doctrine would admit the letter

here in question. The writers on evidence hold that the letter as presented in this case is admissible: Wharton on Criminal Evidence, sec. 398; Underhill on Criminal Evidence, sec. 187; 23 Am. & Eng. Ency. of Law, 2d ed., p. 97; note to 1 Greenleaf on Evidence, sec. 254; note to Commonwealth v. Sapp, 29 Am. St. Rep. 415.

Buffington v. State, 20 Kan. 599, 27 Am. Rep. 193, is the leading case on the subject. The doctrine there is that the statute, which is substantially similar to section 2916 of Sandel & Hill's Digest, limits the privilege to the husband or wife testifying for or against the other, but does not provide that other parties obtaining the communications shall not produce them; and that the privilege attached to letters extends only to them while in the possession or control of the husband or wife or their agents or representatives. This accords with the decision in Ward v. State, 70 Ark. 204, 66 S. W. 926. In that case the husband wrote a letter to his wife and delivered it to her while she was visiting him in jail. It was taken from her person forcibly and against her will. It was clearly privileged while in her possession and control, and the unlawful and forcible taking from her could not destroy its privileged character, and this court properly excluded it as a privileged communication. In State v. Hoyt, 47 Conn. 519, 36 Am. Rep. 89, a capital case, the court said: "The question was not whether the husband or wife could have been compelled to produce this evidence, but whether, when the letters fell into the hands of a third person, the sacred shield of privilege went with them. We think not." The authorities are practically agreed that when a conversation between husband and wife is overheard it may be testified to by the third party: 1 Greenleaf on Evidence, sec. 254; Commonwealth v. Griffin, 110 Mass. 181; Fay v. Guynon, 131 Mass. 31; Allison v. Borrow, 3 Colo. (Tenn.) 414, 91 Am. Dec. 291; State v. Center, 35 Vt. 378; Griffin v. Smith, 45 Ind. 366.

It is also held that a conversation is not privileged when made in presence of third persons: Reynolds v. State, 147 Ind. 3, 46 ⁵⁰⁰ N. E. 31; Mainard v. Beider, 2 Ind. App. 115, 28 N. E. 196; Robb's Appeal, 98 Pa. St. 501.

As the tendency of the rule is to prevent a full disclosure of the truth, it must be strictly construed: Satterlee v. Bliss, 36 Cal. 508; Foster v. Hall, 12 Pick. 98, 22 Am. Dec. 400; Gower v. Emery, 18 Me. 82.

The object of the rule is to prevent husband or wife from impairing the sacredness of confidential communications between themselves, and hence they are rendered incompetent

as witnesses to such transactions and letters, and other communications between them are shielded by the privilege of the marital relation, so long as such letters are in the possession or control of either, and their production cannot be compelled when held by husband or wife or their agents or representatives. This is the extreme limit that public policy and the weight of authority extends the privilege. The letter in question was not taken from custody of the wife, neither her person nor privilege was violated by its production, and it was admissible evidence.

There is no error in the judgment, and it is affirmed.

McCULLOCH, J., Dissenting. I do not agree with majority in holding that the letter written by appellant to his wife while in jail was admissible against him. The authorities pro and con are cited in the opinion of the court, and it is unnecessary to repeat them here. There is a sharp conflict in the authorities, and it is difficult to determine where the weight lies either in numbers or learning. Treating them as of equal weight, I am persuaded that those holding to the view that such a letter is not admissible are in accord with reason and a natural sense of justice.

This court held in *Ward v. State*, 70 Ark. 204; 66 S. W. 926, that a letter written by a husband while in jail to his wife and taken from her person could not be used as evidence against him. The facts of that case were different from the facts here only in that the letter in this case was intercepted before it reached the wife, and in the *Ward* case the letter was taken from the wife after it had reached her.

I cannot see, however, that this difference alters the application of the principle or changes the rule. The fact that the letter was forcibly taken from the wife, on the one hand, and ⁵⁰¹ that it was intercepted before it reached the wife on the other hand should not be a controlling distinction. In either case it is a communication made by the husband to the wife and intended for her only, and by the policy of the law is privileged. It is unimportant and immaterial how the letter comes into the possession of the prosecution, so that it is not with the consent of the husband who wrote it, and against whom it is sought to be used. The benefit is one that results to him only, and only he can raise the privilege. It is introduced in the nature of a confession of guilt, and it is an elementary principle that a confession, to be competent, must have been freely and voluntarily made. A confession written under a privilege cannot, in my opinion, be regarded as a free

and voluntary confession, so as to be admissible as an evidence of guilt. It is the policy of the law to encourage, rather than to limit, free communication and sacred confidences between husband and wife, and the exigencies of no case can demand a violation of the privilege with which the law clothes such communications.

For these reasons, I think the learned circuit judge erred in admitting the letter in evidence, and for that error the judgment should be reversed.

I am authorized to say that Mr. Justice Battle concurs in these views.

The Admissibility in Evidence against a husband accused of crime of letters written by him to his wife which have fallen into the hands of third persons is discussed in the note to Commonwealth v. Sapp, 29 Am. St. Rep. 415-418. Their admissibility is denied in Mercer v. State, 40 Fla. 216, 74 Am. St. Rep. 135; Wilkerson v. State, 91 Ga. 729, 44 Am. St. Rep. 63; Scott v. Commonwealth, 94 Ky. 511, 42 Am. St. Rep. 371. But see People v. Hayes, 140 N. Y. 484, 37 Am. St. Rep. 572.

LA FAYETTE v. MERCHANTS' BANK.

[73 Ark. 561, 84 S. W. 700.]

FORGED DRAFT—Recovery of Money Paid.—The drawee of a forged draft who has paid it to a collecting bank, both being ignorant of the forgery, may recover from the bank the amount thus paid as money paid by mistake, when a bill of sale on the back of the draft, also forged, was notice to everyone taking it that the drawee was paying, or would pay, not upon the funds of the drawer in his hands, but out of his own funds, upon the belief that there was a valid bill of sale and a transfer of the property therein described. (p. 74.)

FORGED CHECK—Laches in Recovering Money Paid.—The fact that the drawees of a forged check who pay it to a collecting bank do not notify the bank of the forgery and the mistake in making payment for six months, does not bar them from recovering back the money from the bank, they being ignorant of the forgery and the bank not being prejudiced by the delay. (p. 74.)

APPEAL.—In Testing the Correctness of the ruling of the trial court in directing a verdict for the defendant, the appellate court must take that view of the facts sustained by evidence which is the most favorable to the plaintiff. (p. 74.)

Hill & Brizzolara, for the appellant.

Ira D. Oglesby, for the appellee.

⁵⁰³ **RIDDICK, J.** This is an action to recover money paid under mistake of fact. And the facts, briefly stated, are that one Boudinot Whitlock had an agreement with the plaintiffs,

La Fayette & Brother, by which La Fayette & Brother agreed to pay drafts drawn by Whitlock on them for the purchase price of cattle, provided that a bill of sale signed by the vendor conveying the cattle to La Fayette & Brother should be indorsed on the back of the draft as security for the payment of the draft. To enable Whitlock to have these drafts with bill of sale in proper form, blank drafts with bills of sale printed on the back, with spaces for description of cattle purchased and for signature of the owner, were prepared and given to Whitlock. The intention was that he should buy these cattle in the Indian Territory, where he lived, and where the firm of La Fayette & Brother was in business. He afterward drew drafts in favor of certain parties living in the territory without their knowledge, and then without their knowledge or consent indorsed their names on the back of the drafts, and signed their names to the bills of sale on the back of the drafts, and then delivered the drafts to the Merchants' Bank, of Fort Smith, which paid him full value therefor. The bank indorsed the draft, and sent it to a bank at Muskogee, Indian Territory, which presented it to La Fayette & Brother for payment, and they paid it. Neither the Merchants' Bank nor La Fayette & Brother had any notice of the forgery, and both supposed that it was a legitimate transaction on the part of Whitlock. On the discovery of the fraud, La Fayette & Brother demanded that the bank repay the money, and upon its refusal to do so they brought this action to recover it.

It is a general rule that money paid under a mistake of fact may be recovered. The right of recovery proceeds upon the theory ⁵⁰⁰ that the plaintiff has paid money which he was under no obligation to pay, and which the party to whom it was paid had no right to receive or to retain. The law therefore raises an implied promise on his part to refund it, and an action will lie to recover it. The reasons which permit a recovery are equitable in their nature, and the rule does not apply in any case where it would be unjust or inequitable to compel the return of the money. For instance, if one, in ignorance of the date of the maturity of a note, pays it, and afterward discovers that it is barred by statute of limitations, he cannot recover the money paid, as there was a moral obligation on him to pay his debt, whether barred or not: 15 Am. & Eng. Ency. of Law, 2d ed., pp. 1103-1106, and cases cited.

But no such reason exists in this case. When this draft was presented to the plaintiffs for payment, it had the indorse-

ment of the defendant bank upon it, as well as the indorsement of the name of the payee and his signature to the bill of sale on the back of the draft. The plaintiffs had the right to suppose that the bank had taken proper precaution to ascertain that these signatures were genuine. The presentation of the draft for payment under such circumstances was in effect a representation on the part of the bank either that it had paid or that it would pay to the payee or to his order the amount named in the draft, and that his signature both to the bill of sale and indorsed on the draft was genuine. Under these circumstances the plaintiffs paid over the money to the collecting bank, acting as the agent of the defendant in making the collection, and it seems to us that the equities are in favor of the plaintiffs, and that a recovery should be allowed, unless there is some rule of law that forbids it.

Now, there is an exception to the rule permitting a recovery of money paid under a mistake of fact in the case of a drawee paying a draft or check upon which the name of the drawer had been forged. The reason for the exception is said to be that the drawee should know the signature of the drawer, and that he is guilty of carelessness in paying a check where the drawer's name has been forged, and that, as between him and an innocent holder, no recovery should be allowed. Defendant contends that the exception applies also where the name of the drawer is ⁵⁶⁷ genuine, and where the drawer has himself forged the signature of the payee. There is authority to support that position. The supreme court of the United States so declared the law in an opinion delivered by Chief Justice Taney. The court said that "the acceptor of a bill is presumed to accept upon funds of the drawer in his hands, and he is precluded by his acceptance from averring to the contrary in a suit brought against him by the holder": *Hortsmann v. Henshaw*, 11 How. 177, 13 L. ed. 653; *Bigelow on Bills and Notes*, 568.

But though there are cases that seem to hold to the contrary (*Merchants' Bank v. Bank of Commonwealth*, 139 Mass. 513, 2 N. E. 89; *Northampton Bank v. Smith*, 169 Mass. 281, 61 Am. St. Rep. 283, 47 N. E. 1009), still we may admit that the rule declared by Chief Justice Taney is correct in cases where there is nothing on the draft to give notice that the drawee does not pay out of funds of the drawer in his hands. But that is not the case here. The bill of sale on the back of the draft was notice to everyone taking it that the drawee was paying, or would pay, not upon the funds of the drawer in his

hands, but out of his own funds, upon the belief that there was a valid bill of sale and a transfer of the property described therein. The form of the draft was notice to the bank that the drawee would not pay unless the bill of sale and the signature thereto were genuine, and it should have taken the usual precautions to ascertain that they were genuine before parting with its money. It obtained this money, not by presenting the drafts alone, but by presenting them in connection with these forged bills of sale. The drawee was ignorant of the forgery, and the case, as we think, comes within the general rule that one who has paid money under a mistake of fact may recover it: *Northampton Bank v. Smith*, 169 Mass. 281, 61 Am. St. Rep. 283, 47 N. E. 1009; *Merchants' Bank v. Bank of Commonwealth*, 139 Mass. 513, 2 N. E. 89; *Star Fire Ins. Co. v. New Hampshire Bank*, 60 N. H. 442; *Carpenter v. Northborough Bank*, 123 Mass. 66.

It is true that the drawees did not notify the bank of the mistake and the forgery until five or six months after the money was paid, but the reason of that was that they were themselves ignorant thereof. Having no reason to suspect that a forgery had been committed, they were not guilty of negligence in failing to discover it sooner; and so soon as they discovered ⁵⁶⁸ it, they notified the bank. Nor is it shown that the bank was injured in any way by the delay, so we think that it furnishes under the circumstances no defense to the action.

The circuit court directed a verdict for the defendant. In testing the correctness of that ruling we must take that view of the facts sustained by evidence that is the most favorable to plaintiffs, and when we do that it seems very clear that the court erred in directing a verdict. The judgment is therefore reversed, and the cause remanded for a new trial.

Hill, C. J., not participating.

The Payment of a Check by a bank is usually regarded as a finality: *Manufacturers' Nat. Bank v. Swift*, 70 Md. 515, 14 Am. St. Rep. 381; *National Bank v. Berrall*, 70 N. J. L. 757, 103 Am. St. Rep. 821. As to whether this rule applies in cases of forgery, see *First Nat. Bank v. City Nat. Bank*, 94 Am. St. Rep. 637, and monographic note thereto on the liability of one receiving payment of a check through a forged indorsement. The rights and remedies of the several parties when a forged check has been paid are further discussed in the monographic note to *People's Bank v. Franklin Bank*, 17 Am. St. Rep. 889-899.

CASES
IN THE
SUPREME COURT
OF
COLORADO.

GRUNDEL v. PEOPLE.

[33 Colo. 191, 79 Pac. 1022.]

CRIMINAL LAW—Postponement of Sentence.—In the absence of a permissive statute, the indefinite postponement of sentence upon one convicted of crime deprives the court of jurisdiction to pronounce sentence at a subsequent term, and is, in effect, a discharge of the prisoner. (pp. 75, 76.)

An information was filed against the plaintiffs in error in June, 1900, charging them with gambling. They pleaded guilty at the same term, and sentence was deferred, at their request, until the first day of the August term; and they were released on their own recognizance until that date. At the August term, on their motion and request, further proceedings were stayed, until the district attorney should move for sentence; and their recognizance was continued. No further steps were taken until November 16, 1903, when the district attorney moved for sentence. The defendants objected, but they were nevertheless sentenced. They bring the case here for review on error.

John A. Ewing, Charles Cavender and Francis Bouck, for the plaintiffs in error.

N. C. Miller, attorney general, and L. B. Melville, for the people.

¹⁹² **GARBERT, C. J.** In the absence of a permissive statute, the indefinite postponement of sentence upon one convicted of crime deprives the court of jurisdiction to pronounce sentence at a subsequent term. Such postponement

is, in effect, a discharge of the prisoner, and therefore ousts the court after the expiration of the term of further authority over him: *People v. Allen*, 155 Ill. 61, 39 N. E. 568, 41 L. R. A. 473; *Commonwealth v. Maloney*, 145 Mass. 205, 13 N. E. 482; 25 Ency. of Law, 2d ed., 314; *In re Flint*, 25 Utah, 338, 95 Am. St. Rep. 853, 71 Pac. 531; *Weaver v. People*, 33 Mich. 296; *People v. Barrett*, 202 Ill. 287, 95 Am. St. Rep. 230, 67 N. E. 23, 63 L. R. A. 82; *United States v. Wilson*, 46 Fed. 748.

By the order entered at the August term, no definite time was fixed within which sentence should be pronounced. The defendants were released upon their own recognizance. Whether or not they would ever be called to the bar for sentence was contingent upon the action of the prosecuting officer. Three years and three months elapsed before such action was taken. This delay, unexplained, in connection with the order under which they were released, was equivalent to an indefinite postponement of sentence. There is no statute which permits this practice, and hence, the court was without jurisdiction to pronounce judgment against them.

The judgment of the district court is reversed and the cause remanded, with directions to dismiss the proceedings against the defendants.

The Principal Case is supported by *In re Flint*, 25 Utah, 338, 95 Am. St. Rep. 853. See, too, *People v. Barrett*, 202 Ill. 287, 95 Am. St. Rep. 230; *Miller v. Evans*, 115 Iowa, 101, 91 Am. St. Rep. 143; *People v. Adams*, 176 N. Y. 351, 98 Am. St. Rep. 675.

ANDREWS v. PEOPLE.

[33 Colo. 193, 79 Pac. 1031.]

HOMICIDE—Indictment in Language of Statute.—The allegations provided by statute are sufficient to support a verdict of murder in the first degree. (p. 79.)

HOMICIDE in Commission of Robbery—Indictment.—To sustain a conviction of murder in the first degree based on a homicide committed in an attempt to perpetrate robbery, it is not necessary for the information to allege that the homicide was committed in an attempt to perpetrate robbery. (p. 79.)

ENACTMENT OF STATUTES—Legislative Journals.—In determining whether the constitution has been complied with in the passage of bills, resort may be had to the legislative journals. If it affirmatively appears therefrom, either expressly or by necessary implication, that the constitution has not been observed, the bill

is not valid; but if they are merely silent on this question, it must be presumed that the fundamental law has in all respects been followed. (p. 80.)

ENACTMENT OF STATUTES—Parol Evidence.—The recitals of legislative journals, or the presumptions which attach to their silence, cannot be contradicted by verbal statements. (p. 81.)

ENACTMENT OF STATUTES—Vote by Ayes and Nays.—The constitutional requirement that the vote on the passage of a bill must be taken by ayes and nays does not apply to a motion to reconsider the action taken on the passage of a bill. (p. 81.)

HOMICIDE in Commission of Robbery—Malice.—Under a statute providing that a homicide committed in the perpetration of a felony is murder, which may, if the jury so determine, be punished by death, it is not necessary, when the evidence shows that a homicide has been committed in an attempt to perpetrate robbery which the defendants conspired to commit, to prove any facts from which malice, deliberation, or premeditation may be inferred. (pp. 81, 82.)

HOMICIDE—Conspiracy to Commit Robbery.—If persons conspire to perpetrate a robbery, and in the execution of their plan a homicide is committed, each is responsible for the act of his confederates, although it was not originally intended. (p. 82.)

CRIMINAL LAW—Confessions.—If one accused of crime makes a confession under circumstances rendering it inadmissible, but subsequently makes another free from legal objections which substantially agrees with the original one, the admission of the latter is not error. (p. 84.)

CHANGE OF VENUE—Discretion of Court.—Whether a change of venue shall be granted in a criminal case rests in the sound discretion of the court, and its action will not be disturbed unless it appears that such discretion was abused to the prejudice of the applicant. (p. 84.)

James B. Belford, Willis V. Elliott and J. M. Essington, for the plaintiffs in error.

N. C. Miller, attorney general, H. J. Hersey, H. A. Lindsey and F. W. Sanborn, for the people.

185 GABBERT, C. J. 1. The information charged that the defendants (after stating the date and venue) "did feloniously, willfully and of their malice aforethought, kill and murder one Amanda Youngblood, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the state of Colorado." At the trial it developed from the testimony that the defendants entered the house of the husband of the deceased with intent to commit a robbery, and that the homicide was committed in the attempted perpetration of that crime. Mrs. Youngblood was killed by a shot fired by either Andrews or Arnold. Counsel for the defendants now urge that the information was insufficient under this testimony to justify a conviction of murder in the first degree, for the reason, as they claim, that where two or more are jointly indicted for

the crime of murder which was committed in the perpetration, or attempt to perpetrate, a felony, and the killing ¹⁹⁶ was done by one, but in the absence of proof of a joint purpose to kill, it is necessary for the information to allege or charge that the homicide was committed in the perpetration, or attempt to perpetrate, one of the felonies named in the statute on the subject of murder. In other words, they contend that because the statute provides that the commission of murder in the perpetration, or attempt to commit, the crime of robbery constitutes murder in the first degree, which may be punished by death if the jury so determine, it was necessary to allege that the homicide was committed by the accused in the perpetration or attempt to perpetrate that crime in order to justify a verdict of guilty of murder in the first degree, based upon the fact that the homicide was committed by the defendants in the perpetration, or attempt to perpetrate, robbery. Murder is defined to be "the unlawful killing of a human being with malice aforethought, either express or implied": 1 Mills' Ann. Stats., sec. 1174. The statutes of the state further provide that "all murder . . . which is committed in the perpetration or attempt to perpetrate any . . . robbery, . . . or perpetrated from a deliberate and premeditated design, unlawfully and maliciously to effect the death of any human being other than him who is killed . . . shall be deemed murder of the first degree, and all other kinds of murder shall be deemed murder of the second degree": Laws 1901, 153, sec. 2; 3 Mills' Ann. Stats. Supp., sec. 1176. The degrees of murder mentioned in this section are not substantive or independent offenses. The purpose of these distinctions is to fix the punishment which shall be inflicted according to the circumstances in which the murder was committed. Section 1433 of 1 Mills' Annotated Statutes designates what shall be sufficient to allege in an indictment or information for the crime of murder. Inter ¹⁹⁷ alia, it provides that "in any indictment for murder . . . it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused, but it shall be sufficient in every indictment for murder to charge that the defendant did feloniously, willfully and of his malice aforethought, kill and murder the deceased."

This provision does not contemplate a charge of murder which shall specifically state any degree of that crime. If it did, or if its provisions were insufficient for any reason, then

it would be necessary, in order to state the crime of murder which had not been committed in the perpetration, or attempt to perpetrate, a felony, to allege that the homicide was committed with deliberation and premeditation; and yet this court has repeatedly held that these averments are not necessary in an indictment or information for murder, but that the allegations provided by statute are sufficient to support a verdict of murder in the first degree: *Redus v. People*, 10 Colo. 208, 14 Pac. 323; *Jordan v. People*, 19 Colo. 417, 36 Pac. 218; *Holt v. People*, 23 Colo. 1, 45 Pac. 374.

It designates what shall be sufficient to state in any information or indictment in order to charge the crime of murder, i. e., the unlawful killing of a human being with malice aforethought, as defined by the statute. Under such a charge, the person accused will be convicted or acquitted, according to the proofs, and, if convicted, the circumstances in which the murder was committed, as designated by the statute respecting the degree of the crime, as it is termed, determines the punishment which shall be inflicted. In short, the statute defines murder, and the section upon which counsel for defendants rely does not create or define distinct offenses of that crime, but merely distinguishes between grades of punishment which shall be inflicted upon one convicted of murder ¹⁹⁸ according to the circumstances in which it was committed. Nor does the statute, in prescribing what shall be sufficient to allege in any indictment or information for murder, violate any constitutional rights of the condemned, which guarantees that "in criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation." The charge was the murder of Mrs. Youngblood, and they were thus fully informed of the nature and cause of the accusation against them: *Jordan v. People*, 19 Colo. 417, 36 Pac. 218; *Graves v. State*, 45 N. J. L. 347, 46 Am. Rep. 778; *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 523; *Dwyer v. State*, 12 Tex. App. 535; *People v. Murray*, 10 Cal. 309; *Cathcart v. Commonwealth*, 37 Pa. St. 108; 10 Ency. of Pl. & Pr. 115.

A valuable discussion of these questions will be found in note 12 to *People v. Sullivan*, 63 L. R. A. 353 (393).

An additional authority in support of the conclusion why in an indictment for murder it is not necessary to state more than the statute provides in order to sustain a conviction of murder in the first degree based upon the fact that the homicide was committed in an attempt to perpetrate one

of the designated felonies, is found in the statute itself. It provides that where one indicted for murder pleads guilty, a jury shall be impaneled to determine the degree of the crime, thus clearly demonstrating that on an indictment for murder in the statutory form, the circumstances in which the homicide was committed is a matter of proof and not of pleading.

2. The validity of the capital punishment act is attacked upon the ground that the requirements of the constitution, section 22, article 5, which designates the steps to be taken and the formalities to be observed in the passage of bills, were not complied with. The bill originated in the House, and the ¹⁹⁹ specific objections urged which we shall consider are, that on the passage of the bill by the Senate it was not read the third time; that the amendments made by the Senate were never printed by the Senate; and that the amendments made by the Senate were not printed by the House. No statements upon which these objections can be successfully based appear either expressly or impliedly from the journals of either the Senate or House. The House journal does show that the speaker gave notice of filing a protest against the bill, but upon what ground is not stated. It does not appear that such protest was ever filed, or any action taken thereon.

It appears from the House journal that "it was moved and seconded that amendments were printed on Senate calendar of March 29th for the use of the members. An amendment was offered that the amendments to House Bill No. 71 had not been printed on House calendar, or otherwise, for the use of the members prior to the vote on the bill." No action appears to have been taken on this motion, or the amendment, and the mere record of notice of a protest which it does not appear was ever filed or acted upon, or of a motion to amend, which the journal is silent as to any action upon, and which it does not appear were ever submitted, are insufficient from which to deduce the conclusion that the constitutional requirements with respect to the printing of amendments were not observed.

In determining whether the constitutional requirements with respect to the passage of bills have been complied with, resort can be had to the legislative journals. If it affirmatively appears therefrom, either expressly or by necessary implication, that the provisions of the constitution were not observed, then a bill is not valid. If, however, they are merely silent on this question, it must be presumed that the ²⁰⁰ fundamental law on the subject of the passage of bills

was in all respects followed: *Massachusetts etc. Ins. Co. v. Colorado Loan etc. Co.*, 2 Colo. 1, 36 Pac. 793; *In re Roberts*, 5 Colo. 525; *State v. Francis*, 26 Kan. 724.

Tested by this rule, it is clear that the objections urged against the validity of the bill are not supported by the legislative journals of either branch of the General Assembly. The speaker of the House also testified that the amendments to the bill were not printed for the use of the House. This testimony cannot be considered. The recitals of legislative journals, or the presumptions which attach from their silence, cannot be contradicted by verbal statements: *Koehler v. Hill*, 60 Iowa, 543, 14 N. W. 738, 15 N. W. 609.

The journal of the House discloses that the bill, after having been passed a second time, was reconsidered on a viva voce vote. Counsel for defendants contend that the same solemnity must attend the reconsideration of the passage of a bill that attended its original passage. This contention is not tenable. The constitutional requirement invoked, that the vote on the passage of a bill must be taken by ayes and nays, does not apply to a motion to reconsider action taken on the passage of a bill.

3. The court instructed the jury, so it is claimed by counsel for the defendants, to the effect that malice is a presumption of law, instead of fact. The court also instructed the jury to the effect that if they found from the evidence beyond a reasonable doubt that the defendants entered the house of the husband of the deceased with intent to commit the crime of robbery, and that in the prosecution of that purpose, either of them shot and killed the deceased, then they would all be guilty of murder. On behalf of the defendants, an instruction was requested and refused, the substance of which is, that the jury would not be warranted in returning a verdict of murder in the ²⁰¹ first degree, unless it appeared that the homicide was committed by them deliberately, willfully and with premeditated malice, or that they formed a conspiracy to kill and murder the deceased, and that she was killed by one of them while in the furtherance or pursuit of the conspiracy or common design. Attention is directed to the decisions of this court, wherein it is held that malice is an inference of fact and not of law. In those cases the homicide was not committed in an attempt to commit a felony, and that is the distinguishing feature between them and the one at bar. There is no question from the testimony but that the defendants committed the homi-

cide in an attempt to perpetrate the crime of robbery. That fact is undisputed. The element of malice does not enter into the crime of murder committed in such circumstances. The purpose of the statute was to make every homicide committed in the perpetration or attempt to perpetrate certain felonies murder, which may be punished by death, if the jury so determine, without regard to malice, deliberation or premeditation. When, therefore, the proof was undisputed that the homicide was committed in an attempt to perpetrate a robbery which the defendants had conspired to commit, it was not necessary to prove any facts from which malice, deliberation or premeditation could be inferred. So that, if the court did not properly state the law on the subject of malice, it was error without prejudice, because malice, in the legal acceptance of that term, was not an element of the crime for which the defendants were tried and convicted; nor did the court err in the instruction given, or in refusing the one requested, because the statute makes the taking of human life in an attempt to perpetrate a robbery murder in the first degree, as it is termed, which may be punished by death, without regard to the questions of ²⁰² intent, premeditation, or deliberation: *State v. King*, 24 Utah, 482, 91 Am. St. Rep. 808, 68 Pac. 418; *Commonwealth v. Flanagan*, 7 Watts & S. (Pa.) 415; *State v. Meyers*, 99 Mo. 107, 12 S. W. 516.

The defendant Peters asked an instruction which was refused, and which, his counsel say, was framed upon the theory that to hold one guilty of a crime he must intend to commit it, or must be engaged in some act the probable or necessary consequence of which is the act for which he is arraigned. As already stated, the question of intent was not an element of the crime for which the defendant Peters was being tried. The defendants went to the house of the husband of deceased armed with deadly weapons. Their common purpose in so doing was to commit the crime of robbery, and in the attempt to commit that crime the life of Mrs. Youngblood was taken. The crime which they conspired to commit, and in the prosecution of which the murder was committed was of a character that its accomplishment would probably require the use of that degree of force and violence which would result in the taking of human life. Each, therefore, is responsible for the act of his confederates which was the probable and natural consequence of the execution of the common design, even though it was not originally intended: *Williams v. State*, 81 Ala. 1, 60 Am. Rep.

133, 1 South. 179; 7 Am. Crim. Rep. 443; *Lamb v. People*, 96 Ill. 73; 1 Wharton on Criminal Law, 9th ed., secs. 214-220; *People v. Vasquez*, 49 Cal. 560.

4. After his arrest Arnold made a voluntary confession to the chief of police, which implicated the other defendants. Andrews and Peters were then brought into the presence of Arnold for the purpose of securing from them a statement. It is claimed that at this interview Andrews was intimidated, by violence and threats, into making a confession, or ²⁰³ that when Arnold was repeating his story, he was prevented from making any statement denying what Arnold had said. The confessions made by the respective parties at these interviews were introduced in evidence over the objection of the defendant Andrews. Of course, if Andrews' confession was secured by intimidation or threats, it would be inadmissible, or if he was denied the privilege of making any statement at the time Arnold was detailing the facts in connection with the commission of the crime, the confession and admissions of the latter would not be admissible as against Andrews. We are convinced, from an examination of the record, that the claim on behalf of Andrews that he was intimidated into making a confession, or was compelled to remain silent while Arnold was speaking, is without foundation. It appears that when Andrews was first brought in he denied any knowledge of the crime. Arnold was then interrogated in regard to certain matters which Andrews denied, and the latter interfered and tried to prevent Arnold from making any statements. He was compelled to desist from this course by the use of violence. Later he, himself, purported to state in detail the facts in regard to the commission of the crime. His statements agreed substantially with those made by Arnold; so it appears that the violence used toward him was not for the purpose of compelling a confession upon his part, nor did it prejudice his rights, or place him in a position where he was entitled to have the testimony of Arnold excluded, because he was compelled to remain silent when Arnold was making his statements, because his own subsequent statements agreed in all substantial particulars with those made by Arnold. Independent of these considerations, the record discloses that the admission of the confessions of Arnold and Andrews made in the office of the chief of police could not, in ²⁰⁴ any possible view of the case, have prejudiced Andrews. After these confessions, they were taken to Colorado Springs. On the train Andrews and Arnold talked about the affair. When they were returned two days later

they also discussed the matter on the train. What they stated in these discussions between themselves was introduced at the trial. At the coroner's inquest both testified voluntarily. The statements which they made on the train, as well as those made before the coroner's jury, agree in all material particulars with the statements which they originally made in the office of the chief of police. Where one accused of a crime confesses his guilt under circumstances which would render the confession inadmissible, standing alone, yet where he subsequently makes a confession which agrees in all substantial particulars with the one originally made, the admission of the latter is not error, when it appears that the second was clearly voluntary and beyond any improper influence which may have induced him to make the original: *Whitney v. Commonwealth*, 24 Ky. Law Rep. 2524, 74 S. W. 257.

5. On the part of the defendant Peters, error is assigned on the refusal of the court to grant his application for a change of venue upon the ground of prejudice of the inhabitants of the city and county of Denver. The application was supported only by the affidavit of the defendant. Whether or not a change of venue in a criminal action shall be granted rests in the sound discretion of the court, and its action will not be disturbed unless it appears that such discretion was abused to the prejudice of the applicant. There is nothing in the record from which it appears that the court erred in denying his application. There were no questions of fact in the determination of which the jury might have been unconsciously influenced by the consideration of extraneous matter. On the contrary, the undisputed testimony clearly supports the verdict returned against the defendant Peters, as well as his codefendants, and establishes their guilt as so determined beyond all reasonable doubt.

The judgment of the district court in each case must be affirmed, and it is so ordered.

It is further ordered that the judgments of the district court be executed during the week commencing May 21, 1905.

A Homicide Committed in the perpetration of robbery may amount to murder in the first degree, notwithstanding it was without a deliberate and premeditated design: See the monographic note to *Johnson v. State*, 90 Am. St. Rep. 579, on unintentional homicide in the commission of an unlawful act.

Each Conspirator is Liable for the acts of the others in the prosecution of the common design, which follows incidentally as one of its natural and probable consequences, though intended as a part of the original plan: *Gibson v. State*, 89 Ala. 121, 18 Am. St. Rep. 96.

See, too, *White v. People*, 139 Ill. 143, 32 Am. St. Rep. 196; *Jenkins v. State*, 35 Fla. 737, 48 Am. St. Rep. 267.

Proof of the Enactment of Statutes is discussed at some length in the note to *Carr v. Coke*, 47 Am. St. Rep. 814-823. In *Portland v. Yick*, 44 Or. 439, 102 Am. St. Rep. 633, it is held that to overthrow a city ordinance because irregularly adopted, it must appear affirmatively from the journals of the common council that the mandatory provisions of the charter have been observed; and mere silence of the records does not amount to such a showing: See, in this connection, *State v. Swan*, 7 Wyo. 166, 75 Am. St. Rep. 889.

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[33 Colo. 224, 80 Pac. 133.]

BILL OF EXCEPTIONS—Affidavits to Supplement.—A statute permitting a bill of exceptions to be made by affidavits when the judge refuses or neglects to allow or sign it, does not apply where he settles and authenticates a bill but refuses to insert therein matters relating to his misconduct during the trial which the appellant claims to be error, and therefore such matters cannot be considered by the supreme court on appeal. (p. 87.)

MURDER BY ABORTION—Malice—Indictment.—Malice is not an essential ingredient of murder committed in procuring an abortion, and the information need not charge that the act was done maliciously or without malice. (pp. 87, 88.)

INDICTMENT—Negating Exceptions.—In charging a statutory crime only such exceptions and provisos need be negated as are descriptive of the offense, without regard to their position or location in the statute. (p. 89.)

MURDER BY ABORTION—Indictment—Negating Exceptions.—In charging the crime of murder committed in procuring an abortion, it is not necessary to negative the exceptions stated in the statute as matters of justification. (p. 92.)

MURDER BY ABORTION—Declarations of Deceased.—On a trial for murder committed in procuring an abortion to which the woman voluntarily submitted, her declarations made to her husband a short time after the operation, to the effect that the defendant had operated on her and procured a miscarriage are admissible in evidence. (p. 94.)

CRIMINAL TRIAL—Striking Out Evidence.—If counsel for the defendant in a criminal trial do not object to the introduction of incompetent evidence, and do not move to have it stricken out until the close of the cross-examination of the witness, the error may be cured by the court withdrawing such evidence and instructing the jury to disregard it, notwithstanding the court takes the motion therefor under advisement for a short time, instead of acting immediately after the admission of the testimony. (p. 95.)

CRIMINAL TRIAL—Misconduct of Jury.—The bare statement of counsel for the accused, unsupported by affidavit, that an incorrect newspaper account of the trial had been read by some of the jurors to the prejudice of the defendant, does not require the court

to stop the trial and enter upon an investigation of the charge. (p. 97.)

CRIMINAL TRIAL—Impeachment of Verdict.—A juror will not be permitted to impeach his own verdict by affidavit. (p. 97.)

The defendant was convicted for a violation of the second clause of the following statute:

“Every person who shall, willfully and maliciously, administer, or cause to be administered to, or taken by, any person, any poison or other noxious or destructive substance or liquid, with the intention to cause the death of such person, and being thereof duly convicted, shall be punished by confinement in the penitentiary for a term not less than one year, and not more than ten years; and every person who shall administer, or cause to be administered, or taken, any such poison, substance or liquid, or who shall use, or cause to be used, any instrument of whatsoever kind, with the intention to procure the miscarriage of any woman then being with child, and shall thereof be duly convicted, shall be imprisoned for a term not exceeding three years in the penitentiary and fined in a sum not exceeding one thousand dollars; and if any woman, by reason of such treatment, shall die, the person or persons administering or causing to be administered such poison, substance or liquid, or using or causing to be used any instrument as aforesaid, shall be deemed guilty of murder, and, if convicted, be punished accordingly, unless it appear that such miscarriage was procured or attempted by or under advice of a physician or surgeon with intent to save the life of such woman or to prevent serious and permanent bodily injury to her.”

The information, omitting its formal parts, alleges that the defendant “unlawfully, feloniously and willfully employed a certain instrument in and upon one Pearl Gordon, who was then and there a woman pregnant with child, and did then and there unlawfully, feloniously and willfully introduce said instrument into the womb of the said Pearl Gordon, with intent to produce and procure a miscarriage of the said Gordon, the defendant then and there knowing that the use of said instrument would accomplish the said purpose, and it not being then and there necessary to produce such miscarriage for the preservation of the life of the said Pearl Gordon, by reason whereof the said Pearl Gordon, languishing, etc., died.”

W. B. McNeel, H. E. Robinson and C. W. Bramel, for the plaintiff in error.

N. C. Miller, attorney general, and H. J. Hersey, for the people.

²²⁸ CAMPBELL, J. When the defendant lodged the record here and applied for a supersedeas it was discovered that her bill of exceptions, incorporated in the transcript, was so imperfect and incomplete that, under our rules, some of the errors relied upon could not be considered. Acting upon the court's suggestion, her counsel asked, and was granted, leave to withdraw the record for correction. Upon application below some of the defects were cured, but the trial judge refused to insert in the bill certain recitals relating to the conduct of the trial, to his treatment of defendant's counsel, his manner of ruling on objections made by the latter, and to certain of his remarks calculated to disparage them in the eyes of the jury, and a general course of conduct on his part throughout the trial which evidenced, as defendant says, a strong feeling against her. Failing in the attempt to get into the bill of exceptions the desired statements, defendant seeks now, by affidavits, to supplement the same, and asks us to regard as incorporated therein matters and things which the affidavits say occurred at the trial, but which the presiding judge virtually denies, by refusing, at defendant's request, to insert them.

Where, as here, the judge makes a return with respect to such matters, and settles and authenticates ²²⁹ a bill of exceptions, the statute, permitting a bill to be made by affidavits when the judge refuses or neglects to allow or sign it, does not apply: *Holland v. People*, 30 Colo. 94, 103, 69 Pac. 519.

It follows, therefore, that defendant cannot be heard upon some of the objections, relating to the treatment of her counsel by the judge, and to his alleged unfairness to her, on which she strongly relies, because there is nothing in the only properly authenticated record before us on which they rest. This reference is pertinent at the outset, and will serve to explain the absence from the opinion of discussion of some of the questions argued in defendant's briefs. We proceed now to consider the objections which are grounded on the record.

1. The information is assailed upon various grounds. First, it is contended that "maliciously," in the first, applies to the crime defined in the second clause of the statute, and since "maliciously," or its equivalent, is not in the information, the pleading is fatally defective.

"Maliciously" does apply to the crime defined in the first clause, which consists in the administering of poison with intent to cause death, but is in no sense applicable to the ad-

ministering of poison, etc., or using instruments with intent to produce the miscarriage of a woman pregnant with child, which is the crime defined in the second clause. This has been expressly ruled in *Dougherty v. People*, 1 Colo. 514, 517. The information, therefore, is not defective for the omission of that word.

2. It is further said that, inasmuch as this statute makes the producing of a miscarriage murder if the woman dies, malice is an essential ingredient thereof, though not expressly so declared therein, because, under our general statute relating to murder, ²³⁰ malice is an essential element of every murder, however committed.

The proceeding against defendant was not under the general murder statute, but was based upon this particular statute, which makes the doing of the act therein prohibited, in a certain contingency, murder (which, of course, is murder of the second degree), and it is sufficient to set forth the offense in the language of the statute which was done; and proof that the act prohibited thereby was committed establishes the ingredient of malice, even if that element should be held essential.

3. A more serious objection urged is that, since this statute contains at least two, and probably three, special grounds of justification for the acts generally prohibited, it is necessary thereunder to negative all these exceptions in the indictment or information, which was not done in this case. That these exceptions do not refer to the first clause is manifest, for that clause defines the offense of administering poison, etc., with intent to cause death, and it would be absurd, as well as inconsistent, to say that such offense is to be excused for the reasons contained in the proviso; hence we must assume that the general assembly never intended, by one clause of a section, to nullify another clause of the same section.

It will be observed that the matters of justification are contained in the last sentence of the section, beginning with the word "unless," and this substantive clause is in the nature of a proviso to the effect that if it shall appear that the miscarriage was procured in the circumstances therein specified, there is no crime. The defendant contends, and the attorney general is disposed to concede, that in this proviso or substantive clause there are three distinct justifications for the act prohibited in the antecedent clause: (1) If the act is done by or under the advice ²³¹ of a physician or surgeon, (2) with intent to save the life of the woman, or (3) to prevent serious and permanent bodily injury to her.

The general rule, as usually announced, is that exceptions and provisos in the enacting clause of a statute must be negatived, and such as are not in the enacting clause need not be negatived, the latter being matters of defense: 10 Ency. of Pl. & Pr. 495. The rule, thus stated, is sufficiently precise to cover most of the cases, but we apprehend that the more accurate expression of the doctrine is that only such exceptions and provisos need be negatived as are descriptive of the offense, without reference to the position or location of the same in the statute. In *State v. Miller*, 24 Conn. 527, it was held that it is immaterial whether the proviso or exception be contained in the enacting or subsequent clause, if it only follow a general prohibition; but if there be no general prohibition in the description of the offense, then it is only a limited prohibition, and the prosecutor in the latter case must allege the circumstances necessary to show that the thing prohibited has been done.

Substantially the same doctrine was announced in the leading case of *United States v. Cook*, 17 Wall. 168, 21 L. ed. 538, followed by us in *Packer v. People*, 26 Colo. 306, 57 Pac. 1087, wherein it was said: "Where a statute defining an offense contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception, but if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may ²³² be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference. . . . When the exception or proviso is in a subsequent substantive clause, the case contemplated in the enacting or general clause may be fully stated without negating the exception or proviso, as a *prima facie* case is stated, and it is for the party for whom matter of excuse is furnished by the statute or contract to bring it forward in his defense."

In *State v. Abbey*, 29 Vt. 60, 67 Am. Dec. 754, the same doctrine is thus expressed: "In saying that an exception must be negatived when made in the enacting clause, reference is not made to sections of the statute, as they are divided in the act; nor is it meant that, because the exceptions are contained in the section containing the enactment, it must for that rea-

son be negatived. . . . The question is, whether the exception is so incorporated with, and becomes a part of, the enactment as to constitute a part of the definition or description of the offense. . . . 'It is the nature of the exception and not its location' which determines the question. . . . The same principle should govern this class of cases which governs other classes, and the exceptions should be negatived only where they are descriptive of the offense, or define it; but where they afford matter of excuse merely, they are to be relied upon in defense. The question is one not only of pleading, but of evidence, and where the exceptions must be negatived in the indictment, the allegations must be proved by the prosecution, though the proof may involve a negative."

In *State v. Rupe*, 41 Tex. 33, the indictment was under a statute wherein the exception was in a section other than, and following, that containing the enacting clause, and the objection was that the pleading ²³³ did not negative the fact that the act charged was done by the advice of a physician to save the life of the mother, which was the exception made. The court held it not necessary to negative this exception, since it was a matter of defense on the trial of the accused; citing *Jenkins v. State*, 36 Tex. 638.

Territory v. Burns, 6 Mont. 72, 9 Pac. 432, *State v. Ah Chew*, 16 Nev. 50, 40 Am. Rep. 488, and *Territory v. Scott*, 2 Dak. 212, 6 N. W. 435, contain good discussions of this subject in line with our conclusion.

Possibly the larger number of cases found in the books are to the effect that under statutes providing that the administration of drugs or use of instruments with intent to produce abortion shall be criminal unless advised by a physician as necessary to save the mother's life, the indictment or information should allege that the act committed was not within the exceptions: 1 Cyc. of Law & Pr., 167 et seq., where is found a concise summary of the law of abortion and a collation of the authorities. *State v. Lee*, 69 Conn. 186, 37 Atl. 75, announces the rule that, under a statute similar to the one under consideration, exceptions must be negatived in the indictment or information, and the state must establish the truth of the negative averment, and in the absence of any evidence on the question the presumption that the miscarriage was not necessary to save the life of the mother will be sufficient to convict. This decision has been criticised as illogical, because if the exception must be negatived in the indictment, and proof of the

negative made by the state, in the absence of any evidence at all to show that the act was not necessary, the defendant ought to be acquitted instead of convicted under a presumption of law merely. However that may be, we think that, even under the general rule above announced, the exceptions contained ²³⁴ in our statute are matters of defense, which must be made to appear by the defendant from the evidence, and need not be negatived in the indictment, or the negative proved by the prosecution. The exceptions are clearly in the nature of a proviso. The offense defined or described in the second clause of the section is entirely complete wholly without reference thereto. Indeed, it was so declared by this court in the Dougherty case, *supra*, where it was said by Mr. Justice Belford that, "It is the administering the noxious substance or the use of the instrument with intent to produce miscarriage that makes up the crime." The indictment in that case, based upon the same statute, did not contain a negative of the exception, though no point seems to have been made upon it, and the same observation applies to the Solander case, *infra*, which goes to show the understanding of the profession in this state to be that the exceptions are not a part of the description of the offense.

The statute was passed upon the presumption of law, which in turn rests upon the common experience of mankind, that the ability to bear and bring forth children is the rule, and that the necessity of procuring an abortion or miscarriage in order to save the life of mother or child is the rare exception. The prohibition against the act is general and includes every person, and the exception, which is in a substantive and independent clause at the close of the section, follows not only the complete description of the offense, but the penalty attached thereto. Mr. Bishop, in volume 1 of Bishop's New Criminal Procedure, section 639 et seq., expresses what we consider the doctrine which is clearly applicable to the case before us and in consonance with our conclusion: "The true view plainly is that in the absence of controlling language in the statute, if the matter ²³⁵ thus referred to is such as ought, on the general principles of pleading, to be alleged by the party assuming the burden of the charge, it should be brought into the indictment by proper negative averments; if not, then no allusion to it need be made."

That it was intended that matters constituting the justification for the act done should be made to appear from the evidence, and that it is not necessary to negative them in the in-

formation or indictment, but that they are matters of defense to be shown by the defendant, are apparent from the nature of the exceptions themselves. While it might be, and generally is, within the power of the prosecution to show by circumstantial evidence that the miscarriage was not produced with the intent to save the life of, or prevent serious or permanent injury to, the woman, it would be almost, if not quite, impossible, unless a defendant himself confesses, to show that the abortion had not been procured or attempted under the advice of a physician or surgeon.

The New York authorities go beyond anything that it is necessary to rule here to save this information. Under chapter 181 of the Session Laws of New York of 1872, which prohibits the use or employment of any instrument with intent to produce miscarriage, "unless the same shall have been necessary to preserve her life or that of such child," etc., it has been held that it was not incumbent upon the state to negative the exception in the indictment or to prove the negative at the trial. In the New York statute the exception unquestionably was in the enacting clause itself, and under some of the authorities would, for that reason, be a part of the description of the offense, and yet the New York rule is sustained by the weight of authority which says that, though this exception is in the enacting clause, if it is not, in fact, a part of the description of the offense, the ²³⁶ indictment need not state that the defendant is not within it: *Bradford v. People*, 20 Hun, 309.

The decision in this case was said to be controlled by *Fleming v. People*, 27 N. Y. 329. The same doctrine was announced in *People v. McGonegal*, 62 Hun, 622, 17 N. Y. Supp. 147. This case was affirmed by the court of appeals in 136 N. Y. 62, 32 N. E. 616. The question as to the negating of the exception was not raised in the court of last resort. The doctrine seems to be so well established in New York that no question was there raised concerning it.

If, however, we are in error as to the foregoing, and if the statute requires the pleader to negative all of the exceptions because the description or definition of the offense is incomplete without a reference to them, and that the same are found in the enacting clause itself, and as a part of the description of the offense—still, this information, under some authorities, is a sufficient compliance with the requirements of the statute. In *Commonwealth v. Sholes*, 95 Mass. 554, an abortion case, the pleading there considered alleged that the defendant com-

mitted the act "unlawfully," and it was held that "unlawfully" negatives or precludes any inference or possibility that the act was done by a surgeon for the purpose of saving the life of the woman, or under any other circumstances which would furnish a justification. It was said that any unlawful use of an instrument, with intent to produce miscarriage, is made criminal by the statute. To the same purport is *Commonwealth v. Brown*, 121 Mass. 69.

Other instances, in our own reports, somewhat analogous to the case at bar, wherein the decision was that exceptions in a statute need not be negatived in an information based thereon, are: *Poole v. People*, 24 Colo. 510, 65 Am. St. Rep. 245, 52 Pac. 1025; *Mitchell v. People*, 24 Colo. ²³⁷ 532, 52 Pac. 671; *Peckham v. People*, 32 Colo. 140, 75 Pac. 422; *Langan v. People*, 32 Colo. 414, 76 Pac. 1048.

4. The prosecution called as a witness the husband of deceased who, over defendant's general objection of incompetency, was permitted to testify to a conversation which he had with his wife soon after she returned from a visit to defendant, in which she made declarations to the effect that she had, a short time theretofore on the same day, called at defendant's office and entered into an understanding or agreement with her, whereby, for a consideration of fifty dollars, Dr. Johnson produced the miscarriage, and, to use the exact language of the witness, "told her that it would be impossible for her to bear a child without risking her life, and then and there the defendant [the physician] operated on her and fixed her up all right." Counsel strenuously insisted that there was error in admitting this purely hearsay testimony. In *Solander v. People*, 2 Colo. 48, a prosecution for a similar offense under the same statute, a witness was permitted to testify to declarations made by the deceased which involved the defendant. The court by Hallett, C. J., in an exhaustive opinion, in speaking to this point, after alluding to holdings in New York and Massachusetts that a woman on whom an abortion has been produced is not an accomplice in the commission of the crime, but rather a victim of the act, said: "But it is not necessary that she should appear to be an accomplice in order to make her declarations accompanying acts done in furtherance of the criminal purpose evidence against another, who has joined in the unlawful act. She may be, and usually is, a party to the illegal combination to effect the abortion, and as this is the ground upon which the declarations are admitted, it can make no difference that she

is not criminally liable for the act done. In ²³⁸ some cases, probably, the woman is an unwilling subject, submitting to, but not actively joining in, the unlawful attempt, and in such cases the community of purpose which alone can make the acts and declarations of one admissible as evidence against his associate in crime may be wanting. But where it appears that the woman not only submits to the unlawful attempt, but actively promotes it, by seeking the aid of others, and eagerly adopting the means suggested to accomplish the crime, it cannot be claimed that she is not a party to the criminal design. If the woman is not technically an accomplice she may, nevertheless, conspire with others to produce the abortion, and the conspiracy being shown, her acts and declarations in furtherance of the common design are evidence against others engaged with her in the criminal act: 4 Starkie on Evidence, 403; 3 Greenleaf on Evidence, 94."

And it was further held that, although the statement of the deceased was made after the interview with the prisoner, and in one sense was a history of a past event, it was during the pendency of the criminal enterprise, and closely attendant upon an act done to promote the criminal purpose. It was therefore held admissible under the principles of *res gestae*, and, because these declarations were attendant upon an act done in furtherance of the criminal design and explanatory of it, they were also proper for the consideration of the jury, in connection with the other evidence in the cause, to determine the fact of conspiracy as well as other facts.

The foregoing references to the Solander case would seem to make the evidence of the witness Gordon admissible. But counsel for defendant maintain that the rule there laid down does not govern here because of the material differences between the facts of the two cases in the following particulars: ²³⁹ In the Solander case the witness who was permitted to testify to the declarations was a co-conspirator, and the conspiracy was not denied; while here Gordon was not a co-conspirator, and the conspiracy was denied. Other similar differences as to facts are pointed out in argument.

There is no difference in principle between the facts of the present case and those of the Solander case. That Gordon was not a co-conspirator, and that there was a denial of the conspiracy, did not make incompetent his testimony with respect to declarations made by his wife, who certainly; if her evidence was to be believed, had entered into the unlawful agreement with the defendant. The declarations of deceased

to which her husband testified were made soon after her interview with defendant, and were in themselves acts, and accompanied by other acts, in furtherance of the criminal design, and closely attendant upon the same, and therefore admissible under the doctrine of the Solander case. There was corroborating evidence as to all essential elements of the crime.

5. The county coroner, under whose direction the autopsy was made, was permitted to testify in behalf of the people to a conversation which he had with deceased shortly before her death, in which the latter made statements strongly incriminating defendant, expressly declaring that defendant used an instrument upon her that caused the miscarriage. The testimony certainly was hurtful to defendant if it remained with the jury. That it was clearly inadmissible, being purely hearsay, and no proper foundation having been laid for it as a dying declaration, is conceded by the attorney general. At the time the question was propounded and the answer given, no objection thereto was made by defendant's counsel. At the close of the examination in chief, ²⁴⁰ defendant's counsel cross-examined the witness at some length, and at its conclusion moved the court to exclude all the testimony upon the ground that it was hearsay, and the motion was taken under advisement by the court. Thereafter, and it does not appear at just what stage of the trial or how long after the same was reserved for decision, the court, apparently of its own motion, and before the cause was submitted to the jury, sustained the motion, remarking to the jury that the testimony was rejected; and when the jury were charged, the court specifically instructed them that the entire testimony of the coroner as to the conversation between himself and deceased was inadmissible and stricken out, and must be totally disregarded by them in arriving at their verdict.

Notwithstanding this action of the court, defendant's counsel insist that the mere failure of the court immediately after its admission to strike out the objectionable evidence and withdraw it from the jury, with a caution to disregard it, was prejudicial error; in other words, that the harmful impression was made at the time of the reception of the evidence, and the error was not cured by subsequently withdrawing, and instructing the jury to disregard it.

Unquestionably, there are cases which properly hold that where seasonable objection is made thereto, the fact that the court withdrew objectionable testimony does not cure the error

in admitting it where the court is of opinion that the unfavorable impression still remains with the jury. Had defendant objected to the introduction of this testimony at the proper time, and not waited until after the entire examination of the witness was closed, quite another question would be presented; but where counsel themselves did not see fit to interpose any objection or make a motion to strike until after the testimony ²⁴¹ was in, the mere fact that the court took the motion under advisement for a short time, and thereafter excluded it from the jury, is sufficient, and all that could be reasonably asked of the court, in the circumstances, to cure the error, if error it be, in permitting the testimony to be given.

In *Hopt v. Utah*, 120 U. S. 430, 7 Sup. Ct. Rep. 614, 30 L. ed. 708, where a similar objection was made, it was said that while in exceptional instances such strong impressions may be made upon the minds of the jury by illegal and improper testimony that its subsequent withdrawal will not cure the effect caused by its submission, yet such cases are exceptional, and usually, if evidence was erroneously admitted, its subsequent withdrawal from the case with appropriate accompanying instructions to the jury to disregard it will cure the defect. We think the error, if any, in this case was cured: See, also, 1 Thompson on Trials, sec. 716.

6. At considerable length defendant argues that the evidence was insufficient to sustain the verdict. Without discussing in detail the unsavory record, we dispose of this objection by saying that a most careful examination of the record convinces us that the verdict is not against the evidence. This conclusion, also, disposes of another assignment that the court should have directed a verdict for the defendant when the people closed its case, and also the point made in the motion for a new trial that the verdict was not sustained by the evidence.

7. General objections are made to the instructions of the court. None of these calls for any extended discussion, for a careful examination of the charge as a whole shows that it was fair, and defendant given the benefit of everything she was entitled to receive under the law of the case.

The refusal of the court to instruct the jury as to the law of manslaughter was right. Where the ²⁴² woman dies as the result of the treatment referred to in the statute, the person administering such treatment is declared to be guilty of murder, so that no element of manslaughter was present.

8. While the trial was in progress, and in the presence of the jury, defendant's counsel called the attention of the court to the alleged fact that a newspaper containing a garbled, incorrect and imperfect account of the court proceedings upon the trial had been seen in the presence of, and read by, some one or more of the jury, greatly to the prejudice of defendant. Counsel asked that the court should then institute an inquiry, or permit him to interrogate the jury to ascertain the truth of the statement. The court refused the request, and in language which counsel claims was insulting to him and harmful to his client, characterized the incident as an insult to the court.

The record does not bear out the contention of counsel as to just what occurred, though in the affidavits hereinbefore referred to they are sustained. The court, in the exercise of a wise discretion, might have permitted the investigation to be made; but upon the bare statement of counsel, without any affidavit in its support, it was not incumbent upon the court to stop the trial and enter upon such an investigation. In aid of defendant's motion for a new trial were some affidavits, including that of a juror, tending to show that such newspaper had been in the possession of some one or more members of the jury and read. Contrary affidavits, some by other jurors, were filed tending to show that no such newspaper was in the possession of, or read by, any member of the jury.

It is scarcely necessary to say that a juror will not be permitted to impeach his own verdict by affidavit, and we cannot say that the court was wrong ²⁴³ in deciding the issue of fact against the contention of defendant or that defendant was thereby prejudiced.

The record before us exhibiting no prejudicial error, the judgment is affirmed.

In Alleging a Statutory Offense only such exceptions and provisos need be negatived as are descriptive of the offense: *State v. Bouknight*, 55 S. C. 353, 74 Am. St. Rep. 751. See, in this connection, *State v. Williamson*, 22 Utah, 248, 83 Am. St. Rep. 780; *Poole v. People*, 24 Colo. 510, 65 Am. St. Rep. 245. As to the necessity of negativing exceptions in an indictment for homicide committed in procuring an abortion, see the note to *State v. Moore*, 95 Am. Dec. 785.

Whether a Homicide Committed in procuring an abortion amounts to murder in the absence of an intent to kill, is discussed in the monographic note to *Johnson v. State*, 90 Am. St. Rep. 578.

PEOPLE v. DISTRICT COURT.

[33 Colo. 328, 80 Pac. 888.]

HABEAS CORPUS.—The Constitutionality of a Statute or ordinance cannot be tested on habeas corpus. (p. 100.)

N. C. Miller, attorney general, I. B. Melville, Milton Smith, D. L. Webb and H. R. Hersey, for the relator.

O'Donnell, Toney & Graham and W. B. Crisp, for the respondents.

329 STEELE, J. H. E. Winslow was tried, convicted and fined for the violation of Ordinance 62, Series of 1904, of the city and county of Denver, in the justice's court of B. F. Stapleton, Esq. The defendant, having refused to pay the fine imposed, was committed to the common jail of the city and county of Denver. On September 16th, he applied to the district court of the second judicial district of the state for a writ of habeas corpus. The writ was granted by the Honorable John I. Mullins, one of the judges of said district court, returnable September 20, 1904. On September 20th, the application of the attorney general for a writ of prohibition was presented to this court, and the district court was ordered to proceed no further in the said cause than to determine the question of its jurisdiction. On September 26th, the said judge of the district court ruled that the district court had jurisdiction to hear and determine the petition for writ of habeas corpus and all questions, matters and things raised by the petition, demurrer, and the return thereto, including the constitutionality of the ordinance in question.

In the answer of the respondent it is admitted that in the petition filed before him as the judge of the district court the said H. E. Winslow, as a ground for the issuance of the writ, alleged that the ordinance of the city and county of Denver for the violation of which he was imprisoned was unconstitutional and void. The question for determination is: Has the district court jurisdiction to release on habeas corpus a person imprisoned under a sentence of the justice of the peace, whenever the district court determines ³³⁰ that the statute or ordinance on which the conviction was based is unconstitutional? A great number of cases are cited sustaining the contention of counsel that the district court is empowered to interfere by means of the writ of habeas corpus and investi-

gate the constitutionality of a statute or ordinance on which a judgment which results in the imprisonment of a petitioner is founded. In *Ex parte Neet*, 157 Mo. 527, 80 Am. St. Rep. 638, 57 S. W. 1025, it is said: "The only remaining question is whether habeas corpus is a proper remedy. The rule must now be regarded as settled in this state that if a person is imprisoned for an act which is not in contravention of any existing law, or if the act under which he is held is unconstitutional, habeas corpus is a proper remedy to restore to him his freedom of which he has been improperly and illegally deprived. . . . The underlying reason is that an unconstitutional act is no law at all, and that no court has a right to imprison a citizen who has violated no law of the state, but that such act, even if done by a court under the guise and form of law, is as subversive of the right of the citizen as if it was done by a person not clothed with authority, and hence it is the duty of this court . . . to discharge him by means of a writ of habeas corpus."

We are precluded from accepting these cases as authority for our action, or from making an investigation of the question, because, upon a review of the cases, this court has determined that the court has not the power on an application for habeas corpus to look beyond the judgment to determine the constitutionality of the statute, and that this question must be tested upon appeal or error. In the case of *People v. District Court*, 26 Colo. 380, 58 Pac. 608, the authority of the district court to release on habeas corpus a person convicted of a misdemeanor in the county court was under consideration. The court held that the district ²³¹ court did not have jurisdiction to hear and determine the question presented on the application for habeas corpus, and the peremptory writ of prohibition was granted. After citing many cases holding that the question of the constitutionality of a law must be tested on appeal or writ of error, the writer of the opinion says: "These cases proceed upon the theory that it was within the jurisdiction of the court trying the cause to pass upon the constitutionality of the statute under which the prisoner was being prosecuted, as well as upon other questions involved; and if they held the law to be constitutional, when in fact it was not, it was simply an error, which must be reviewed in the proper way, and could not be availed of collaterally on habeas corpus." And, after citing from cases announcing the contrary doctrine, proceeds: "But we think the cases first above cited lay down the better rule of practice."

In the course of the opinion it is said: "We have found no case which recognized the right of a court, in a proceeding in habeas corpus, to review the decision of another court of co-ordinate jurisdiction, upon the question of its jurisdiction, and set aside and annul its judgment upon the ground that it had erroneously decided as to the constitutionality of the statute under which the conviction was had."

Counsel contend that the case is authority only in so far as it declares that the district court, being a court of co-ordinate jurisdiction with the county court, has not jurisdiction to release on habeas corpus, upon the ground that the statute conferring jurisdiction upon the county court is unconstitutional, one sentenced by the judgment of the county court. It is true that the court calls attention to the fact that no case is cited which authorizes a court of co-ordinate³³² jurisdiction to thus set aside the judgment of another court, but the decision is not based upon the ground that the district and county courts are courts of co-ordinate jurisdiction, but that in habeas corpus proceedings no court or judge can inquire into the legality or justice of a judgment or decree of a court legally constituted, except in the cases mentioned in the statute; and that the question of whether the statute under which the conviction was had is constitutional or void does not bring a case within the exception mentioned. The justice's court of the city and county of Denver has original and exclusive jurisdiction of all causes arising under the charter and ordinances, and it was within its jurisdiction to determine whether the ordinance under which it was proceeding was constitutional or void. If it should wrongfully hold that the ordinance was constitutional, its judgment would be an error which could be reviewed in the manner provided by statute. The petitioner for the writ had another remedy. He could appeal to the county court, where the constitutionality of the ordinance could be passed upon. From an adverse judgment a writ of error would lie from this court, where the question would be finally determined. This is the procedure provided by statute, and it affords ample relief to persons convicted of a violation of the ordinances. The proceedings in habeas corpus are summary in their nature, and it was not contemplated by our law, whatever may be the rule in other jurisdictions, that the constitutionality of a statute should be tested in this manner. The case of *People v. District Court*, 26 Colo. 380, 58 Pac. 608, above referred to, is decisive of this, and the peremptory writ of prohibition will be allowed.

The Principal Case, while it stands opposed to the weight of authority, is supported by the decisions of a number of the state courts: See the monographic note to *Koepke v. Hill*, 87 Am. St. Rep. 174-176; and the recent case of *Ex parte Lewis*, 45 Tex. Cr. Rep. 1, post, p. 000.

CITY OF TELLURIDE v. DAVIS.

[33 Colo. 355, 80 Pac. 1051.]

COTENANCY IN WATER—When Does not Exist.—When two persons act together in appropriating water and in constructing a ditch, under an agreement that each is to have one-half of the water and apply his half to his separate estate and land, they are not tenants in common in the water right, and either may change his place of use or point of diversion, if the change does not damage or infringe the right of the other. (p. 103.)

L. C. Kinikin and Lyman I. Henry, for the appellant.

Hogg & Watson, for the appellee.

³⁵⁶ GODDARD, J. About July 1, 1887, one F. P. Brown, together with appellee, who was plaintiff below, and T. A. Davis, located, surveyed and filed their claim to the waters of Mill creek to the extent and amount of thirteen and twenty-five hundredths cubic feet per second of time, and constructed a ditch through which they conveyed the water so claimed from the point of diversion to the lower end of the Ohio Placer, the property of F. P. Brown, where one-half was turned onto said placer and the remainder onto the Kokomo Placer, the property of the appellee. The water so diverted has ever since been used for beneficial purposes on said placers, Brown claiming one-half, and the appellee Davis one-half thereof, he having become vested with the interest originally held by T. A. Davis.

During the year 1897 an action was commenced in the district court of San Miguel county by F. P. Brown, E. L. Davis and others against the city of ³⁵⁷ Telluride for the purpose of restraining the town from diverting the waters of Mill creek so appropriated as aforesaid, in which action a decree was entered in January, 1898, for the relief asked. In this decree the ditch above mentioned was designated as the Big Ditch, and was awarded priority number three for the use of F. P. Brown for irrigation purposes, fifty-one statute inches, and for the use of E. L. Davis, for like purposes, fifty-one statute inches. On the thirteenth day of April, A. D. 1901,

Brown conveyed to appellant, among other rights, the fifty-one inches of the waters of Mill creek awarded him in priority number three. It is alleged that by virtue of such conveyance the appellant claims the right, and threatens, to divert the fifty-one inches of water aforesaid at a point above the point where the same is diverted by said ditch, and that if permitted so to do, the plaintiff will be greatly damaged in his estate for the reason that he will be unable to secure sufficient water to irrigate his land.

The court below held that the appropriation made by Brown and Davis was a joint appropriation, and was owned and held by them as tenants in common, and that neither could, without the consent of the other, divide the water at any other point than where they have heretofore divided it, nor divert or take his water through a different headgate, and that his grantee, having acquired no greater rights than Brown had, could not do so, and entered a decree enjoining the appellant from diverting any portion of the water allotted to priority number three in any manner except as the interest derived by appellant has heretofore been diverted and used by its grantor Brown.

We think the court below erred in holding that the appropriation made by Brown and Davis invested them with a joint ownership of the water appropriated. ³³⁸ While it is true that they acted together in making the appropriation and in constructing the ditch, it was their understanding that each was to be entitled to one-half of the water so appropriated, and such share was to be applied on the separate estate and land of each; and while there is a unity of possession in the water while it was being carried through the ditch, yet, when it reached the Ohio Placer, the property of Mr. Brown, such unity of possession ceased, and one-half of the water was diverted to his individual use, while the remaining one-half was continued on till it reached the Kokomo Placer, the separate and individual property of appellee. The water was not used, or to be used, upon any land jointly owned by them, but, as stated above, was to be used upon each one's separate and individual land.

In these circumstances the right to a unity of possession necessary to constitute a tenancy in common did not extend to the right of user, which is essential to the existence of such a tenancy in a water right: *Norman v. Corbley* (Mont.), 79 Pac. 1059.

We think this conclusion is clearly sustained by the allegations of the complaint and the evidence introduced. After

stating the location of the water right, plaintiff avers: "That said Brown, by virtue of said location, was entitled to an undivided one-half of the waters so claimed, and this plaintiff with his co-claimant was, and is, entitled to the remaining one-half thereof."

The appellee, on his redirect examination, was asked the following question: "You may state as to the amount of water that you understood you were to use through this ditch, or out of this creek by means of this ditch, and how much Mr. Brown was to use? A. Mr. Brown was to have one-half and I was to have one-half."

Mr. Brown testified as follows: "Q. Was anything ever done for the ³⁵⁰ division of the water carried through that ditch between you people? A. During the time I think Mr. Adams was on the place the question would be raised who was getting the most water, whether I was getting my share and they theirs. I had been irrigating and they also; and I put in a box down at the lower end of the Ohio Placer, I called it a dividing box, one-half of it was run through on the Kokomo and the other on the Ohio Placer." And again: "Q. You answered Mr. Hogg a few minutes ago that for some years this water was allowed to run without a division box; what years were those? Who was in possession of the Kokomo Placer during such time? A. What I mean by not a division, we would put anything, a stone or anything, in the box to divert a portion of it; we were supposed to each get half of it and the parties that were on the place would take more than half, they would take it all a great many times, and I put this box in to let it run equal. Q. Then if this ditch, as your memory has now been refreshed, was begun and constructed in 1887, it was in 1888, then, that Frank Adams went upon the Kokomo Placer, was it? A. Well, that is my recollection. Q. Did Mr. Davis, or anyone for him, ever protest against you dividing that water in that manner as you have stated by the division box, one-half to each? A. No, sir."

Without noticing the evidence further in detail, we think that when considered in the light of the conduct of the parties, together with the fact of the intended and actual application of the water, the right thereto was not a joint, but a separate and several, right in each of the parties to a one-half of the water appropriated. In this view of the case there can be no question of the right of either to change his place of use of the water or the point of its diversion, if such

change does not damage or infringe the ³⁶⁰ right of the other, nor of the right of his grantee to avail itself of the same privilege. There is no evidence that tends to show wherein the contemplated change of the point of diversion by appellant would in any way damage the appellee.

In the absence of such showing, the appellee is not entitled to the relief awarded. The decree is therefore reversed and the cause remanded.

Chief Justice Gabbert and Mr. Justice Bailey concur.

Where Several Persons Join in making an appropriation of water, they are said to be usually regarded as tenants in common of the water right: See *Wiel on Water Rights in the Western States*, sec. 49. But, to quote from *Norman v. Corbley*, 32 Mont. 195, 79 Pac. 1059: "To constitute a tenancy in common, there must be a right to the unity of possession, and if this right is destroyed the tenancy no longer exists. With respect to a water right this unity must extend to the right of user, for the parties can have no title in the water itself."

NORTHERN INVESTMENT COMPANY v. FREY REAL ESTATE AND INVESTMENT COMPANY.

[33 Colo. 480, 81 Pac. 300.]

SUBROGATION to Rights of State on Payment of Taxes.—The purchaser at a mortgage foreclosure sale is entitled to be subrogated to the rights of the state when he has redeemed the land from tax sales. (p. 107.)

A. B. Seaman and H. S. Silverstein, for the appellant.

James W. McCreery and John T. Jacobs, for the appellees.

⁴⁸⁰ **STEELE, J.** The Frey Real Estate and Investment Company, to secure an indebtedness to the National Bank of Commerce, in Denver, executed its deed of trust March 3, 1897. Default having been made, the public trustee of the county of Weld foreclosed the deed of trust on September 24, 1898, and issued his certificate of purchase to the Northern Investment Company. During the month of May, 1899, the purchaser at the foreclosure sale paid certain taxes on the land for the year 1897, and redeemed the land from the tax sales for the years 1894, 1895 and 1896, the total amount paid being two hundred and forty-nine dollars and thirty-eight cents. On the 16th of May, 1899, the Northern Investment Company filed its complaint in the district court of

Arapahoe county, making the appellees here defendants, and the cause ⁴⁸¹ was transferred, on change of venue, to the county of Weld. Among the defendants in the suit was a judgment creditor of the Frey Real Estate and Investment Company, and the suit was brought by the plaintiff for the purpose of having the lands bought by it at foreclosure sale subjected to the lien of the taxes for the years 1894, 1895, 1896 and 1897. A demurrer to the complaint was sustained, and the plaintiff took an appeal to the court of appeals. We have but one question to determine; that is, whether a purchaser at a mortgage foreclosure sale is entitled to be subrogated to the rights of the state when he has redeemed the land purchased by him from tax sales. It does not appear in the record whether the land was redeemed by the judgment creditor or not. It is stated by counsel that the judgment creditor did redeem the land from the foreclosure sale, and we shall assume that the case is here because the land was so redeemed. The defendants insist that as the deed of trust was in the ordinary form, that the beneficiary should have paid the taxes before sale, and that the property, having been sold before redemption, the persons who redeemed it are mere volunteers and cannot recover the amount paid from the purchaser at the foreclosure sale, nor are they entitled to a lien upon the premises. But we are of opinion that the plaintiff was entitled to be subrogated to the rights of the state, and that the demurrer should have been overruled. Sheldon, in his work on Subrogation, defines subrogation as "that change by which another person has been put in the place of a creditor, and which makes the right of the creditor, and any security that he holds, pass to the person who, by his being subrogated to him, enters into his right": Sheldon on Subrogation, p. 9.

And it is said of subrogation that, "It is not dependent upon contract, agreement or stipulation, ⁴⁸² or upon privity or strict suretyship; but is a mode which equity adopts to compel the ultimate payment of a debt, by one who in justice, equity and good conscience ought to pay it": Harris on Law of Subrogation, p. 2.

As between two creditors of the Frey Investment Company, one holding the mortgage and the other a judgment, each, desiring to secure the debt, could have paid the taxes on the premises and have compelled payment from the other creditor. While the period of redemption was running, the purchaser at foreclosure sale had a lien merely upon the premises; that is, he had a lien that had ripened into a certificate

of purchase; but the owner had six months, and creditors three months, thereafter in which to redeem, so that he would have been divested of any title conveyed to him by the certificate of purchase by the issuance of a tax deed. It is shown by the complaint that the purchaser of the tax certificate for the taxes of 1894 would have been entitled to a deed at any time; so that, in order to protect his title to the property and his lien thereon, it became necessary for him to get rid of the outstanding tax certificates. He bought the property subject to the taxes, but he had a right to protect his security by paying off the superior lien evidenced by the tax certificate; and when the judgment creditor desired to redeem, as the statute does not give to the holder of certificates of redemption, other than a mortgagee or beneficiary, the right to add the amount of taxes to the debt, it follows that the purchaser at foreclosure sale is entitled to a lien, if at all, by virtue of the doctrine of subrogation. It is universally held that one who has a lien upon property may, in order to protect his security, pay off superior liens, and that he becomes, by such payment, subrogated to the rights of the creditor holding the superior lien. As this ⁴⁸³ purchaser had a lien upon the property for the period of nine months, which, at the expiration of that time, would ripen into a perfect title, if he so desired it, and as the holders of the tax certificates had a superior lien, such purchaser had the right to pay the amount necessary to redeem the land from tax sale, and in doing so should become subrogated to the rights of the state and municipal authorities.

In the case of *Pratt v. Pratt*, reported in 96 Ill. 184, it is held: "A holder of a lien upon land has a right to purchase a certificate of sale of the land for taxes, where the time of redemption has expired, paying a reasonable sum therefor, or to redeem from the tax sale if the time of redemption has not expired, and to have the money so paid refunded. The taxes being a paramount lien to all others, a lienholder who discharges the same is entitled to be subrogated to the rights of the state, and the amount paid to extinguish such paramount lien or encumbrance will constitute a first lien on the land."

In the case of *Swayne v. Stockton Savings etc. Assn.*, 78 Cal. 600, 12 Am. St. Rep. 118, 21 Pac. 365, it is held: "That a purchaser of land at an execution sale, before the time of redemption has passed, and before the sheriff's deed has issued, has a lien upon the land, . . . and when necessary for the protection of his interest, is entitled to be subrogated to a

superior lien held under a prior deed of trust in the nature of a mortgage, which had been executed by the judgment debtor on the same land."

In Cooley on Taxation, page 814, it is said: "As between the first mortgagee and the second, it is the duty of each to pay taxes; and if the second pays the taxes, he is entitled to reimbursement when his rights are cut off by foreclosure."

These authorities, it seems to us, sustain the contention of the appellant that he is entitled to be ⁴⁸⁴ subrogated to the rights of the state, and that the amount paid by him to redeem the land from tax sale should be and constitute a first lien upon the premises in controversy.

For the reasons given, the judgment is reversed.

The Chief Justice and Mr. Justice Campbell concur.

For Authorities Supporting the Principal Case, see the monographic note to American Bonding Co. v. National etc. Bank, 99 Am. St. Rep. 498, on the right to subrogation.

PATRICK v. MORROW.

[33 Colo. 509, 81 Pac. 242.]

MARRIED WOMAN—Capacity to Contract with Attorney.—A married woman has legal capacity to make a contract with an attorney to procure a divorce, by which she gives him her promissory note for the amount of his fee, and agrees to secure it by a deed of trust on certain land if the title thereto is vested in her by the decree of divorce. (p. 108.)

MARRIED WOMAN—Equitable Lien on Land.—If a married woman employs an attorney to procure a divorce, gives him her promissory note to cover his compensation, and agrees to secure the note by a deed of trust on certain land if the title thereto is vested in her by the decree of divorce, an equitable lien or mortgage attaches to the property the moment the decree is rendered, which is not affected by her claim of homestead. (p. 109.)

C. S. Essex, for the plaintiffs in error.

⁵¹⁰ **MAXWELL, J.** Under a stipulation, this cause was submitted to the trial judge upon an agreed statement of facts, from which the facts pertinent to a determination of this appeal are:

Plaintiffs, who were copartners in the practice of law, were employed by defendant to prosecute an action against her husband for divorce and alimony, and to procure, if possible, a decree vesting in her the title to certain lots in the city of

Pueblo; the agreed compensation which plaintiffs were to receive for their services was one hundred and fifty dollars, for which amount defendant gave to them her promissory note, secured by a chattel mortgage upon certain livestock; at the date the note and chattel mortgage were given a written instrument was executed between the parties, in and by which defendant, in substance, agreed that, in the event that title to the lots should be vested in her by the decree in the divorce proceedings, that in lieu of the chattel mortgage above noted, she would give the plaintiffs a deed of trust upon the lots as security for the payment of the note given for professional services.

A suit in the district court of Pueblo county, conducted by plaintiffs in error, resulted—July 29, 1895—in a decree of divorce, and vested in the defendant herein the title to the property above described; the ⁵¹¹ defendant failed to pay such promissory note except the sum of twenty-seven dollars; the security of the chattel mortgage proved to be worthless; defendant is insolvent; the decree in the divorce proceedings was filed in the office of the clerk and recorder, February 19, 1897, and March 24, 1897, defendant caused to be entered on the margin of the record of such decree the word “homestead”; the value of the property involved does not exceed the sum of two thousand dollars.

Prayer was for judgment for the amount of the note and interest, and that such judgment be decreed to be a lien upon the real estate described in the decree, relating back to the date of the decree.

The court found that the defendant was indebted to the plaintiffs in the sum of one hundred and seventy-two dollars and fifty cents, and rendered judgment against her for that amount, and further found that plaintiffs were not entitled to the lien prayed for in their complaint.

The contract above set forth was executed contemporaneously with the contract of employment, was a part thereof, related to the same subject matter, and is supported by a sufficient consideration, to wit, the services to be rendered by plaintiffs in error, which services, having been fully performed, renders it enforceable.

The legal capacity of defendant in error to enter into the contract cannot be successfully questioned: *Rose v. Otis*, 18 Colo. 59, 31 Pac. 493, and cases cited.

The contract under consideration constituted an equitable mortgage or lien upon the property therein described, and al-

though the title to the property was not in the defendant in error at the date of the contract, the lien of such equitable mortgage attached when the title became vested in her by the decree of the court in the divorce proceedings.

In discussing this subject, in *Mitchell v. Winslow*, 2 Story, 638, 644, Fed. Cas. No. 9673, Mr. Justice Story says: ⁵¹² "It seems to me a clear result of all the authorities that whenever the parties, by their contract, intended to create a positive lien or charge, either upon real or personal property, whether then owned by the assignor or contractor, or not, or, if personal property, whether it is then in esse or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires the title thereto against the latter and all persons asserting title thereto."

And in *Jones on Liens*, section 42, it is said: "Whenever a positive lien or charge is intended to be created upon real or personal property, not in existence or not owned by the person who grants the lien, the contract attaches in equity as a lien or charge upon the particular property as soon as he acquires title and possession of the same."

The entry of the word "homestead" on the margin of the record of the divorce decree in the clerk and recorder's office, some twenty months after the rendition of the decree, did not in any manner affect the equity of the lien or mortgage of plaintiffs in error.

Section 2137 of Mill's Annotated Statutes provides: "Nothing in this act (homestead) shall be construed to prevent the owner and occupier of any homestead from voluntarily mortgaging the same."

Our conclusions are that defendant in error was legally capacitated to enter into the contract; that it was based upon a sufficient consideration; that it constituted an equitable mortgage or lien upon the property therein described, which attached the moment the decree was rendered, and that such mortgage or lien was not affected by the homestead claim.

The judgment will be reversed, with directions to the court below to enter a judgment according to this opinion.

The Chief Justice and Mr. Justice Gunter concurring.

Equitable Mortgages are considered in the monographic note to *Hutzler v. Phillips*, 4 Am. St. Rep. 696-708. An equitable mortgage arises whenever a writing shows a clear agreement to make some particular property security for the debt or obligation therein mentioned: *Dulaney v. Willis*, 95 Va. 606, 64 Am. St. Rep. 815. See, also, *Higgins v. Manson*, 126 Cal. 467, 77 Am. St. Rep. 192; *Wood v. Holly Mfg. Co.*, 100 Ala. 326, 46 Am. St. Rep. 56.

CASES
IN THE
SUPREME COURT
OF
IDAHO.

WILSON v. EAGLESON.

[9 Idaho, 17, 71 Pac. 613.]

UNDERTAKING FOR INJUNCTION—Want of Justification.—An undertaking, regular in form, is not invalid because the sureties did not justify that they were householders or freeholders of the county and state. The justification is no part of the undertaking. (p. 110.)

INJUNCTION—Injury to Growing Crops.—If a complaint praying an injunction alleges great and irreparable injury to growing crops, and that the damages cannot be justly estimated, the court has power to order an injunction to restrain the acts complained of. (p. 117.)

Martin & MacElroy, for the appellants.

Richards & Haga, for the respondents.

20 STOCKSLAGER, J. This action is here on appeal from an order granting a preliminary injunction made by the district judge of Ada county on the twenty-third day of July, 1902. The complaint alleges that plaintiffs, with defendants, are the owners of what is known as the "Peninger lateral"—a ditch diverting water from what is known as the "New York canal"; that the same is a community ditch, etc. The second allegation sets out the course, lands through which it passes, etc. The third is that each of the plaintiffs are owners of tracts of land in Ada county under and tributary to said lateral. Fourth. That their lands are desert in character, and require the application of water to reclaim, produce crops, etc. Fifth. That said lateral is the only convenient means by which water can be carried from said lateral to their lands. Sixth. That plaintiffs have respectively placed under cultivation a large part of their lands, and that the same are now in a high state of cultivation, and

are in need of water, etc. Seventh. That defendants have wrongfully, and without consent of plaintiffs, or any of them, at a point above the lands of plaintiffs, and in the vicinity of the point where the lateral diverts water from said canal, placed in said lateral check-gates which prevent the water belonging to plaintiffs from flowing through said lateral to said tracts of ²¹ land of plaintiffs. Eighth. That defendants have been frequently urged and requested to remove such obstruction, but declined so to do, and threatened to continue and will continue to maintain said obstruction of said lateral, unless required to remove the same by order of the court. Ninth. That if defendants maintain said check-gate in said lateral, the crops of plaintiff will be wholly destroyed, the labor and expense incurred in putting said lands under cultivation totally lost, and plaintiffs irreparably injured, etc. Tenth. That a large part of said crops are of recent planting, and require frequent irrigation to preserve the same until well started; that said crops have been deprived of the necessary water, for the reasons above stated, for some time; that should plaintiffs wait to give notice of this application for the injunction prayed for, such crops would be largely, if not wholly, destroyed, by reason of lack of moisture, etc. Then follows prayer for temporary injunction.

This complaint was filed June 27, 1902, and on the same day the judge made the following order and injunction:

"ORDER.

"The plaintiffs in the above-entitled cause having commenced an action in the above-entitled court against the above-named defendants, and having prayed for an injunction against the said defendants, requiring them to refrain from certain acts in the complaint filed herein, and hereinafter more particularly mentioned, on reading the said complaint in the said action, duly verified by the oath of H. G. Wilson, one of the plaintiffs in the said action, and it satisfactorily appearing to me therefrom that it is a proper case for an injunction, and that sufficient grounds exist therefor, it is hereby ordered by me, judge of said court, that upon filing by said plaintiffs of an undertaking in the sum of two hundred and fifty dollars, duly conditioned as required by law, with the clerk of said court, there issue out of said court, under the seal thereof, a writ of injunction restraining said defendants, and each of them, their agents, servants, attorneys, lessees, and employés, and all others acting in aid or

assistance of each or every of them, from in any manner maintaining ²² the alleged obstruction in the lateral described in said complaint, in any manner that will prevent said plaintiffs, and each of them, from procuring through said lateral the water to which the said plaintiffs, and each of them, are entitled, until the further order in the premises, and that they appear before me at 10 A. M. July 1, 1902, and show cause, if any there be, why said injunction shall not be made perpetual.

“INJUNCTION.

“To the Above-named Defendants, Greeting:

“The above-named plaintiffs having filed their complaint in our court against the above-named defendants, praying for an injunction against said defendants, requiring them to refrain from certain acts in said complaint, and hereinafter more particularly mentioned, on reading the said complaint in this action, and it satisfactorily appearing to the judge of said court therefrom that it is a proper case for an injunction, and that sufficient grounds exist therefor, and the necessary and proper undertaking having been given: We, therefore, in consideration thereof and of the particular matters in the said complaint set forth do strictly command that you, the said A. H. Eagleson, John W. Eagleson, and Ern G. Eagleson, until the further order of said court, and your, and each of your, attorneys and agents, servants, lessees, and employés, and all others acting in aid or assistance of you, or either of you, do absolutely desist and refrain from maintaining any obstruction in that certain ditch or lateral known as the ‘Peninger lateral,’ and taking water from the New York canal at a point in the northeast quarter of the southeast quarter of section 20, township 3 north, range 2 east, Ada county, Idaho, and extending thence in a northwesterly direction through the southwest quarter of the northeast quarter and the southeast quarter and southwest quarter of the northwest quarter of said section 20; thence through the northeast quarter of the northeast quarter of section 19 in said township; thence in a westerly direction along the northern boundary of said section 19; also along the northern boundary of section 24 in township 3 north, range 1 east; thence in a northwesterly direction through sections 14, 15, ²³ 16 and 17 in township 3 north, range 1 east,—in any manner that will prevent the said plaintiffs, and each of them, from procuring through said lateral the water to which the said plaintiffs, and each of them, are entitled to, in the reclamation and cultivation of the lands of the said plaintiffs lying

under and tributary to said lateral, and from in any manner interfering with the water of the said plaintiffs flowing through said lateral; and you may appear before the judge of said court at the courthouse at Boise City, Idaho, at 10 o'clock A. M. Tuesday, July 1, 1902, and show cause, if any there be, why this injunction should not be made perpetual.

"Witness: Hon. Geo. H. Stewart, judge of the said judicial district court, at the courthouse in the county of Ada and the seal of the said court, this twenty-seventh day of June, 1902.

"[Seal.]"

On July 9th defendants filed their verified answer, denying that plaintiffs, or either of them, are the owners of any interest, estate, or title in the Peninger lateral at any point from the headgate of said lateral to and across the north half section 20, township 3 north, range 2 east, in Ada county, or any right to use said lateral for carrying water, except as hereinafter expressly admitted. Aver that at all times herein mentioned defendant A. H. Eagleson has been, and still is, the owner and in possession of the north half of section 20, township 3 north, range 2 east, and that the check-gates mentioned in the complaint herein are situated on the southeast quarter of northeast quarter of said section 20, and that said check-gates as well as the part of said lateral whereon the same are situated, is wholly situated upon the land of defendant; that said defendant, together with the New York Canal Company, Limited, owner of said New York canal, and plaintiff George Peninger, constructed said Peninger lateral from said headgates to said check-gates in the winter of 1900-1901, and completed the same in the spring of the year 1901, at which time, and as a part of the original construction thereof, defendants constructed the check-gate complained of herein; that at the time said lateral was constructed there was an understanding between defendant ²⁴ A. H. Eagleson and said water company that an arrangement would be made whereby said water company should, by deed, acquire the right of way for the water carried by them through said lateral; that thereafter such intention was abandoned, and said defendants and neither of them have never conveyed any right of way or interest in said lateral to the plaintiffs herein, or either of them. Admit that plaintiffs George Peninger and Marion Elliott have carried small quantities of water through said lateral for the purposes of irrigation, but defendants allege that the same has been done under an oral

license only, and not under a claim of right adverse or superior to the ownership by said defendants of said lateral and said check-gates, etc. Deny the other allegations of the complaint. Aver that two hundred inches of said water is diverted from said Peninger lateral upon the land of defendants through the lower two of the said sublaterals by means of the check-gate complained of, and then set up the design and manner in which said check-gate is operated. Another averment is that defendants have one hundred and twenty-five acres of their lands cultivated to grass, which is wholly dependent upon the water through these laterals for irrigation.

After this answer was filed, a motion to quash the temporary injunction was interposed, and on the twenty-third day of July, 1902, the district judge made the following order:

"On reading and filing the affidavits, and after hearing, Richards & Haga appearing for complainants, and Martin & McElroy appearing for defendants, it is now, on motion of Richards & Haga, attorneys for plaintiffs, ordered that a preliminary injunction issue against the said defendants, and each of them, their agents, servants, lessees, attorneys, or employes and each of them, from maintaining the check-gate mentioned in the complaint at a greater elevation than fourteen inches from the floor of such check-gate, as now situated, and not less than sixty inches in width between the interior of the side walls of said check-gate.

"GEO. H. STEWART,
"Judge."

²⁵ It is from this order the appeal is taken. The writ of injunction was issued on presentation of the complaint, and required the defendants to appear before the judge of said court at the courthouse, Boise City, at 10 o'clock A. M., Tuesday, July 1, 1902, and show cause, if any there be, why this injunction should not be made perpetual. On this date defendants appeared, and moved the court to dissolve and vacate the temporary injunction heretofore issued in this case for the following reasons: 1. That this is not a case where a temporary injunction or a mandatory injunction should issue prior to the finding of the court, and the plaintiffs made no showing herein authorizing the issuance of such injunction; 2. That plaintiffs have not filed a bond herein in compliance with law, and the sureties thereon have failed to justify or qualify according to law; 3. That the statement of facts made by plaintiffs in support of their application for

injunction herein is false. Appellants have five assignments of error: 1. Denying the motion to dissolve the temporary injunction; 2. In issuing a temporary injunction herein without notice to defendants; 3. In making an order modifying the temporary injunction; 4. In issuing the injunction herein, and ordering a modification thereof, without requiring from the plaintiffs a lawful undertaking, and in sufficient amount to protect the property of the defendants; 5. In ordering a temporary injunction, or the modification thereof, upon the pleadings and evidence in this case—neither the complaint nor the evidence offered by plaintiffs being sufficient, *prima facie*, to sustain an order for injunction.

In the argument, counsel for defendants say: "The case then tendered by the plaintiffs is purely for the abatement of a nuisance, and not for the determination of conflicting claims to a canal, or water carried by a canal. We have attempted to classify our contentions under six subdivisions, to wit: 1. The court should not order injunction to issue without an adequate undertaking in form required by law."

As to the sufficiency of the bond in question, we only desire to say that it was a matter wholly within the discretion of the district judge, and we do not see wherein such discretion was abused. We may say, also, that counsel for appellants do not ²⁶ call our attention to what may be termed an abuse of such discretion.

The next question urged by counsel in their able and exhaustive brief is that the bond was defective, for the reason that the sureties did not state that they were householders or freeholders within this state, in their justification as such sureties. The justification is as follows: "State of Idaho, County of Ada—ss.: Judson Spofford and W. H. Thompson, whose names are subscribed as sureties to the foregoing undertaking, being severally duly sworn, each for himself says that he is a resident and . . . holder within this state, and is worth the sum in said undertaking specified as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution." This justification was before the clerk of the district court of Ada county, on the twenty-seventh day of June, 1902, and approved by the district judge on the same day. In support of their contention that this bond was defective, counsel call our attention to section 4934 of the Revised Statutes of Idaho. This section, among other things, says: "The officer taking the same [referring to the undertaking] must require the sure-

ties to accompany it with an affidavit that they are each residents and householders or freeholders within the territory," etc. This question was passed upon by this court in *Miller v. Pine Min. Co.*, 3 Idaho, 603, 32 Pac. 207. The court says: "The affidavit which is usually attached to a bond contains the justification of the sureties under section 4934. It is, however, no part of the undertaking, and the undertaking is complete without it." And the court cites 2 Hayne on New Trial and Appeal, section 213. We take it that the requirement of the statute in the justification of the sureties is more in aid of the officers who have to approve the bond, than any validity it may give to the bond; and in this case, if the district judge was fully satisfied that the bondsmen were able to respond in the amount named as a penalty, it would have been of no advantage to him to have them justify that they were freeholders or householders of Ada county. If, on the other hand, there was a question of their responsibility in his mind, he could have required them to take the statutory oath.²⁷ Counsel cite *McCracken v. Harris*, 54 Cal. 81, and *Schacht v. Odell*, 52 Cal. 448. We have examined these authorities, but do not find they take a different view from the one above expressed.

It is next urged that it does not appear that plaintiffs have not an adequate remedy at law. It is true, plaintiffs do not allege the insolvency of the defendants, but they do say that "the damage to the crops growing upon these lands could not be justly estimated." Counsel for appellants call our attention to *Fulton Irr. Ditch Co. v. Twombly*, 6 Colo. App. 554, 42 Pac. 254. This case supports the contention of appellants, but our attention is not called to any statutory provision of that state similar to section 4288 of our statute. However, we have examined the Civil Code of Colorado, and find no section corresponding with said section 4288. It reads: "An injunction may be granted in the following cases: 1. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually. 2. When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, great or irreparable injury to the plaintiff. 3. When it appears during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of

the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual. 4. When it appears, by affidavit, that the defendant, during the pendency of the action, threatens or is about to remove or to dispose of his property with intent to defraud the plaintiff, an injunction order may be granted to restrain the removal or disposition. 5. An injunction may also be granted on the motion of the defendant upon filing a cross-complaint, praying for affirmative relief upon any of the grounds mentioned above in this section, subject to the same rules and provisions provided for the issuance of injunctions on behalf of the plaintiff. 6. The district courts or any judge thereof sitting in chambers, in addition to the powers already possessed, shall have power to ²⁸ issue writs of injunction for affirmative relief having the force and effect of a writ of restitution, restoring any person or persons to the possession of any real property from the actual possession of which he or they may be ousted by force, or violence, or fraud, or stealth, or any combination thereof, or from which he or they are kept out of possession by threats whenever such possession was taken from him or them by entry of the adverse party on Sunday or a legal holiday, or in the night-time, or while the party in possession was temporarily absent therefrom. The granting of such writ shall extend only to the right of possession under the facts of the case, in respect to the manner in which the possession was obtained, leaving the parties to their legal rights on all other questions the same as though no such writ had issued; provided, that no such writ shall issue except upon notice in writing to the adverse party of at least five days of the time and place of making application therefor." Again, it is noticeable that the opinion in this case does not refer to any statutory provision in Colorado, and hence is based upon the old equitable rule relating to injunctions. This question has been before this court in the case of *Gilpin v. Sierra Nevada etc. Min. Co.*, reported in 2 Idaho, 696, 23 Pac. 547, 1014, decided in February, 1890, and again *Staples v. Rossi*, decided in 1901, and reported in 7 Idaho, 618, 65 Pac. 67. These two cases discuss the question involved in the case at bar, and both hold that similar property may be protected by injunction under the provisions of our statute.

Counsel for appellants very earnestly and ably contend under their third assignment that this was not a proper case for a preliminary injunction, mandatory in character, the title of plaintiffs being in dispute, and it being conceded that the

removal of the check-gate would inflict great damage on defendants. A number of authorities are cited in support of this contention. We have examined them carefully, but cannot agree with this contention. We think the complaint in this case alleged sufficient facts to justify the district judge in an effort to protect the property of all parties to the litigation, and, as we view it, the only real question before us for review is whether the district judge was in error in making the order appealed ²⁰ from. The record shows that in the first order he required the parties to appear before him on the first day of July, 1902, and show cause why the order should not be made perpetual; that at this hearing a large number of affidavits were produced and read on both sides of the question, before him; that after a full hearing, and argument of counsel, the court or judge modified the first order, and seemingly attempted to protect all parties to litigation, by providing means by which each party to the suit should be furnished with water for the irrigation of their growing crops.

Counsel for respondents cite a number of authorities in support of their contention that there was no error in the order made by the district judge, appealed from, or any of the proceedings complained of by appellants. If the district judge did not abuse the discretion vested in him as a chancellor in this case, then the judgment should not be reversed.

We are of the opinion that there was no error in the order of the district judge, and that the judgment should be affirmed. It is so ordered, with costs to respondents.

Sullivan, C. J., and Ailshie, J., concur.

Injunctions Against the Destruction of crops and trees are discussed in the monographic note to Moore v. Halliday, 99 Am. St. Rep. 748-751.

The Fact That a Surety on a Bond conditioned for the faithful performance of his duties by a public officer does not justify will not relieve him from liability, if the bond has been accepted without such justification: See the monographic note to Estate of Ramsay v. People, 90 Am. St. Rep. 191.

GWINN v. MELVIN.

[9 Idaho, 202, 72 Pac. 961.]

EXECUTORS AND ADMINISTRATORS—Application for in an "Action."—A proceeding for the appointment of an administrator is an "action" within the meaning of that word as used and defined in the statutes. (p. 122.)

EXECUTORS AND ADMINISTRATORS—The Statute of Limitations Applies to the Time in which letters of administration may be issued, and if application therefor is not made within four years from the date when the applicant's right accrued, the statute is a bar to such appointment on direct attack. (p. 126.)

EXECUTORS AND ADMINISTRATORS—Administration of an estate of a decedent is not absolutely necessary when there are no debts against the estate, and especially where the heirs have made a satisfactory distribution among themselves. (p. 126.)

W. Griffiths and H. E. Wallace, for the appellants.

F. J. Smith, for the respondent.

²⁰⁶ SULLIVAN, C. J. On the fourteenth day of June, 1902, R. M. Gwinn filed a petition in the probate court of Canyon county, praying to be appointed administrator of the estate of Edmund Melvin, deceased, who died intestate in said county in the month of April, 1896, and left surviving him his widow and six children. It appears that deceased at the time of his death was a resident of said county, and left some estate therein. The value of the real estate was about one thousand dollars, and it appears that if there was any personal property it had been appropriated by the widow and children long prior to the commencement of this proceeding. There is no allegation in the petition that there are debts or claims against said estate. Two of the heirs of said deceased filed objections to the appointment ²⁰⁷ of said Gwinn as administrator, (1) on the ground that said Gwinn had no legal, equitable or other right to be appointed to the office of administrator of said estate, and (2) that said Gwinn was barred by the statute of limitations from being appointed as such administrator. Upon a hearing said objections were overruled and said Gwinn was appointed administrator. Thereupon an appeal was taken to the district court, where the matter was heard upon stipulated facts. All of the heirs of said deceased appeared therein and objected to the appointment of said Gwinn as administrator of said estate, on the ground, (1) that said Gwinn had no interest, directly or in-

directly, in said estate, (2) that there were no claims against said estate, (3) that the heirs had fully agreed upon and distributed all of the property of said estate among themselves, and (4) that the time had expired within which an administrator might be appointed as shown upon the face of the petition filed therefor and as provided by the Revised Statutes of Idaho, sections 4060 and 4080. The matter was heard by the district court, and the action of the probate court in appointing said administrator was approved and affirmed. From said judgment this appeal was taken.

The stipulated facts show that Edmund Melvin died on or about the — day of April, 1896, at the county of Canyon, state of Idaho, and at the time of his death he was a resident of said county and left estate in said county consisting of real and personal property. The value of the personal property was not known and has been used by the heirs of said estate; that the real estate is of the value of one thousand dollars; that the said deceased died intestate; that his estate had never been probated nor letters of administration applied for until the respondent applied therefor; that said respondent was a resident of said county and legally competent to act as administrator of said estate, and made his said application in his own behalf and on behalf of no other person; that in January, 1889, said deceased and his wife executed and delivered to the Jarvis-Conklin Mortgage Trust Company their promissory note for six hundred and twenty-five dollars, due five years after date, together with a mortgage on the real estate of said decedent, and that said mortgage remains uncanceled, and that ²⁰⁸ since the appointment of said administrator the owner and holder of said note and mortgage has commenced an action in the district court to foreclose the same; that the debt secured by said mortgage has not been paid; that since the appointment of said administrator and since the filing of the inventory and appraisal of said estate, the owner and holder of said note and mortgage has expressly waived all claim and recourse against the said estate; that there are no claims against the said estate; that there were no claims or debts against said estate at the time of the appointment of the said administrator, except said note and mortgage above mentioned; that all of said estate has been in the peaceable possession of the heirs at law of said deceased; that said heirs have equitably and peaceably settled, divided and distributed the said estate to their complete and entire satisfaction; that the taxes on said real property have been paid by the owner

and holder of said note since the death of said Melvin; that the said respondent has not and did not have at any time any interest, either directly or indirectly, in the above-mentioned property or in the estate of said deceased, or in the control, management, possession or distribution thereof; that he is not in any manner related to and has never had any interest, directly or indirectly, in any heir of said deceased or any distributee, benefactor or other person interested in said estate. That all of said heirs, distributees, benefactors and persons interested in said estate object to the appointment of any administrator.

From those facts the district court found, under the law, that said administrator had been properly appointed. It will be observed that more than six years had elapsed between the death of said deceased and the appointment of said administrator, and it is contended that such appointment was barred by the provisions of section 4060 of the Revised Statutes.

It is contended by counsel for appellants that proceedings in probate courts for the appointment of administrators are expressly defined and classified by the legislature as special proceedings of a civil nature, and suggest that part 3 of the Code of Civil Procedure, entitled "Of Special Proceedings of a Civil Nature," is composed of twelve titles, the tenth of which ²⁰⁰ is entitled "Of Proceedings in Probate Courts," and that while proceedings in probate courts are classed as special proceedings they are proceedings in courts for the protection or enforcement of private rights, and that the provisions of section 4060 of the Revised Statutes are applicable to and include special proceedings such as that at bar. Said section is as follows: "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

Section 4020 of the Revised Statutes is as follows: "There is in this territory but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs; provided, that in all matters not regulated by this code, in which there is any conflict or variance between the rules of equity jurisprudence and the rules of the common law, with reference to the same matter, the rules of equity shall prevail."

Section 4080 of the Revised Statutes is as follows: "The word 'action,' as used in this title, is to be construed wherever it is necessary so to do, as including a special proceeding of a civil nature."

And it is contended by counsel for respondent that under the provisions of said last-quoted section some special proceedings are actions, while others are not, and contends that our statutes in relation to actions follow the interpretation and definition of the California statute, although not expressed in the same terms.

Section 363 of the Code of Civil Procedure of California is identical with section 4080 of the Revised Statutes above quoted. The term "action" is defined by section 22 of said California code as follows: "An action is an ordinary proceeding in the court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." Said section 22 is not found in our statutes.

In re Estate of Moore, 72 Cal. 335, 13 Pac. 880, is cited in support of respondent's said contention. We are unable to see wherein that case has any application to the question under consideration. The phrase "special proceeding" has been used ²¹⁰ in New York and other codes of procedure as a general term for all civil remedies which are not ordinary actions: New York Code of Procedure, sec. 3; Black's Law Dictionary, 1113.

Under the provisions of said sections 4020 and 4080, *supra*, is the proceeding to appoint an administrator to be construed as an action? We think so, for it is a proceeding given to an heir or creditor of an intestate to protect a private right.

Sections 4051 to 4059, inclusive, of the Revised Statutes, prescribe the time in which certain actions, naming them, must be commenced, and said section 4060 provides that an action for relief not provided for in the last above cited sections must be commenced within four years after the cause of action shall have accrued. And as the time for commencing a proceeding or action to have an administrator appointed is not particularly mentioned in either of said sections, it comes within the provision of said section 4060, and must be commenced within four years after the right to commence the proceeding or action has accrued.

The statute of limitations of this state is a statute of repose, and is applicable to a creditor of a decedent having a claim which he wishes to establish against the estate, and if the widow or next of kin, or the public administrator, neglects or refuses to take out letters as provided in section 5351 of the Revised Statutes, the creditor may do so. And if he would save his claim against the estate from the bar of the statute,

he must exercise reasonable diligence in such matter; he cannot without good cause or reason defer making application until the statute of limitations has run, and then successfully contend that said statute was suspended on account of the nonappointment of an administrator: *Dauserman v. Charlott*, 46 Kan. 480, 26 Pac. 1051. In that decision Chief Justice Horton said: "But a creditor cannot, as in this case, postpone the appointment for months and years, and then recover upon his claim. If he can do so for several months or several years, he can do so for any indefinite length of time, and then resort to administration and establish his claim. This is not in accord with the policy of the statutes nor with our prior decisions. We do not think it ²¹¹ accords with right or justice in establishing claims against the estates of decedents."

That case was appealed to the supreme court of the United States, and is reported in 147 U. S. 647, 13 Sup. Ct. Rep. 466, 37 L. ed. 316. Mr. Justice Gray, in delivering the opinion of that court, referring to the decision of Chief Justice Horton, above quoted from, said: "That decision was evidently deliberately considered and carefully stated, with the purpose of finally putting at rest a question on which some doubt had existed; it is supported by satisfactory reasons, and is in accord with well-settled principles, etc."

The laws of this state provide for the protection and enforcement of all rights and the redress of all wrongs shall be opportunely and with reasonable diligence demanded and enforced, if need be, by proper proceedings in the courts.

The language of section 4060, *supra*, does in fact, and we must consequently hold was intended to, comprehend every case of relief not elsewhere in the general statute directly provided for, whether sought by action or proceeding. For the term "action," as used in our statutes, is broad enough and does include all proceedings in any court for the enforcement or protection of private rights and the redress of private wrongs. We believe that the legislative policy of this state has been to fix in every case a limit of time for the beginning of an action or proceeding for relief, unless in terms excepted, and said section 4060 was intended for that purpose where no other period had been prescribed: *Allen v. Froman*, 96 Ky. 313, 28 S. W. 497; *Fitzgerald v. Glancy*, 49 Ill. 465; *Lewis v. Ford*, 67 Ala. 143; 1 *Woerner's American Law of Administration*, sec. 201; *Harwood v. Wyle*, 70 Tex. 538, 7 S. W. 789; *Flood v. Pilgrim*, 32 Wis. 376; *Filbey v. Carrier*, 45 Wis. 471.

It is contended by counsel for respondent that the statute of limitations (section 4060, *supra*) has no application to the time in which letters of administration may be issued, and cites *Healy v. Buchannan*, 34 Cal. 569; *Lyne v. Sanford*, 82 Tex. 58, 27 Am. St. Rep. 852, 19 S. W. 847; *Cochran v. Thompson*, 18 Tex. 652; *In re Strong's Estate*, 119 Cal. 663, 51 Pac. 1078; *In re Pina's Estate*, 112 Cal. 14, 44 Pac. 332; *Shirley v. Warfield*, 12 Tex. Civ. App. 449, 34 S. W. 390.

²¹² In *Healy v. Buchannan*, 34 Cal. 569, the facts show that the plaintiff was appointed administrator seventeen years after the death of his decedent, and after such appointment brought suit against the defendants for the possession of a certain lot or parcel of ground, alleging that the defendants had wrongfully entered into the possession of said premises and expelled plaintiff therefrom. In that suit the defendants demurred to the complaint on five several grounds, and the demurrer was sustained by the court; and in the course of the decision the court said: "We are very clear that an intruder without title, whose possession commencing a few days after the grant of letters on the estate, should not be allowed to allege that the claim of the plaintiff was stale as to him. . . . On principles of public policy and to encourage diligence in suitors, a court of equity will not interfere to aid a stale demand. But these principles have no application to a case like the present where the defendants, averring no right or title of entry, are simply intruders of a very recent date on property which the demurrer admits belonged, at the time of his death, to the plaintiff's intestate. It is not for them to complain of the delay in granting letters on the estate." It will be observed that that was a collateral attack upon the appointment of the administrator, while the case at bar is a direct attack made on the application for the appointment of an administrator and by the heirs.

In *Cochran v. Thompson*, 18 Tex. 652, the court holds, as stated in the syllabus, as follows: "As a general rule, grants of administration after so great a lapse of time should be regarded as nullities, but there may be special reasons which would even then support a grant, as, for instance, a money demand, or claim of the estate which had lately fallen due."

In *Lyne v. Sanford*, 82 Tex. 58, 27 Am. St. Rep. 852, 19 S. W. 847, it appears that in 1852 the existing probate law of Texas did not fix a time within which administration should commence after the death of the intestate. The intestate died in 1841, the administration commenced in 1852, and it was

held under the facts of that case that the appointment of an administrator was valid.

In *Re Strong's Estate*, 119 Cal. 663, 51 Pac. 1078, the deceased died intestate in a foreign state without any debts, and having no property except ²¹³ land in the state of California. The heirs agreed that no administration should be taken out, and one of their number purchased title to the whole of the property and took possession. It was held that the estate was not exempt from administration. It appears that letters were granted to the public administrator, upon the allegation of the jurisdictional fact that the heirs were unknown; it was held that such appointment could not be set aside by collateral attack made by one of the heirs alleging that when the administrator filed his petition, and for more than five years prior thereto, she was in actual possession of the property belonging to the estate, and the court states as follows: "This order [referring to the order of the court holding that such administrator was properly proceeding to administer upon said estate] until reversed or set aside by some proper method, is conclusive upon appellant."

In *Re Pina's Estate*, 112 Cal. 14, 44 Pac. 332, the court holds that if it appears that decedent left any estate, and the same has not been administered, letters should be granted. It appears in that case that the court below held that there were no creditors of said estate and no property thereof, hence, no necessity for an administrator. The supreme court held that the evidence showed that there was property belonging to said estate. In the opinion the court says: "Whether the appellant is entitled to be so appointed, the court did not, by reason of the erroneous view taken by it, proceed far enough to determine, but dismissed the application upon the grounds stated without hearing the evidence as to appellant's right to administer. The latter was entitled to have his application determined upon its merits, and for the failure of the court to so determine it, the order must be reversed."

In *Shirley v. Warfield*, 12 Tex. Civ. App. 449, 34 S. W. 390, it was held that a petition for letters filed eleven years or more after intestate's death, stated that the intestate was possessed of property and owed debts, and that letters were applied for at the request of a creditor was sufficient to give the court jurisdiction.

While some of the above-cited authorities support the contention of counsel for respondent, we are not inclined to follow them, as we believe under the provisions of our statutes

it was ²¹⁴ intended to include the proceeding for the appointment of an administrator within the statute of limitations.

While there is a conflict of authority upon this question, we think the better reasoning and weight of authority under statutes similar to our own is that such proceedings come within the statute of limitations.

It is contended by counsel for respondent that our laws contemplate that all estates shall be probated. Conceding that to be true, it does not follow that it is absolutely necessary to probate the estates of all decedents. It is held in numerous states that administration is unnecessary when there are no debts of the estate, and in volume 1 of Woerner's American Law of Administration, section 201, the author refers to eighteen states supporting the doctrine that it is not necessary to administer an estate when there are no debts against it.

When the only duty devolving upon an administrator is distribution of the estate among the heirs, and they make a satisfactory distribution thereof themselves, administration is regarded as "a useless ceremony": 1 Woerner's American Law of Administration, sec. 201.

We therefore conclude that the court erred in the appointment of said administrator, and the order and judgment appointing him must be reversed, and it is so ordered, and the cause is remanded with instructions to enter judgment in favor of appellants, dismissing said proceeding.

Costs of this appeal are awarded to appellants.

Stockslager and Ailshie, JJ., concur.

A Will may be Admitted to Probate at any time after the death of the testator, in the absence of any statutory limitation: *Shumway v. Holbrook*, 1 Pick. 116, 11 Am. Dec. 153; *Haddock v. Boston etc R. R.*, 146 Mass. 155, 4 Am. St. Rep. 295. See, too, *Reid v. Bengel*, 112 Ky. 810, 99 Am. St. Rep. 334. And when the law in force at the time of the death of an intestate does not fix the time within which administration of his estate must be commenced, the fact that administration is granted more than ten years after his death does not render it void: *Lyne v. Sanford*, 82 Tex. 58, 27 Am. St. Rep. 852.

CARSON v. CITY OF GENESEE.

[9 Idaho, 244, 74 Pac. 862.]

NEGLIGENCE, CONTRIBUTORY—Knowledge of Defective Sidewalk.—The fact that a person undertakes to pass over a sidewalk with a previous knowledge of a defect therein is not per se contributory negligence which will defeat a recovery for an injury, and whether such act is contributory negligence or not is a fact for the jury to determine. (p. 129.)

NEGLIGENCE, CONTRIBUTORY—Defective Streets or Sidewalks.—Previous knowledge of a dangerous place in a street or sidewalk is not per se evidence of such negligence as will preclude a recovery for an injury therefrom, except in those cases where the known defect is so great as to prevent a reasonably cautious person from attempting to pass over such street or sidewalk in the usual manner. (p. 130.)

MUNICIPAL CORPORATIONS—Liability for Defective Streets and Sidewalks.—Municipal Corporations, incorporated under general laws granting to them exclusive control over their streets, avenues, and alleys, are liable in damages for a negligent discharge of the duty of keeping such streets and alleys in a reasonably safe condition for the use of travelers in the usual modes. (p. 133.)

Forney & Moore, for the appellant.

S. S. Denning, for the respondent.

²⁴⁷ AILSHIE, J. This action was commenced in the district court by the plaintiff against respondent to recover damages for personal injuries received while traveling over a defective sidewalk within the corporate limits of the appellant corporation. The appellant, city of Genesee, is a city of the second class, organized and existing under the general laws of this state. Plaintiff obtained a verdict and judgment. The city has appealed from the judgment and from an order denying it a new trial.

Both the briefs and oral arguments in the case have been entirely devoted to two assignments of error, and we will consider these points in the order in which they are discussed.

Appellant first contends that the court should have peremptorily instructed the jury to return a verdict for defendant, for the reason that the evidence shows the plaintiff guilty of contributory negligence. This contention is based upon the evidence of plaintiff wherein she testifies that she had "known this sidewalk to be in bad condition for a long time," and that she was passing over it in the night-time and "didn't even think about those holes." She also testifies that she had

not been over this defective walk for from one to two weeks previous to the time of the accident. It appears that she had been visiting a sick neighbor and had gone over another walk that afternoon, but being detained until about dark, went back across lots part of the way and came out onto this street, and after traveling for some distance came to the intersection of the walk along Spruce street with the walk on Walnut street, where a hole was broken in the board, into which she stepped and fell and received injuries. She says she was walking along "just the same as anyone would walk up the street," and that she did not know that the holes were still there or that the walk was still out of repair. This walk, notwithstanding its condition, ²⁴⁸ was in constant use by pedestrians going to and from their homes and places of business. It appears that the walk was in good repair on the other side of the street, and that the respondent could have reached her home over a sidewalk that was in safe condition.

The substance of appellant's contention on this point is: That for plaintiff to undertake to pass over this sidewalk with previous knowledge of the defect therein was per se contributory negligence, and that the trial court should have declared it so as a matter of law, and taken the case from the jury. In support of this position appellant cites *Hobart v. City of Seattle*, 32 Wash. 330, 73 Pac. 383; *Rumple v. Oregon Short Line Ry. Co.*, 4 Idaho, 13, 35 Pac. 700; *City of Bedford v. Neal*, 143 Ind. 425, 41 N. E. 1029, 42 N. E. 815; *City of Huntington v. Breen*, 77 Ind. 39; *Town of Gosport v. Evans*, 112 Ind. 133, 2 Am. St. Rep. 164, 13 N. E. 256; *City of Fort Wayne v. Breese*, 123 Ind. 581, 23 N. E. 1038; *Cincinnati etc. Ry. Co. v. Howard*, 124 Ind. 280, 19 Am. St. Rep. 96, 24 N. E. 892, 8 L. R. A. 593.

In *Hobart v. City of Seattle*, 32 Wash. 330, 73 Pac. 383, the supreme court of Washington held that a general verdict in favor of plaintiff should have been set aside where the special findings of the jury showed that plaintiff, a woman, had crossed over an open ditch on the afternoon of the accident, and that it was so wide and deep that she had to jump the ditch, and that it was raining and the banks were wet and slippery, and that with this knowledge she returned that way the same night, without a light, and in extreme darkness attempted to again jump the ditch, and fell and received the injuries for which she sued. In that case the court held that with such facts before it the trial court should have declared the plaintiff guilty of contributory negligence as a matter of

law. It will be observed that the evidence in that case was submitted to the jury, and they found the specific facts which the court held were in conflict with their general verdict. That learned court appreciated the difficulty with which they were confronted and distinguished the facts in that case from the facts in the case of *Jordan v. Seattle*, 26 Wash. 61, 66 Pac. 114—a case where the evidence was very similar to ²⁴⁹ the facts in the case at bar, and wherein they had held that “the question of contributory negligence was for the jury.”

This court, through Mr. Justice Morgan, announced the general rule as to contributory negligence in *Rumple v. Oregon Short Line Ry. Co.*, 4 Idaho, 13, 35 Pac. 700, and held that under the facts as proven in that case the plaintiff was, as a matter of law, guilty of contributory negligence, and could not recover. There, it should be noted, the plaintiff received his injuries while trying to cross the track under a car attached to a locomotive and train of cars temporarily stopped. That case rests on a state of facts widely different from this case, and throws but little light on the point here raised. *City of Bedford v. Neal*, 143 Ind. 425, 41 N. E. 1029, 42 N. E. 815, *City of Huntington v. Breen*, 77 Ind. 39, *Town of Gosport v. Evans*, 112 Ind. 133, 2 Am. St. Rep. 164, 13 N. E. 256, *City of Fort Wayne v. Breese*, 123 Ind. 581, 23 N. E. 1038, and *Cincinnati etc. Ry. Co. v. Howard*, 124 Ind. 280, 19 Am. St. Rep. 96, 24 N. E. 892, 8 L. R. A. 593, are all Indiana cases, and hold that the degree of care which should be exercised must be proportionate to the known danger, and that a person attempting to pass over a dangerous place, of which he has knowledge, will be held to a greater degree of caution and care than he would be if the danger were unknown to him.

In *City of Bedford v. Neal*, 143 Ind. 425, 41 N. E. 1029, 42 N. E. 815, that court said: “Ordinary care, however, is a relative term. What would be ordinary care under one set of circumstances might be gross negligence under a different set of circumstances. Therefore, what would constitute ordinary care to avoid injury in passing over a defective and unsafe sidewalk in the dark by one ignorant of its defective and unsafe condition would not constitute ordinary care in one thus passing who had knowledge of its defective and unsafe condition.”

It will be seen that these authorities do not support the proposition that knowledge of the defect will of itself defeat a recovery.

Mr. Beach, in his work on Public Corporations, volume 2, section 1541, says: "The attempt to pass a dangerous place in a street in the darkness is not conclusive of negligence, but is a fact for the jury." *Dundas v. City of Lansing*, 75 Mich. 499, 13 Am. St. Rep. 457, 42 N. W. 1011, 5 L. R. A. 143, was a case where the plaintiff had previous knowledge of a defect in the ²⁵⁰ sidewalk, and testified that if she had been thinking about it, or looking for it, she would not have stepped into it, and the supreme court of Michigan held that the question of contributory negligence was properly left to the jury: See, also, *Village of Orleans v. Perry*, 24 Neb. 83, 40 N. W. 417; *Cuthbert v. City of Appleton*, 24 Wis. 387; *Kelly v. Southern Minnesota Ry. Co.*, 28 Minn. 102, 9 N. W. 588; *Argus v. Village of Sturgis*, 86 Mich. 344, 48 N. W. 1085; *Pinn v. City of Adrian*, 93 Mich. 504, 53 N. W. 614. The latter case holds that where plaintiff knew of the defect some days before the accident occurred that "she had the right to assume that the walk had in the meanwhile been placed in good condition."

It seems to be the rule in some of the states that if one has knowledge of a dangerous place or obstruction in a street or sidewalk, and undertakes to pass over the same in the darkness, he becomes thereby guilty of such negligence that he cannot recover for any injury he may sustain in such venture. This is not the general rule, however, as established by the great weight of authority. The prevailing principle which seems to run through the cases on this subject is: That previous knowledge of a dangerous place in a street or sidewalk is not per se evidence of such negligence as will preclude a recovery except in those cases where the known defect is so great as to prevent a reasonably diligent person from attempting to pass over such street or sidewalk in any usual manner.

The supreme court of Georgia, in *Samples v. City of Atlanta*, 95 Ga. 110, 22 S. E. 135, announces this principle very clearly in these words: "Where the danger is exceedingly small and trivial, it may not be at all negligent to disregard it. Where it is exceedingly great and obvious, it would be negligence per se to incur the hazard of being injured by it. In other cases it would be open to question whether incurring such possible or probable hazard would be consistent with ordinary care, and in cases of this kind the question of contributory negligence is one for determination by the jury."

In the case at bar the question of plaintiff's negligence in going upon the sidewalk where she received the injuries com-

plained ²⁵¹ of was properly submitted to the jury, together with the other facts in the case, and we find no reason for disturbing their verdict on that ground. We cannot say that the mere act of going upon this sidewalk with knowledge that ten days previous thereto it contained a broken board was such negligence as will defeat a recovery.

The second and most serious point urged by appellant is: That "in Idaho, municipal corporations are not liable in damages to the individual for injuries sustained by reason of defective streets or sidewalks." In support of this proposition appellant cites *Town of Waltham v. Kemper*, 55 Ill. 346, 8 Am. Rep. 652; *Davis v. Ada County*, 5 Idaho, 126, 95 Am. St. Rep. 166, 47 Pac. 93; *Sievers v. City and County of San Francisco*, 115 Cal. 648, 56 Am. St. Rep. 153, 47 Pac. 687; *Goddard v. Inhabitants of Harpswell*, 84 Me. 499, 30 Am. St. Rep. 373, 27 Atl. 958; *Winbigler v. Los Angeles*, 45 Cal. 36; *Chope v. City of Eureka*, 78 Cal. 588, 12 Am. St. Rep. 113, 21 Pac. 364, 4 L. R. A. 325; *Barnett v. Contra Costa Co.*, 67 Cal. 77, 7 Pac. 177; *Arkadelphia v. Windham*, 49 Ark. 139, 4 Am. St. Rep. 32, 4 S. W. 450; *Hill v. Boston*, 122 Mass. 357, 23 Am. Rep. 332; *Detroit v. Blakeley*, 21 Mich. 106, 4 Am. Rep. 450; *Young v. Charleston*, 20 S. C. 116, 47 Am. Rep. 827.

Davis v. Ada County, 5 Idaho, 126, 95 Am. St. Rep. 166, 47 Pac. 93, is urged by appellant as an authority from this court sustaining the position of the city. In that case the sole question involved was the liability of a county of this state for damages caused on account of a defective and negligently constructed bridge. The conclusion reached in that case is plainly stated in the syllabus as follows: "A county is not liable for damages sustained by reason of negligence in construction and maintenance of bridges unless made so by statute."

It can only be said that that case decides any question involved in the case under consideration, upon the assumption that the same principle applicable to counties of this state applies equally to the cities and villages organized under the general laws of the state. We therefore approach this subject as an open question in this jurisdiction.

²⁵² Appellant insists that cities organized under the general laws "are not distinguishable in principle from counties created by law." Upon this point we will first examine the legislation of the state relative to their respective powers and duties. The counties are political subdivisions of the state arbitrarily organized and governed entirely by the statutes

enacted with a view to the general policy of the state at large as an aid to the complete administration of the state. Cities and villages organized under the general laws voluntarily assume municipal existence, and in addition to the exercise of the functions of self-government, transact matters of a quasi private and business character, not for the government of its inhabitants, but rather for the acquisition of a private gain for the municipality and its citizens.

Section 1, page 192 of Session Laws of 1899, provides that: "All cities, towns and villages containing more than one thousand and less than fifteen thousand inhabitants shall be cities of the second class," and appellant urges that this provision creates involuntary municipal corporations. It will be observed, however, from other provisions of the act from which the foregoing section is quoted, that in order to become a "city, town or village" within the meaning of the act, the inhabitants must make application therefor, and hence it becomes voluntary: Sess. Laws 1899, p. 197, sec. 40.

Section 81 of the act of 1899 providing for the government of cities and villages (Sess. Laws 1899, p. 208) is in part as follows: "The city council, or board of trustees, shall have the care, supervision and control of all public highways, bridges, streets, alleys, public squares and commons within the city or village, and shall cause the same to be kept open and in repair and free from nuisance."

Subdivisions 27, 28 and 29 of section 73 of the same act authorize and empower cities and villages to "prevent and remove all encroachments into and upon all sidewalks, streets, avenues and alleys," and to "open, widen or otherwise improve any street, avenue, lane or alley," and to "create, open and improve new streets," etc.

²⁵³ Section 887 of the Revised Statutes of 1887, as amended by the fifth legislative session (Sess. Laws 1899, p. 270), makes each incorporated city or village in the state a separate road district, and takes all control over the roads therein away from the board of county commissioners, and authorizes the council or board of trustees to appoint a road overseer, and require bonds of him and a settlement at any time they may desire, and empowers them to remove him at pleasure.

The statute authorizes the levy and collection of road taxes, and subdivisions 4, 5 and 6 of section 73 of the Session Laws of 1899, page 202, authorize the construction and repair of sidewalks and the assessment of the expense thereof against the abutting property.

It will be seen from the foregoing that the power of cities and villages in this state over the streets is exclusive and unlimited, and the question therefore arises: Are their express or implied duties to the public and the individual commensurate with the powers granted them? It is conceded that there is no express statute in this state making municipal corporations liable in damages for negligence. The only remaining question is: Can such liability be said to be implied?

Beach on Public Corporations, at section 1496, says: "The general rule is that under the powers usually conferred upon municipal corporations in respect to streets within their limits, it is their duty to keep them in a reasonably safe condition for use by travelers in the usual modes, and that they are liable in damages for injuries resulting from neglect of such duty; and this rule extends not only to the roadbed, but also the structures over it."

Mr. Dillon in his work on Municipal Corporations, at section 1017, fourth edition, uses almost the same language as quoted from Mr. Beach. It must be conceded that the American authorities are at variance on this question, but we think the great weight of authority from both text-writers and adjudicated cases sustains the liability of such municipal corporations. Much of this diversity of precedent appears to be due to the legislation of the respective states with reference to the powers and duties of cities and villages. In some of the states ²⁵⁴ denying municipal liability in such cases the courts seem to have treated and regarded cities as purely governmental instruments formed for no other purpose, and that for negligence in the performance of such governmental duties they should not be held liable. This view seems to have found place in the opinion of the court in the California case we are asked to follow—*Winbigler v. City of Los Angeles*, 45 Cal. 36. The court there said: "The statute, as we have seen, imposes the duty in question not upon the corporation as such, but upon the city council, and according to the argument the liability for its nonperformance would devolve upon them. Incorporated cities in this state are mere governmental instruments formed under the state laws for the purpose of internal administration. They are not distinguishable in principle from counties created by law for the same purpose." That case is the first positive expression we have found by the California court as to its position on this question, and notwithstanding our great respect for that distinguished court, their reasons given for the conclusion at which they arrived do not

appeal to us as sound or well considered. The later cases from that court dealing with the same question indicate to us that the doctrine announced in the Winbigler case has been followed more on account of the precedent established than on account of soundness of the rule.

In *Chope v. City of Eureka*, 78 Cal. 588, 12 Am. St. Rep. 113, 21 Pac. 364, 4 L. R. A. 325, the same principle was involved, and Mr. Justice McFarland, who wrote the majority opinion, said: "There is, no doubt, some conflict of decisions on the question in other states, although it is to be observed that in New England and some other states there are statutory declarations of the liability. But in California the doctrine above stated has been clearly and continuously adopted, and if any change in the laws is desirable, that change must be made by the legislature." Mr. Justice Works wrote a very concise dissenting opinion in that case, concurred in by Mr. Chief Justice Beatty, contending that the city should be held liable.

Arnold v. City of San Jose, 81 Cal. 618, 22 Pac. 877, was a department decision by a divided court, and the opinion was rested entirely upon the authority of *Chope v. City of Eureka*. The court there, however, took occasion to repudiate the suggestion made in the Winbigler case that the duties imposed ²⁵⁵ are "not upon the corporation as such, but upon the city council," and that therefore any liability for nonperformance would rest upon them and not upon the corporation. That distinction is disposed of as follows: "We are unable to see any merit in the point. The corporation can act only through its agents; and what they do within the scope of their authority is 'the direct act of the city.'"

The California authorities are neither convincing nor satisfactory on this question.

It seems to us that incorporated cities and villages act not only in a legislative and governmental capacity, but also in a private or business capacity, and that the care and repair of streets and sidewalks cannot reasonably be said to be the exercise of legislative or governmental discretion, but is rather a ministerial or business duty it owes to the individuals it impliedly invites to travel over its thoroughfares. This view is sustained by the following authorities: *Sutton v. City of Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 573; *Dillon on Municipal Corporations*, 4th ed., sec. 1023; *Beach on Public Corporations*, sec. 1209; *City of Denver v. Dunsmore*, 7

Colo. 328, 3 Pac. 705; *Stevens v. City of Muskegon*, 111 Mich. 72, 69 N. W. 229, 36 L. R. A. 777.

Cities and villages become incorporated because of the fact that a large number of people have gathered together in the same community and deem it to their best interest, both governmental and business, to assume corporate existence. In such communities the travel both by day and night is so much greater in comparison with the travel over the country at large that the maintenance of good and safe thoroughfares for the protection of life and property becomes an urgent necessity, and such corporations should be held liable for a negligent discharge of that duty. The application of this principle should prove a spur to the officials of such corporations to keep the streets and sidewalks in a safe condition for the uses to which they are dedicated. Its denial would be to defeat the plainest justice in many instances.

The following are some of the many authorities sustaining the foregoing conclusion: *Dillon on Municipal Corporations*, 256 4th ed., secs. 999, 1017; *Beach on Public Corporations*, secs. 757, 759, 1494; *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440; *District of Columbia v. Woodbury*, 136 U. S. 540, 10 Sup. Ct. Rep. 990, 34 L. ed. 472; *Sutton v. City of Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273; *City of Denver v. Dunsmore*, 7 Colo. 28, 3 Pac. 705; *Snook v. City of Anaconda*, 26 Mont. 128, 66 Pac. 756; *City of Cleveland v. King*, 132 U. S. 295, 10 Sup. Ct. Rep. 90, 33 L. ed. 334; *Levy v. Salt Lake City*, 3 Utah, 63, 1 Pac. 160; *Jansen v. City of Atchison*, 16 Kan. 58; *Farquar v. City of Roseburg*, 18 Or. 271, 17 Am. St. Rep. 732, 22 Pac. 1103; *Sullivan v. City of Helena*, 10 Mont. 134, 25 Pac. 94; *Nebraska City v. Campbell*, 2 Black, 390, 17 L. ed. 271; *Noble v. City of Richmond*, 31 Gratt. 271, 31 Am. Rep. 726; *Pettengill v. City of Yonkers*, 116 N. Y. 558, 15 Am. St. Rep. 442, 22 N. E. 1095.

Appellant's counsel suggests that under the law there is no fund out of which to pay such a claim, and no adequate provision for raising revenue for such purposes, and that therefore it was not intended that such liability should attach.

Upon this point it is clear that the legislature has granted ample authority to the city to raise revenue to keep its streets open and in repair and thereby discharge its duty, and if it neglects such duty and commits a wrong it certainly cannot, with any degree of reason, say it has done what the legislature had in mind, and is without revenue to pay for its torts. The

legislature must be understood to have contemplated that the city would discharge its duty, and armed it with adequate means and authority to do so. It had all the authority requisite to have kept its streets in repair, and thereby avoid the liability to which it now finds itself subjected.

The other assignments of error have not been argued in the briefs, but we see no error in them, and will not discuss them in this opinion.

The judgment and order appealed from are affirmed, with costs to respondent.

Sullivan, C. J., and Stockslager, J., concur.

WHAT MUNICIPAL CORPORATIONS ARE ANSWERABLE FOR INJURIES DUE TO DEFECTS IN STREETS AND OTHER PUBLIC PLACES.

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I. Scope of Note.

In this note we shall confine ourselves to a discussion of the cases in which the primary question was whether a right of action existed against the municipal corporation for defects in its streets or other public places as distinguished from the question whether the facts relating to the defect constituted a cause of action. The earlier cases on the subject were discussed in previous notes, viz.: The liability of cities for neglect to repair their streets was exhaustively considered in the monographic note to *Browning v. Springfield*, 63 Am. Dec. 345; while the liability of such corporations for sewers, culverts and drains was discussed in the notes to *Perry v. Worcester*, 66 Am. Dec. 435, *Barry v. Lowell*, 85 Am. Dec. 690, and *Chalkley v. Richmond*, 29 Am. St. Rep. 737. The general principles of law relating to the right of action against municipalities for the negligence and other misconduct of its officers and agents with respect to the construction and repair of streets, sewers and other public improvements was very exhaustively discussed in the monographic note to *Goddard v. Harpswell*, 30 Am. St. Rep. 376. Cases involving the tests for determining the liability for damages occasioned in the exercise of governmental or sovereign powers were considered in the note to *Perry v. Worcester*, 66 Am. Dec. 434; while the liability of municipalities for the unauthorized acts of their officers was considered in the note to *Hilsdorf v. St. Louis*, 100 Am. Dec. 358. The liability of municipal corporations to persons injured by defects in or want of repair of public streets in cases where the right of action against the municipality was not disputed, was considered exhaustively in the very recent monographic note to *Dudley v. City of Flemingsburg*, 103 Am. St. Rep. 257.

II. General Nature and Powers of Municipal Corporations.

Before entering into a discussion of the general principles underlying the subject of this note, it may be well to advert in merely a general way to the general nature and powers of municipal corporations. It has been said that a municipal corporation may be defined to be a body politic and corporate established by law to assist in the government by the state, with delegated authority to regulate and administer the local and internal affairs of a city, town or district which is incorporated: *Coyle v. McIntire*, 7 *Houst.* 44, 40 *Am. St. Rep.* 109.

But incorporated cities and villages act not only in a legislative and governmental capacity, but also in a private or business capacity: *Carson v. City of Genesee* (principal case), *ante*, p. 127. In adverting to the dual nature of municipalities in that they partake of sovereign power with respect to some things and of the ordinary private character of other corporations as to other things, the court, in *Rhobidas v. Concord*, 70 *N. H.* 90, 85 *Am. St. Rep.* 604, observed: "Ever since the time of the Roman empire municipalities have been subject to private law relations, not applicable to sovereignty: 1 *Dillon on Municipal Corporations*, sec. 3. The exact location of the divisional line between those matters which are governmental and those which are not has not always been clearly indicated. Courts have not agreed upon the precise location of the line; but there has been no dissent from the proposition that municipalities have duties on each side thereof. This has been the law of the state for many years. It may be fairly assumed that many instances of legislative action or nonaction have been based upon it."

In its capacity as a private corporation a municipality stands on the same footing as would any individual or body of persons on whom a like special franchise had been conferred. Hence, it is liable in the same manner as such individual or private corporation would be under like circumstances: *Chicago v. Selz*, 104 *Ill. App.* 376; *Potter v. New Whatcom*, 20 *Wash.* 589, 72 *Am. St. Rep.* 135, 56 *Pac.* 394. Its charter is the measure of its powers, and it is said that the enumeration of certain powers implies the exclusion of all others: *Chicago v. Banker*, 112 *Ill. App.* 94. But it is also said that municipal corporations can exercise only the powers granted in express words, those necessarily or fairly implied, and those essential to the declared objects and purposes of the corporation: *Joplin v. Leckie*, 78 *Mo. App.* 8; *Becker v. La Crosse*, 99 *Wis.* 414, 67 *Am. St. Rep.* 874, 75 *N. W.* 84, 40 *L. R. A.* 827; *Ft. Scott v. W. G. Ends Brokerage Co.*, 117 *Fed.* 51, 54 *C. C. A.* 437. Of course, the grant of power carries with it authority to do those things necessary to the exercise of the power granted: *Wilson v. Boise City*, 6 *Idaho*, 391, 55 *Pac.* 887. The status of governmental bodies as representing the sovereign was discussed in the monographic note to *Bannock Co. v. Bell*, 101 *Am. St. Rep.* 161, 162.

From the fact that in many of the states which have heretofore denied municipal liability, the legislative bodies have passed statutory enactments affirming the liability of municipal corporations for negligent acts or omissions on the part of the agents and servants of the municipality with respect to streets and other places, it would seem that the doctrine of liability will in time become universal among the various states. And it would seem that with the present tendency toward municipal ownership of public utilities, and in some instances of things not within the well-defined limits of public utilities, the courts will be very likely to extend the responsibilities of municipal corporations with respect to such matters so as to make them correspond to the liability of private corporations under like circumstances—and thus weaken the force of reasoning employed in support of the doctrine of nonliability.

III. General Nature of Streets and Highways, and the Duty of the Municipality Toward Them.

Most of the cases involving this subject arise with respect to defects in streets and highways. Consequently, the subject of what are the relations of the municipality toward its streets is most frequently discussed in the cases. Of course, the primary object of streets and highways is to furnish a passageway for travelers in vehicles or on foot, and while they may be put to numerous other uses, such uses must be enjoyed in subordination to this primary object: *People v. Squire*, 107 N. . 593, 1 Am. St. Rep. 893, 14 N. E. 820; *Rich v. Minneapolis*, 37 Minn. 423, 5 Am. St. Rep. 861, 35 N. W. 2. And in those jurisdictions where redress is allowed against municipalities, the general rule is that a municipality is bound to exercise ordinary care to keep its streets in a condition of reasonable safety for the use of the public: See monographic note to *Dudley v. Flemingsburg*, 103 Am. St. Rep. 263; *Jefferson v. Chapman*, 127 Ill. 438, 11 Am. St. Rep. 136, 20 N. E. 33; *Anderson v. East*, 117 Ind. 126, 10 Am. St. Rep. 35, 19 N. E. 726, 2 L. R. A. 712; *Maus v. Springfield*, 101 Mo. 613, 20 Am. St. Rep. 634, 14 S. W. 630; *Scott v. Provo City*, 14 Utah, 31, 45 Pac. 1005; and the same general rule applies to the maintenance of its sidewalks: *Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 318; *Wilmette v. Braehle*, 209 Ill. 621, 71 N. E. 41; and also to its sewers: *Weidman v. New York*, 84 App. Div. 321, 82 N. Y. Supp. 771; affirmed in 176 N. Y. 586, 68 N. E. 1125.

The streets of a town or city, like all other roads, are public highways: *Arkadelphia v. Windham*, 49 Ark. 139, 4 Am. St. Rep. 32, 4 S. W. 450. A municipal corporation holds its streets in trust for the public and cannot put them to any use inconsistent with street purposes: *Bennett v. Mt. Vernon*, 124 Iowa, 537, 100 N. W. 349. The public highways of a city are not its private property: *Simon v. Northrup*, 27 Or. 487, 40 Pac. 560, 30 L. R. A. 177; *McHugh v. Boston*, 173 Mass. 408, 53 N. E. 905. But in the use of a public street the law recognizes no favorites. Hence, subject to the law of the

road, no one man has a superior right upon and in the street as against the general public: *Chicago Union Traction Co. v. Stanford*, 104 Ill. App. 99.

IV. Rule of Liability Where Injury Results from an Act of a Governmental Character.

The general rule is that a municipal corporation is not liable for injuries resulting from the nonperformance or negligent performance of acts relating to matters of a governmental character: *Judge v. Meriden*, 38 Conn. 90; *Judd v. Hartford*, 72 Conn. 350, 77 Am. St. Rep. 312, 44 Atl. 510; *Colwell v. Waterbury*, 74 Conn. 568, 51 Atl. 530, 57 L. R. A. 218; *Mayor etc. of Wilmington v. Vandergift*, 1 Marvel (Del.), 5, 65 Am. St. Rep. 256, 29 Atl. 1047, 25 L. R. A. 538; *Love v. Atlanta*, 95 Ga. 129, 51 Am. St. Rep. 64, 22 S. E. 29; *New Orleans v. Kerr*, 52 La. Ann. 413, 69 Am. St. Rep. 442, 23 South. 384; *Keeley v. Portland (Me.)*, 61 Atl. 180; *Howard v. City of Worcester*, 153 Mass. 426, 25 Am. St. Rep. 651, 27 N. E. 11, 12 L. R. A. 160; *Lehigh County v. Hoffort*, 116 Pa. St. 119, 2 Am. St. Rep. 537, 9 Atl. 177; *McDade v. Chester City*, 117 Pa. St. 414, 2 Am. St. Rep. 681, 12 Atl. 421; *Bates v. Rutland*, 62 Vt. 178, 22 Am. St. Rep. 95, 20 Atl. 278, 9 L. R. A. 363; *Aitken v. Wells*, 70 Vt. 308, 67 Am. St. Rep. 672, 40 Atl. 820, 41 L. R. A. 566; *Wood v. Hinton*, 47 W. Va. 645, 35 S. E. 824; *Bartlett v. Clarksburg*, 45 W. Va. 393, 72 Am. St. Rep. 817, 31 S. E. 918, 43 L. R. A. 295. "When, however, the act done is not one for which municipal liability must be denied because it is governmental in character and is one which the municipality did intentionally and in the assumed execution of municipal functions, and from the doing of which injurious consequences result to a private citizen, it is well-nigh iniquitous to deny him redress on the ground that the municipality was not given power to do what it did": See monographic note to *Orlando v. Pragg*, 34 Am. St. Rep. 26. Of course, a city while acting, not in the management of its private or corporate affairs, but in the interest of the public, and as the guardian of the health, peace, convenience and welfare of the public, is not liable for the negligent acts of its officers or employees engaged in the execution of its ordinances: *Whitfield v. Paris*, 84 Tex. 431, 31 Am. St. Rep. 69, 19 S. W. 566, 15 L. R. A. 783. So also, it is said that inasmuch as a municipality represents the commonwealth and municipal officers while engaged in duties relating to the public safety and the maintenance of the public order are the servants of the commonwealth, although their duties may be confined to the enforcement of the law within a specified territory, a city is not liable for the acts of its officers in enforcing the criminal or penal laws of the commonwealth or in enforcing its own penal ordinances: *Taylor v. Owensboro*, 98 Ky. 271, 56 Am. St. Rep. 361, 32 S. W. 948. And it is said in a general way that a municipal corporation is not answerable in damages for the negligent acts of its officers in the execution of such powers as are con-

ferred on the city or its officers for the public good: *Ulrich v. St. Louis*, 112 Mo. 138, 34 Am. St. Rep. 372, 20 S. W. 466. But it is also stated that municipalities are liable for the negligent acts of their agents where the acts are for the benefit of the individuals who are inhabitants of the municipality: *McAuliffe v. Victor*, 15 Colo. App. 337, 62 Pac. 231.

V. Determination of Question Whether Act is of Governmental or Merely Corporate Character.

a. What are Governmental, Corporate or Ministerial Acts.—As a matter of convenience it has become a matter of policy for the state to delegate to the municipality the power to legislate with respect to such matters as more particularly affect those citizens residing within the locality circumscribed by the municipal limits.

In order to determine whether there is a municipal responsibility, the inquiry must be whether the department whose misfeasance is complained of is a part of the machinery for carrying on the municipal government and whether it was at the time engaged in the discharge of a duty or charged with a duty primarily resting upon the municipality: *Pettengill v. Yonkers*, 116 N. Y. 558, 15 Am. St. Rep. 442, 22 N. E. 1095. Of course, a state may delegate the supervision and control of streets to the municipality in which they are located; *City Council v. Parker*, 114 Ala. 118, 62 Am. St. Rep. 95, 21 South. 452.

A power of a municipality which has relation to public purposes and is for the public good is governmental in character, but when it relates to the accomplishment of private corporate purposes in which the public is only indirectly concerned, it is private in its nature: *Springfield etc. Ins. Co. v. Keeseville*, 148 N. Y. 46, 51 Am. St. Rep. 667, 42 N. E. 405, 30 L. R. A. 660. And it is also said that municipal duties are governmental when imposed by the state for the benefit of the general public: *Judd v. Hartford*, 72 Conn. 350, 77 Am. St. Rep. 312, 44 Atl. 510. A governmental use may include any act which the state may lawfully perform or authorize, and in this sense a governmental act is one done in pursuance of some duty imposed by the state on a person, individual or corporation, which is one pertaining to the administration of government and is imposed as an absolute obligation on a person who receives no proof or advantage peculiar to himself from its execution: *Platt v. Waterbury*, 72 Conn. 531, 77 Am. St. Rep. 335, 45 Atl. 154, 48 L. R. A. 691. And when power is given to do an act which concerns public interest, its execution, when applied to a public official or body, may be insisted upon as a duty although the phraseology of the statute be permissible only, but when the power is lodged with persons exercising, or to exercise legislative or judicial functions, and the subject matter of the statute and its phraseology concur in showing that the authority is essentially discretionary, no absolute duty is imposed: *McDade v. Chester City*, 117 Pa. St. 414, 2

Am. St. Rep. 681, 12 Atl. 421. Of course, municipal corporations are persons in law, capable of inflicting injuries, and are liable to suit by a person who suffers injuries unless they flow from and are incidental to the performance of governmental duty: *Judd v. Hartford*, 72 Conn. 350, 77 Am. St. Rep. 312, 44 Atl. 510.

It would seem that the private duty of a municipal corporation is somewhat analogous to the duty of a private corporation toward its stockholders. The court, in *Bowden v. Kansas City*, 69 Kan. 587, 105 Am. St. Rep. 187, 77 Pac. 573, 66 L. R. A. 181, in discussing the nature of the duties of a municipality toward the public, observed: "In determining the necessity for a fire department, the number and location of fire stations, the kind, quality and number of fire extinguishers and all matters involving the efficiency of such department, the council are in the exercise of their legislative power, judgment, and discretion. In the performance of such duties the question of nonfeasance or misfeasance are not subjects of judicial inquiry. Having, however, determined these questions, the execution of the work and the management of its property is ministerial. In determining the locality, width and grade of streets, and in establishing a system of sewers and the kind and location of the pipes therefor, the corporation exercises its legislative authority; in the one instance as a government instrumentality; in the other in its public capacity, as benefactor of the inhabitants. In either case the city is liable to property owners for injury to their property occasioned by the negligent execution of the plan."

Sometimes it is said that acts involved in the necessary performance of a duty prescribed by a municipal ordinance are ministerial in character: *Danbury etc. Co. v. Norwalk*, 37 Conn. 109; *Logansport v. Wright*, 25 Ind. 512; *Richmond v. Long's Admr.*, 17 Gratt. 375, 94 Am. Dec. 461.

b. Distinction Between Acts for Benefit of General Public and Those for Benefit of Municipality.—That there is a distinction between certain acts of a municipality to the effect that certain classes of acts are deemed governmental in character while others are deemed merely corporate or private in character is not questioned by any of the authorities, and the authorities are not so very inharmonious in describing the qualities which determine whether an act is governmental or corporate, but they quite frequently disagree when it comes to applying the principles of law to a concrete case.

There is a clear distinction between those governmental duties imposed upon a city as a mere agent of the government and those governmental powers granted as a privilege primarily for the personal benefit of its inhabitants, but the tests for the demarcation of the two classes of powers are not so well settled. It seems that when the terms of the statute are clear, they furnish the most reliable test, and some weight, perhaps, may be given to the nature

of the power as commonly regarded, though care should be taken not to clothe an individual with the immunity of the state beyond the necessity of his agency: *Platt v. Waterbury*, 72 Conn. 531, 77 Am. St. Rep. 335, 45 Atl. 154, 48 L. R. A. 691. Likewise, it has also been said that the distinction between governmental and quasi private acts of a municipality may be determined by this, namely, if the power conferred on the municipality be granted for public purposes exclusively, it is governmental, but if for private advantage and emoluments, though the public derive a common benefit therefrom, the corporation quoad hoc is to be regarded as a private corporation: *Stevens v. Muskegon*, 111 Mich. 72, 60 N. W. 229, 36 L. R. A. 777. So also it is said that where any person has a right to demand the exercise of a public function by a municipal corporation, and there is an officer or set of officers authorized to exercise that function, there the right and the authority give rise to the duty, but where the right depends on the grant of authority, and that authority is essentially discretionary, no legal duty is imposed for the negligence of which it could be held liable: *Carr v. Northern Liberties*, 35 Pa. St. 324, 78 Am. Dec. 342. In *Maximilian v. New York*, 62 N. Y. 160, 20 Am. Rep. 468, the court said: "When it is determined that the power and duty are given and taken for the benefit of the corporation as a corporate body, and the act to be done is to be done by it through agents appointed or under its control and power of removal, there is no doubt of its liability for negligent omission or negligent attempt at performance. When the powers created and duly enjoined are given and laid upon officers to be named by the corporation, but for the public benefit and as a convenient method of exercising a function of general government, and the corporation has no immediate control nor immediate power of removal of those officers, nor of their subordinates and servants, then it is not liable for their negligent omission or action."

In the very recent case of *Collier v. Ft. Smith*, 73 Ark. 447, 84 S. W. 480, the court observed: "A well-defined distinction is found in the authorities between acts and duties of a municipal corporation which are strictly public and governmental in their nature and those of a private or quasi private nature. This is properly defined, and the rule well stated in the note to *Goddard v. Inhabitants of Harpswell*, 30 Am. St. Rep. 376, as follows: 'These corporations are regarded, with reference to some of their duties and functions, as representing and acting for the state or sovereign, and with reference to others as acting for themselves somewhat as a private corporation, and generally, when acting in the former capacity, they are not answerable for the acts and omissions of their officers or agents, while, when acting in the latter capacity, their liability is ordinarily the same as that of a private person or corporation. The great difficulty and the great divergence of judicial opinion arise from the fact that no test has been formulated by which to decide

with unerring accuracy whether a particular act or omission occurred in the discharge of governmental or quasi private duties': See, also, *Wright v. Augusta*, 78 Ga. 241, 2 S. E. 693; *Wilkins v. Rutland*, 61 Vt. 336, 17 Atl. 735; 20 Am. & Eng. Ency. of Law, p. 1191; 2 Dillon on Municipal Corporations, sec. 998."

See, also, in the comparatively recent case of *Bullmaster v. St. Joseph*, 70 Mo. App. 60, the court, after a review of the question, very pertinently observed: "The authorities from which we have quoted and others to which we have referred illustrate and make plain the distinction between those powers of a municipal corporation which are public governmental functions delegated to it by the state and conferred upon it exclusively for the public good, such, for instance, as that to maintain a city workhouse or hospital, or that to abate, prevent and remove nuisances, or that to establish a fire department and to pass ordinances to extinguish fires, or those relating to the public peace and good order, or the suppression of vice and immorality, or preserving the public health, caring for the poor, or providing for education, or those relating to the general welfare coupled with judicial or legislative discretion touching the manner or mode of their execution and the like; and those powers which are of a proprietary or private character which have been conferred for the private advantage of the municipality, as, for instance, those to construct and maintain sewers, to provide water for the use of the city and its inhabitants, or to make and repair streets and other like powers granted for private municipal advantage and emolument. The officers of the municipality exercising the former class of powers are to be regarded as agents of 'the greater public,' while those exercising those of the latter are the agents of the lesser public. When the agents of 'the greater public' are guilty of nonfeasance or misfeasance in the exercise of any one of the former class of powers, the principles of the maxim of respondeat superior do not apply, but the maxim does apply when the agents of the lesser public are guilty of nonfeasance or misfeasance in the exercise of the latter class of powers."

c. **Effect Where Act is of Special Benefit or Pecuniary Profit to the Municipality.**—It seems that where the performance of an act or the maintenance of a public place or improvement is done merely for the special benefit or pecuniary profit of the municipality that the municipality stands in the same relation as a private corporation would under like circumstances. This view seemed to have obtained in *Moffitt v. Asheville*, 103 N. C. 237, 14 Am. St. Rep. 810, 9 S. E. 695, where it said that the grading of streets, cleansing of sewers or keeping of wharves in safe condition, from which the corporation derives a profit, are corporate duties. But in *Curran v. Boston*, 151 Mass. 505, 21 Am. St. Rep. 465, 24 N. E. 781, 8 L. R. A. 243, it was said that a municipal corporation is not liable for the negligence or omissions of its officers or servants in charge of a work on the

ground that its inmates are required to work and some revenue is derived from their labor, if the institution is not conducted with a view to pecuniary profits.

d. **What Amounts to a Private Benefit or Profit to a Municipality.**—It seems that a corporation uses works constructed for the public benefit for its corporate profit when the profits are to be applied to the maintenance of the works and the reduction of the debt incurred by the corporation in their construction: *Hourigan v. Norwich*, 77 Conn. 358, 59 Atl. 487.

e. **Effect Where Act Which is Beneficial to Municipality is Also Beneficial to General Public.**—Municipal corporations acting within the purview of their authority and in their ministerial or corporate character, in the management of property for their own benefit, or in the exercise of powers, assumed voluntarily for their own advantage, are impliedly liable for damages caused by the negligence of their officers and agents, though they may be engaged in some work that will inure to the general benefit of the municipality. Grading streets, cleansing sewers or keeping wharves in safe condition, from which a profit is derived are duties of this character: *Moffit v. Asheville*, 103 N. C. 237, 14 Am. St. Rep. 810, 9 S. E. 695. And it has also been held that the fact that the duty of keeping the streets in repair and keeping them clean might incidentally benefit the public does not make the acts of the commissioner of street cleaning a public function: *Missano v. New York*, 160 N. Y. 123, 54 N. E. 744. In this general connection see, also, the monographic note on public uses attached to *Zircle v. Southern Ry. Co.*, 102 Am. St. Rep. 809.

f. **Execution of Discretionary Work as a Ministerial Duty on Part of Municipality.**—In passing an ordinance establishing a street and defining the lines and extent of the street and declaring in what manner and to what extent it shall be imposed and be given to the public, a municipality acts in a governmental capacity, but, it seems, after such an ordinance has been passed, and the city undertakes the work of constructing or reconstructing it as required by the ordinance it acts in a ministerial capacity: *Ely v. St. Louis*, 181 Mo. 724, 81 S. W. 168. See, also, *Danbury eta. Co. v. Norwalk*, 37 Conn. 109; *Logansport v. Wright*, 25 Ind. 512; *Bowden v. Kansas City*, 69 Kan. 587, 105 Am. St. Rep. 187, 77 Pac. 573, 66 L. R. A. 181, and *Richmond v. Long's Admr.*, 17 Gratt. 375, 94 Am. Dec. 461, to the same general effect.

g. **Public Streets as Constituting a Special Benefit to the Municipality.**—It seems to be the rule that the laying out of a public street is the performance of a public duty imposed upon all towns and cities alike, from the performance of which they derive no special advantage in their corporate capacity, and is not the institution by the city of work for its own particular use and benefit: *Butman v. Newton*, 179 Mass. 1. 88 Am. St. Rep. 342, 60 N. E. 401. And it

is said that work on a street required for public convenience is not work carried on as a business for profit, even though the city owns abutting land which will be increased in value by the street being laid out: *Taggart v. Fall River*, 170 Mass. 325, 49 N. E. 622. And in *Hall v. Concord*, 71 N. H. 367, 52 Atl. 864, 58 L. R. A. 455, in answer to the contention that the city should be held liable because improvements on the highway (which in this case was a widening of the street into a boulevard) which everyone has the right to use regardless of his residence, were for the "special benefit and profit" of the city, the court said: "This assumption is both misleading and unwarranted. In precisely the same sense it might be said that all repairs and improvements of highways therein are a special benefit to the city, as distinguished from the general public. But no such distinction can be made. The legislature imposes on municipalities, whether they wish it or not, the burden of maintaining highways, not for their own but for the public benefit and welfare (*Wooster v. Plymouth*, 62 N. H. 193, 215); and if they choose to expend in their maintenance more than may be necessary to render them suitable for the public travel, they do not, in a legal sense, derive any special benefit, profit or advantage therefrom in their corporate capacity beyond that derived by the public. And if the contrary were true, and whether the money with which highway repairs and improvements are made is provided by the municipality or is donated by an individual, no reason is afforded why the expenditure of the money shall not be made by the public officer charged by law with the direction and control of all such repairs and improvements."

But in considering the force of the decisions just cited in jurisdictions outside of New England, it must be borne in mind that the basic idea as to the duties of towns, villages and cities toward highways and streets in the New England states tends very strongly toward the idea that they are merely agencies of the state in respect to everything connected with streets and highways.

It would seem that with the improved methods of urban transportation by means of automobiles, and the greatly increased amount of use of streets by the people, who are residents of the municipality, that the use of the streets by the general public of the commonwealth ought to be held to be a use merely incidental to the purely urban use, and, besides, the maintenance of safe streets and sidewalks undoubtedly adds very materially to the comfort and prosperity of the citizens of the municipality by inviting strangers to do business in the municipality and by facilitating the transportation of merchandise and people from one part of the municipality to another. These benefits to the people of the municipality are somewhat in the nature of the profits to the stockholders of corporations operating under public franchises if we should consider the citizen as in the nature of a stockholder in the municipal corpora-

tion. But perhaps reasons of this character are more properly addressed to the legislative than to the judicial tribunals.

h. Nature of the Work of Caring for or Repairing Streets, Sidewalks and Sewers.—Official action is said to be ministerial when it is absolute, certain and imperative, involving the mere execution of a set task, and when the law which imposes it prescribes the time, mode and occurrence of its performance with such certainty that nothing remains for judgment or discretion: *Chicago v. Seben*, 165 Ill. 371, 56 Am. St. Rep. 245, 46 N. E. 244. In the principal case (*Carson v. Genesee*, ante, p. 127), it was said that the care and repair of streets and sidewalks cannot be reasonably claimed to be the execution of legislative or governmental discretion, but rather a ministerial or business duty which the municipality owes to the inhabitants whom it impliedly invites to travel over its thoroughfares.

In *Hall v. Austin*, 73 Minn. 134, 75 N. W. 1121, Justice Mitchell observed: "In claiming that the city is not liable for the negligence of its officials, such as the street commissioner, counsel for the city fail to distinguish between cases where the duty rests upon a municipal corporation as such and those where the duty rests upon it as an agency of the state in the exercise of police powers in which the corporation as such has no interest. Police officers in preserving public order, firemen in extinguishing or preventing fires, health officers in taking measures to preserve the public health, fall under the latter head, while the duty of keeping public streets in repair falls under the first head and the doctrine of *respondet superior* applies."

In *Missano v. New York*, 160 N. Y. 123, 54 N. E. 744, it was held that the city of New York, in the ordinary and usual care of its streets, both as to repairs and cleanliness, acts in the discharge of a special power granted to it by the legislature, in the exercise of which it is a legal individual, as distinguished from its governmental functions when it acts as a sovereign. So, also, in the appellate division of that state it was held that the duty imposed on a city of keeping its highways free from encumbrances is in its nature private, and the persons employed to perform it are the agents of the corporation in its private capacity: *Scott v. New York*, 27 App. Div. 240, 50 N. Y. Supp. 191. And it has been also held that a municipal corporation acts ministerially in the construction and maintenance of its sewers, and hence that its negligence in respect to them is actionable: *Murphy v. Indianapolis*, 158 Ind. 238, 63 N. E. 469. And it is also said that the power to repair, coupled with the exclusive control of the streets, makes it the ministerial duty of the city to exercise ordinary care to the end that the streets might be reasonably safe for travel. The court saying: "Having the power to keep its streets in repair, the defendant was bound to exercise it. The duty corresponds with, and

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is not less than, the power. For failure to perform that duty the defendant is liable to anyone who, without fault, on his part, suffers injury thereby": *Snook v. Anaconda*, 26 Mont. 128, 66 Pac. 756. The duty of keeping streets in repair was also declared a ministerial duty in *Sutton v. Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273.

But in the New England states, it seems that the work of caring for or repairing streets and highways is regarded as the performance of a governmental act to which the rule of respondeat superior does not apply: See *Judge v. Meriden*, 38 Conn. 90; *Colwell v. Waterbury*, 74 Conn. 568, 51 Atl. 530, 57 L. R. A. 218; *Wellington, Petitioners*, 16 Pick. 87, 26 Am. Dec. 631; *Bates v. Rutland*, 62 Vt. 178, 22 Am. St. Rep. 95.

1. Distinction Between Cities, Counties and Towns Respecting Their Liability for Acts of Their Officers or Agents.—Even in those states where municipal corporations are held liable for defects in streets and other public places a distinction on the question of liability between municipal corporations and counties or towns is made by the court, the courts, as a general rule, holding the latter not liable unless liability is created by statute: *Nagle v. Wakey*, 161 Ill. 387, 43 N. E. 1079; *Carson v. Genesee*, 9 Idaho, 244, ante, p. 127, 74 Pac. 862 (principal case); *Heigel v. Wichita County*, 84 Tex. 392, 31 Am. St. Rep. 63, 19 S. W. 562. Justice Mitchell, in *Snider v. St. Paul*, 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 181, in remarking upon this distinction, observed: "But respecting the principle upon which to rest this distinction or as to the nature of the duties to which it extends, the courts seem to be much perplexed, and their decisions, often in conflict with each other, leave the subject in some confusion. The ground for the distinction is not to be found in the mere fact that one is created by special charter which the other is not, for both are alike subdivisions of the state, created for public, although local, governmental purposes. Nor is it to be found in the fact that the one is given greater powers than the other, unless the power is, not for public governmental purposes, but to engage in some enterprise of a quasi private nature, from which the municipality will derive a pecuniary benefit in its corporate or proprietary capacity; as, for example, power to build gasworks or waterworks, to furnish gas or water to be sold to consumers, or to build a toll bridge, from each of which the city would derive a revenue. In this class of cases it is generally held that corporations are liable for wrongful or negligent acts, because done in what is termed their 'private' or 'corporate' character, and not in their public capacity as governing agencies, in the discharge of duties imposed for the general or public benefit. But it is also generally held that they are not liable for negligence in the performance of a public governmental duty imposed upon them for public benefit, and from which the municipality in its corporate or proprietary ca-

pecity derives no pecuniary profit. The liabilities of cities for negligence in not keeping streets in repair would seem to be an exception to this general rule, which we think the courts would do better to rest either upon certain special considerations of public policy or upon the doctrine of *stare decisis* than to attempt to find some strictly legal principle to justify the distinction."

"And, as already suggested, as to what are public and governmental duties and what are private or corporate duties the courts are not in entire harmony, and their decisions do not furnish a definite line of cleavage between the two. Nor shall we attempt to fix any such line of universal application. For a quite full discussion of the subject see Dillon on Municipal Corporations, c. 23; and for an exhaustive review of the authorities, see *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332."

In *Galveston v. Posnainsky*, 62 Tex. 118, 50 Am. Rep. 517, the court said that the reason for the distinction to the effect that quasi public corporations, such as counties and towns, are not liable, while municipal corporations are, is that counties and towns are but agencies of the state for the general convenience and benefit of the whole state, whereas municipal corporations, created by special charter, are supposed to be created chiefly for the benefit of the inhabitants of the municipality.

In this connection it might be observed that when the nonliability doctrine respecting counties and towns was first promulgated, highways were the principal avenues by which communication was had between the different parts of the state, but that now the transportation facilities afforded by the railroads has relieved highways from much of the travel by the general public which formerly passed over them, although highways may become very important avenues for general travel if the new mode of transportation by automobiles will in the future become less of a plaything and more of a commercial means of transportation.

The court in *Young v. Charleston*, 20 S. C. 116, 47 Am. Rep. 827, in declaring that no right of action existed against a municipality for an injury from a defective condition of the street, gave, perhaps, the strongest reasons which we have observed for the doctrine announced by that line of decisions. It said: "We find it not only difficult but absolutely impossible to perceive any good reason why a person who sustains an injury by reason of a defect in a highway just beyond the corporate limits of a city or town has no right of action against the public authorities charged with the duty of keeping such highway in repair, while such person would have a right of action if the injury he sustained had been received within the corporate limits of such city or town. The duty of establishing and keeping in repair the public highways, whether within or without the corporate limits of a city or town, is a public duty, and whether such duty is imposed upon one set of public officers or another cannot make any

difference in this respect. The character of the duty imposed in both cases is the same, the result to the injured party of a failure to perform such duty is the same, and we are unable to see why the liability should not be the same. The public, generally, as well as the individuals composing the public, have the same and perhaps a greater interest in having the public highways outside as well as those within the limits of incorporated cities or towns kept in good repair; for if an injury should be sustained in a remote or unfrequented part of the public highway, the consequences might be much more serious than if the same injury were sustained within the corporate limits of a city or town where relief could readily be obtained."

j. Distinction Between Omission to Perform Duty and Negligence in Its Performance.—In *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302, the court said: "A distinction has been suggested in argument between an omission or total neglect to perform a public duty, and negligence in the manner of performing it. It has been contended that though the town might not be liable for damages caused by omission to perform the duty, it would be for an injury caused by the negligent and improper manner of performing it. There are doubtless cases where a party who is under no legal obligation to perform an act or service is yet liable for damages caused by his negligence, if he voluntarily enters upon the performance of it. But our discussion of this case has gone on the assumption that it was the duty of the town to provide a safe and suitable place for holding the town meeting; and we are unable to perceive any distinction in principle between a claim to recover damages for a total neglect to perform an admitted public duty, and for neglect to perform it properly and with due care, when the injury complained of happens to the plaintiff in the exercise of his public rights as a citizen of the town. The duty is not performed unless it is properly performed. In both cases the town has neglected to perform, or failed to perform, the public duty which they owed to the plaintiff and other citizens." In this general connection see *Young v. Charleston*, 20 S. C. 116, 47 Am. Rep. 827, and *Bathurst v. McPherson*, 4 Law Rep. (App. Cas.) 256, 33 Moak Eng. Rep. 173.

VI. General Rule Respecting Liability of Municipal Corporations for Injuries from Defective Public Places.

a. General Statement of the Rule.—In many of the states where the right of action against a municipality for causes within the subject of this note is affirmed or not questioned it is because of a statute allowing a recovery in such classes of cases; hence the cases in which a recovery is allowed in the absence of a statute of that character are by no means as numerous as might be thought from the array of cases which affirm recoveries for injuries from defective streets and other public places. It may be safely said that in the majority of states, a recovery is allowed in such cases

although in many of the states, as we have just remarked, the recovery is allowed by statute or charter provisions: See *Albrittin v. Huntsville*, 60 Ala. 486, 31 Am. Rep. 46; *Bradford v. Mayor of Aniston*, 92 Ala. 349, 25 Am. St. Rep. 60, 8 South. 683; *Denver v. Dean*, 10 Colo. 375, 3 Am. St. Rep. 594, 16 Pac. 30; *Peoria v. Simpson*, 110 Ill. 294, 51 Am. Rep. 683; *Anderson v. East*, 117 Ind. 126, 10 Am. St. Rep. 35, 19 N. E. 726, 2 L. R. A. 712; *Manderschild v. Dubuque*, 29 Iowa, 73, 4 Am. Rep. 196; *Board of Commissioners v. Topeka*, 39 Kan. 197, 18 Pac. 161; *Olathe v. Mizze*, 48 Kan. 435, 30 Am. St. Rep. 308, 29 Pac. 754; *O'Neil v. New Orleans*, 30 La. Ann. 220, 31 Am. Rep. 221; *Baltimore v. Marriott*, 9 Md. 160, 66 Am. Dec. 326; *St. Paul v. Seitz*, 3 Minn. 297, 74 Am. Dec. 753; *Young v. Waterville*, 39 Minn. 196, 39 N. W. 97; *Hall v. Austin*, 73 Minn. 134, 75 N. W. 1121; *Whitfield v. Meridian*, 66 Miss. 570, 14 Am. St. Rep. 596, 6 South. 244, 4 L. R. A. 834; *Mans v. Springfield*, 101 Mo. 613, 20 Am. St. Rep. 634, 14 S. W. 630; *Ponce v. Crawford*, 23 Neb. 662, 8 Am. St. Rep. 144, 37 N. W. 609; *Storrs v. Utica*, 17 N. Y. 104, 72 Am. Dec. 437; *Saulsbury v. Ithaca*, 94 N. Y. 27, 46 Am. Rep. 122; *Russell v. Town of Monroe*, 116 N. C. 720, 47 Am. St. Rep. 823, 21 S. E. 550; *Farquar v. Roseburg*, 18 Or. 271, 17 Am. St. Rep. 732, 22 Pac. 1103; *Clark v. Richmond*, 83 Va. 355, 5 Am. St. Rep. 281, 5 S. E. 369; *Weisenberg v. Appleton*, 26 Wis. 56, 7 Am. Rep. 39; *Olson v. Chippewa Falls*, 71 Wis. 558, 37 N. W. 575. In many of the cases just cited the liability is not made dependent upon the existence of a statute imposing such liability. In the principal case (*Carson v. Genesee*, ante, p. 127), it was, as we have seen, held that cities and villages incorporated under the general laws are liable for their negligent discharge of the duty of keeping their streets in a reasonably safe condition for the use of travelers even in the absence of a specific statute imposing such liability: See, also, *Moreton v. St. Anthony*, 9 Idaho, 532, 75 Pac. 262, and *Guthrie v. Swan*, 5 Okla. 779, 51 Pac. 562.

But in some of the states it is insisted that in the absence of any statute imposing liability upon the municipality, a person injured by defects in streets and other public places is without any redress against the municipality: *Arkadelphia v. Windham*, 49 Ark. 139, 4 Am. St. Rep. 32, 4 S. W. 450; *Collier v. Ft. Smith*, 73 Ark. 447, 84 S. W. 480; *Hewison v. New Haven*, 37 Conn. 475, 9 Am. Rep. 342; *Winbigler v. Los Angeles*, 45 Cal. 36; *Tranter v. Sacramento*, 61 Cal. 271; *Chope v. Eureka*, 78 Cal. 588, 12 Am. St. Rep. 113, 21 Pac. 364, 4 L. R. A. 325; *Arnold v. San Jose*, 81 Cal. 618, 22 Pac. 877; *Barry v. Lowell*, 8 Allen, 127, 85 Am. Dec. 690; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Detroit v. Blackeby*, 21 Mich. 84, 4 Am. Rep. 250; *McCuteheon v. Homer*, 43 Mich. 483, 38 Am. Rep. 212; *Roberts v. Detroit*, 102 Mich. 64, 60 N. W. 450, 27 L. R. A. 572; *Goddard v. Lincoln (Neb.)*, 96 N. W. 273; *Pray v. Mayor of Jersey City*, 32 N. J. L. 394; *Carter v. Rahway*, 55 N. J. L. 177, 26 Atl. 96; *Young v.*

Charleston, 20 S. C. 116, 47 Am. Rep. 827; *Parks v. Greenville*, 44 S. C. 168, 21 S. E. 540; *Dunn v. Barnwell*, 43 S. C. 398, 49 Am. St. Rep. 843, 21 S. E. 315; *Navasotoa v. Pearce*, 46 Tex. 525, 26 Am. Rep. 275 (but see *Galveston v. Posnainsky*, 62 Tex. 118, 50 Am. Rep. 517, where a contrary doctrine was announced); *Bates v. Rutland*, 62 Vt. 178, 22 Am. St. Rep. 95, 20 Atl. 278, 9 L. R. A. 363.

It may be observed, however, that in a few of the decisions just adverted to dissenting opinions were filed. In the case of *Detroit v. Blackeby*, 21 Mich. 84, 4 Am. Rep. 450, Justice Cooley filed a vigorous dissenting opinion, and though the opinion in *McCutecheon v. Homer*, 43 Mich. 483, 38 Am. Rep. 212, 5 N. W. 668, which followed the earlier rule was delivered by him, it will be noted that the learned justice does not in any respect retract the reasons for his former dissenting opinion, and follows the rule formerly laid down in his state by reason of the force of precedent. And in *Chope v. Eureka*, 78 Cal. 588, 12 Am. St. Rep. 113, 21 Pac. 364, 4 L. R. A. 325, there was a dissenting opinion by Justice Works concurred in by Chief Justice Beatty, and in *Arnold v. San Jose*, 81 Cal. 618, which was a decision in department, Works and Fox, JJ., concurred solely on the ground that they were bound by the precedent of the decision in bank. Perhaps the ablest and most exhaustive opinion in support of the nonliability rule is that to be found in *Hill v. Boston*, 122 Mass. 345, 23 Am. Rep. 332, where the United States supreme court decisions and the English decisions are very exhaustively reviewed. But in some of the states which have affirmed the nonliability rule, the subject was later on regulated by statute: See *McEvoy v. Sault Ste Marie* (Mich.), 98 N. W. 1006; *Goddard v. Lincoln* (Neb.), 96 N. W. 273; *Dunn v. Barnwell*, 43 S. C. 398, 49 Am. St. Rep. 843, 21 S. E. 35. It was held in *Gordon v. Sullivan*, 116 Wis. 543, 93 N. W. 457, that under a charter provision that an injured party must exhaust his remedy against the lot owner as a condition precedent to his right to maintain an action against the city, a judgment must be recovered against the lot owner first. See, also, *Devine v. Fond du Lac*, 113 Wis. 66, 88 N. W. 913, and *Henker v. Fond du Lac*, 71 Wis. 616, 88 N. W. 187, in this connection. Of course, where the liability rests exclusively on statute, the legislature can limit such liability or remove it entirely: *Goddard v. Lincoln* (Neb.), 96 N. W. 273. And in *Jansen v. Atchison*, 16 Kan. 358 (the opinion being delivered by Justice Brewer), it was held that cities which have the powers ordinarily conferred upon them respecting sidewalks and bridges within their limits owe to the public the duty of keeping them in a safe condition for use in the usual mode by travelers, and that they are liable for negligence in the performance of this duty. And in *Browning v. Springfield*, 17 Ill. 143, 63 Am. Dec. 345, a leading American case, it was held that a municipal corporation is liable for negligence in not repairing streets, where a specific duty

to repair is imposed and adequate powers and means to discharge the duty are provided. As has been stated in the fore part of this note, while an act of a municipal corporation remains judicial, quasi judicial, discretionary or legislative, the municipality will not be liable, but where in carrying into execution such an act, it acts in a ministerial capacity, and in this capacity acts through its agents negligently, unskillfully, and in a manner producing injury, it will generally be held liable: See monographic note to *Perry v. Worcester*, 66 Am. Dec. 435. Or, in other words, if the duty of a municipal officer or agent pertains to mere political or governmental affairs, the municipality is not answerable, but if it pertains to the private affairs of the corporation, it is liable for their negligence the same as private individuals: *Esberg Cigar Co. v. Portland*, 34 Or. 282, 75 Am. St. Rep. 651. A private action does not lie at common law against a municipal corporation for the nonperformance of any public duty imposed on such corporation without its request by general statute unless it receives or is entitled to receive some privilege or profit in consideration of the duty: *Wixon v. Newport*, 13 R. I. 454, 43 Am. Rep. 35; *Blair v. Granger*, 24 R. I. 17, 51 Atl. 1042. Of course, it is generally conceded that a municipality is liable where it negligently performs or fails to perform a ministerial duty imposed on it by law: *Dooley v. Sullivan*, 112 Ind. 451, 2 Am. St. Rep. 209, 14 N. E. 566; *Anderson v. East*, 117 Ind. 126, 10 Am. St. Rep. 35, 19 N. E. 726, 2 L. R. A. 712. But a municipality cannot be made liable, in the absence of a statute giving a remedy, for an injury arising from a negligent use of its property, from which it receives in its corporate capacity no special benefit, or from a negligent use of its property by its officers not acting as agents or servants of the corporation, but as public officers whose duties are defined by general law: *Edgerley v. Concord*, 62 N. H. 8, 13 Am. St. Rep. 533. But, on the other hand, it is also stated by some of the courts that a municipal corporation holding property as a private person is charged with the same duties and obligations devolved upon individuals, and is therefore answerable for negligence in the same manner as a private owner: *Pekin v. McMahon*, 154 Ill. 141, 45 Am. St. Rep. 114, 39 N. E. 484, 27 L. R. A. 206; *Gibson v. Huntington*, 38 W. Va. 177, 45 Am. St. Rep. 853, 18 S. E. 447, 22 L. R. A. 561. Where an officer of a municipal corporation has no other authority than that intrusted to him by law, and he acts beyond that authority and commits a tort whereby a citizen is injured in person or property, the tort is the act of the officer only, and ordinarily no damages can be recovered against the municipality: *Sievers v. San Francisco*, 115 Cal. 648, 56 Am. St. Rep. 153, 47 Pac. 687. In the absence of a statute to that effect, a municipality is not as a rule liable for the negligent acts of its officers: See *Prichard v. Board of Commrs.*, 126 N. C. 908, 78 Am. St. Rep. 679, 36 S. E. 353; *Caspary v. Portland*, 19 Or. 496, 20 Am.

St. Rep. 842, 21 Pac. 1036; *O'Rourke v. Sioux Falls*, 4 S. Dak. 47, 46 Am. St. Rep. 760, 54 N. W. 1044, 19 L. R. A. 789; *Bartlett v. Clarksburg*, 45 W. Va. 393, 72 Am. St. Rep. 817, 31 S. E. 918, 43 L. R. A. 295.

b. **Rule Followed by the Federal Courts.**—The federal courts seem to hold that a municipality is liable for defects in its streets and bridges where there are no decisions in the state from whence the appeal was taken settling the law to the contrary effect: *Weightman v. Corporation of Washington*, 1 Black, 39, 17 L. ed. 52; *Chicago v. Robbins*, 2 Black, 418, 17 L. ed. 298; *Nebraska City v. Campbell*, 2 Black, 590, 17 L. ed. 271; *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440; *Evanston v. Gunn*, 99 U. S. 660, 25 L. ed. 306. In *Detroit v. Osborne*, 135 U. S. 492, 10 Sup. Ct. Rep. 1012, 34 L. ed. 260, the United States supreme court followed the rule laid down by the Michigan court in *Detroit v. Blackeby*, 21 Mich. 84, 4 Am. Rep. 450, denying liability on the part of a municipality for defects in highways and streets, on the ground, however, that it was a decision on a matter of local law which was binding upon the courts of the United States within the state. This ruling of the supreme court was followed in the recent case of *Blaylock v. Muskogee*, 117 Fed. 125, 54 C. C. A. 639, where the United States court of appeals in determining a case from Indian Territory, in a case involving the liability of a city with respect to its streets and sidewalks, construed the law of Arkansas which was adopted by Indian Territory as part of its laws, in the light of the Arkansas decisions respecting liabilities in such cases.

c. **Reasons Assigned by the Courts for the Rule Followed by Them.**—The reasons assigned by the various courts for the rule followed by them are by no means uniform. One court will lay stress upon one line of reasoning, while another court will be equally emphatic that the reason assigned by it is the one which should control these classes of cases. It seems that very often a reason which seems to be quite strong as to a defect in one class of public improvements will seem weak when applied to some other line of public improvement to which it logically should be applicable. Then, of course, the courts do not agree in their classification of cases which fall within the definition of a governmental duty. And some of the courts can see no reason why a municipal corporation having control of its streets should not be liable for defects therein, while those same courts maintaining such liability will concede that there is no corresponding liability on the part of counties or towns, which are charged with a like duty with respect to bridges and highways. But it would seem that with the rapid advance of modern improvements with respect to urban communication, a much stronger reason now exists than formerly for municipal liability, though it must be confessed that the reasons are rather legislative than judicial.

In *Denver v. Dunsmuir*, 7 Colo. 328, 3 Pac. 705, the court reviewed some of the earlier English cases and seemed to come to the conclusion that the basis of recovery, where a recovery was allowed against incorporated cities, was that the privileges and emoluments granted by the charters constituted a consideration for the performance of the duties imposed upon the corporation, and that by the voluntary acceptance of the charter, such corporations bound themselves in the nature of a contract to the performance of such municipal duties. The same conclusions were reached by the court in *Richmond v. Long's Admr.*, 17 Gratt. 375, 94 Am. Dec. 461.

In the recent case of *Bowden v. Kansas City*, 69 Kan. 587, 105 Am. St. Rep. 187, 77 Pac. 573, the court, in holding that a municipal corporation in maintaining a fire station-house was performing a ministerial public duty, for the negligent maintenance of which the municipality was liable, observed: "There is a line of authorities which hold that municipal corporations are liable for the negligent performance only of such ministerial public duties as are imposed upon them by law, but not for the negligent performance of assumed duties which are permissive only. To this doctrine we do not agree. The performance of public duties which are imperative upon the corporation, as well as those which are merely optional, is for the general purpose—the general welfare of the community. When a municipal corporation assumes the performance of a public duty, which was permissive only and enters upon the discharge of such duty, and through the negligent performance thereof by its authorized agents one is injured either in person or property, the corporation cannot escape liability by saying that the performance of this duty was not imperative. The principle here followed is well stated in *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289, and the reasoning therefor we think sound: 'Many authorities may be found among the adjudicated cases where the liability of municipal corporations was based upon, and would seem to be limited to, instances where the duty negligently performed lay in the management of property for which the corporation derived an immediate income. Such distinction cannot be sustained by reason. The liability springs from the duty which is due from every person, whether natural or artificial, to exercise such reasonable care in the conduct and management of his property that it will not unnecessarily result in injury to another. A municipal corporation in control of public property is not exempt from this rule when discharging a ministerial duty.' Mr. Jones, at section 150 of his work on *Negligence of Municipal Corporations*, says: 'The obligation to exercise care does not arise between individuals because one pays money to another and is therefore entitled to its exercise. It springs, as has been said, from the right of personal safety, and is wholly removed from the question of pecuniary profit. So between corporations, whether public or private, and individuals, the duty is not

dependent on the payment of money. It comes into existence from the same right of personal safety. And it is not consistent with principle to hold that a duty exists to exercise care in respect to remunerative public property, but that no such obligation arises in respect to public property from which no income is derived. Moreover, the weight of authority does not justify a distinction of this character. And an examination of the cases upon this question will sustain the conclusion that municipal corporations are responsible in damages for all injuries occasioned by their negligence in the management or care of public property, irrespective of the question whether an income is derived from it.'''

And in *Eastman v. Meredith*, 36 N. H. 284, though the court did not sustain the doctrine of liability when applied to an imperfectly constructed town hall, it discussed the reasons given by courts for the doctrine maintained. It said: "In some of the cases in which cities have been held liable to a civil action for neglect to perform public duties growing out of grants conferring special powers and privileges, stress appears to have been laid on the circumstance that the city derived a pecuniary profit from the grant, in the shape of a toll or rent. But in other cases, where no benefit of that kind was derived from the grant, cities have been held liable and the decision has been put on the ground that the grant of special powers, though not the source of any direct pecuniary profit, was yet in the nature of a special privilege or immunity, granted for the particular local advantage of the city, and placed the corporation on the same footing of liability as if the benefit were in the shape of a rent, or toll, or other pecuniary income; that the grant was made and accepted on the same condition of performing the public duties growing out of it as if it had afforded a direct profit in money.'"

And see, also, the quotation from the opinion of Justice Mitchell in *Snider v. St. Paul*, 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 151, set forth in V, i, in discussing the distinction between cities, towns and counties with respect to liability for acts of their officers. The court, in *Chicago v. Seben*, 165 Ill. 371, 56 Am. St. Rep. 245, 46 N. E. 244, after referring to the distinction drawn between the liability of municipal corporations, proper, and counties and towns, said: "The reason for the distinction, as given by this court in the cases above referred to, is, that cities and chartered towns and villages act under charters, by which valuable privileges are conferred upon them at their request, these privileges being held to be a consideration for the duties imposed upon them; and for the performance of these duties, like individuals, they must be responsible in an action: *White v. County of Bond*, 58 Ill. 297, 11 Am. Rep. 65. Such organizations are the result of the action of the people, impelled thereto by considerations affecting, more or less, their private interest, while counties and towns do not become so at the special request of the people. Such counties and towns are 'involuntary quasi

corporations, being political or civil divisions of the state created by general laws to aid in the general administration of the government': *Symonds v. Clay County*, 71 Ill. 355. Cities are regarded as corporations created for their own benefit, while the inhabitants of a district invested by statute, in invitum, with particular powers, are made corporations without their consent: *Waltham v. Kemper*, 55 Ill. 346, 8 Am. Rep. 652."

The court in *Arkadelphia v. Windham*, 49 Ark. 139, 4 Am. St. Rep. 32, 4 S. W. 450, attempted to show the reasons why no distinction should exist as to the liability for defective highways between cities and counties. Referring to the rule applicable to counties, it said: "It is difficult to understand why this rule does not apply and should not be enforced as to incorporated towns and cities in respect to streets; for like counties, they are a part of the machinery of the state, and are its auxiliaries in the important business of municipal rule and internal administration, and their functions are almost wholly of a public nature; like counties, their functions, rights, and privileges are under the control of the legislature, and may be changed, modified or repealed, as a general rule, as the exigencies of the public service or the public welfare may demand; like counties, they can sustain no right or privilege, or their existence, upon anything like a contract between them and the state, because there is not and cannot be any reciprocity of stipulation, and their objects and duties are wholly incompatible with everything of the nature of a compact. The duty of keeping in repair the public highways in their respective limits is imposed on both for the benefit of the public, without any consideration or emolument received by either. Before the incorporation of the town or city, the county was charged with the duty of keeping its highways in repair. When the town or city becomes incorporated, that duty is transferred to the town or city, from one governmental agency to another. The object, purpose, reason and character of the duty are the same in both cases. This being true, there can be no reason why the town or city shall be any more liable to a private action for neglect to perform this duty than the county previously was, unless the statute transferring the duty clearly manifests an intention in the legislature to impose this liability."

In the recent case of *Rhobidas v. Concord*, 70 N. H. 90, 85 Am. St. Rep. 604, 47 Atl. 82, 51 L. R. A. 381, the suit was for injuries received by a person through the negligence of the agents of the city in placing him in an unsafe place to work while he was employed as a servant of the city in its waterworks department, the court, in discussing the various cases on municipal liability with respect to public improvements, said: "Nonliability has not been put upon the same ground in all cases; nor have the cases in which a liability was found to exist all depended upon a common rule. It is only in an attempt to put upon common ground cases which in-

volve different principles that confusion arises. When the cases are properly classified, they appear to be consistent with each other, and in a general way with the law of other states: See 2 Dillon on Municipal Corporations, secs. 962, 966, 971, 974, 981, 985. Viewed only with reference to the work in which the town was engaged, the decision in *Sargent v. Gilford*, 66 N. H. 543, 27 Atl. 306, that the town was not liable at common law for injuries received by a traveler by reason of a defect in the highway, might seem to conflict with the holding that a town was so liable for building a highway so as to flow water over the abutter's land: *Gilman v. Laconia*, 55 N. H. 130, 20 Am. Rep. 175. But the reason for the different results is plain. To establish his case a plaintiff must show that he had a right which has been infringed. In *Sargent v. Gilford*, 66 N. H. 543, 27 Atl. 306, the only right upon which the plaintiff could rely was the public one of using the highway, and the only duty of the town was the statutory one to maintain the way. The plaintiff's injury was suffered while he was in the exercise of a public right, and for this no action lies at common law: *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302. Take away the public right, and the plaintiff would stand only as a trespasser, to whom the town would owe no positive duty as to the condition of the premises: *Buch v. Amory Co.*, 69 N. H. 257, 76 Am. St. Rep. 163, 44 Atl. 809. 'The wrong thus complained of is not . . . in violation of the plaintiff's common-law right and the defendant's common-law duty, but a violation of the statutory right of a traveler, by a nonperformance of the defendant's statutory duty of keeping the highway in good repair suitable for the travel': *Doe, C. J., Edgerly v. Concord*, 59 N. H. 78, 79. As no private right had been infringed, the plaintiff had no cause of action at common law. In *Gilman v. Laconia*, 55 N. H. 130, 20 Am. Rep. 175, the situation was different. The right there invaded was the private right of property. The plaintiff complained not that the town had failed to perform some public duty, but that it had invaded his property right. It was no answer to this complaint to say that the town was engaged in a public undertaking, or even that it was performing a public duty imposed upon it against its will. If such a defense was available private rights would not be secure against arbitrary forfeiture, and the implied constitutional provision against taking private property for public use without compensation would be abrogated: *Eaton v. Boston etc. R. R. Co.*, 51 N. H. 504, 511, 12 Am. Rep. 147. 'We can solve more easily and safely questions of this character, if we take pains to free our minds from the false notion that a municipality had some indefinable element of sovereign power, which takes from the property of the citizen, as against its aggressions, the protection enjoyed against the aggressions of a natural person. The same constitutional provision that protects the right of private property against invasion by private individuals must protect it from similar

aggressions on the part of municipal corporations': Jeremiah Smith, J., *Eaton v. Boston etc. R. R. Co.*, 51 N. H. 534, 12 Am. Rep. 147." We will advert to those questions which are generally argued as affecting the question of municipal liability in the succeeding subdivisions.

d. Effect Where Negligent or Omitted Act is One Imposed by Municipal Charter or General Law.—When a duty to keep its streets in repair is enjoined on a municipal corporation either by a statute or by a provision which authorizes it to pass ordinances for the laying out and keeping in repair of streets, and with the power to levy taxes for that purpose and presumably to obtain a fund for satisfying claims for damages, a right of action is said to arise for negligence by it with respect to keeping them in repair: *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440; *Cleveland v. King*, 132 U. S. 295, 10 Sup. Ct. Rep. 90, 33 L. ed. 334; *District of Columbia v. Wood*, 136 U. S. 450, 10 Sup. Ct. Rep. 990, 32 L. ed. 472; *Nebraska City v. Campbell*, 2 Black, 590, 17 L. ed. 271; *Evans-ton v. Gunn*, 99 U. S. 660, 25 L. ed. 306. And it is said that a municipal corporation is liable for its failure to comply with a statute requiring it to keep its streets, alleys, sidewalks, roads, and bridges in repair: *Gibson v. Huntington*, 38 W. Va. 177, 45 Am. St. Rep. 853, 18 S. E. 447, 23 L. R. A. 120. But the general statement also is made that municipal corporations are not liable for omissions or negligence in performance of a corporate duty imposed upon them by law or for that of their servants employed therein, when such corporations derive no benefit therefrom in their corporate capacity, unless such an action is given by statute: *Curran v. Boston*, 151 Mass. 505, 21 Am. St. Rep. 465, 24 N. E. 781, 8 L. R. A. 243. And the general statement is also made that municipal corporations are not liable for willful or negligent acts of its agents or servants in performance of a public duty; *Tomlin v. Hildreth*, 65 N. J. L. 438, 47 Atl. 649. Sometimes the qualification is added unless it is within the scope of the corporate powers as prescribed by its charter or by some positive enactment: *Orlando v. Pragg*, 31 Fla. 111, 34 Am. St. Rep. 17, 12 South. 368, 19 L. R. A. 196. In *Denver v. Dunsmore*, 7 Colo. 328, 3 Pac. 705, the court said: "Common reason teaches that streets and bridges must be kept in a safe condition for ordinary use. Under the charter of this city, no one without authority from the corporation can in any manner interfere with its streets or bridges, either for the purpose of making repairs or otherwise. The duty of making repairs is essentially a corporate, as distinguished from a governmental, duty, and it does not extend outside the corporate limits. Property within the city limits is not taxable for road purposes outside such limits." Hence it is said that a municipal corporation is liable for injury sustained by reason of its neglect to keep its streets in proper and safe condition, where it has by its charter the power to lay out, improve

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and keep them in order: *Clarke v. Richmond*, 83 Va. 655, 5 Am. St. Rep. 281, 5 S. E. 369; *Noble v. Richmond*, 31 Gratt. 271, 31 Am. Rep. 726. See, also, *Lord v. Mobile*, 113 Ala. 360, 21 South. 366; *Chicago v. Seben*, 165 Ill. 371, 56 Am. St. Rep. 245, 46 N. E. 244; *Furnell v. St. Paul*, 20 Minn. 117 (Gil. 101); *Welter v. St. Paul*, 40 Minn. 460, 12 Am. St. Rep. 752, 42 N. W. 392; *Farquar v. Roseburg*, 18 Or. 271, 17 Am. St. Rep. 732, 22 Pac. 1103. In some of the cases the fact that the municipality has the authority to raise the necessary funds to keep its streets in repair seems to have been important in holding them liable for defects in the streets: See *Mans v. Springfield*, 101 Mo. 613, 20 Am. St. Rep. 634, 14 S. W. 630; *Russell v. Town of Munroe*, 116 N. C. 720, 47 Am. St. Rep. 823, 21 S. E. 550; *Farquar v. Roseburg*, 18 Or. 271, 17 Am. St. Rep. 732, 22 Pac. 1103. In *Winbigler v. Los Angeles*, 45 Cal. 36, under a general statute which constituted the charter of a city, and which provided that the "city council shall have power . . . to cause the streets to be cleaned and repaired," it was held that no duty was imposed upon the corporation as such, but upon the city council, and hence that the municipality was not liable for defects in a bridge over a public street, the court observing that: "Incorporated cities in this state are mere governmental instruments formed under the state laws for the purposes of internal administration." So, also, in *Tranter v. Sacramento*, 61 Cal. 271, the court, in considering the effect of a charter which read: "The same [the streets] shall be kept in repair at the expense of the city," said that the case was not distinguishable from the case just cited. In *Makepeace v. Waterbury*, 74 Conn. 360, 50 Atl. 876, it was held that the acceptance by the city of a special law amending its charter and imposing on it the duty of repairing all highways rendered it liable for defects in highways within its corporate limits.

e. Effect of Privileges Conferred by Municipal Charter as Consideration for Holding Municipality Liable.—It would seem that the privilege of self-government and of maintaining such local institutions as are conducive to the general prosperity of the people of the limited area bounded by the municipal limits is a consideration which ought to charge the holders of the municipal charter with certain duties and a corresponding penalty for a failure to perform such duties in the same manner that a private corporation receiving a valuable franchise is charged with certain duties in relation to it.

This seems to have been substantially the conclusion reached by the court in *Denver v. Dunsmore*, 7 Colo. 328, 335, 3 Pac. 705, after a review of the English authorities. In the Colorado case, just cited, the court, in discussing the subject, said: "We see no reason why these domestic organizations, upon accepting the benefit of a charter of incorporation conferring the powers ordinarily granted over streets and bridges, should not be held to assume corresponding burdens and responsibilities in respect to them." For a further dis-

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cussion of this phase of the subject see; also, subdivision VI, c, and the following subdivision.

f. Effect of Voluntary Assumption of Act of Constructing or Repairing Public Ways or Places.—In *Weet v. Brockport*, 16 N. Y. 163, which is one of the cases cited frequently on account of the force of the reasoning employed, Justice Selden, in referring to the effect of charter duties, observed "that such charters are never imposed upon municipal bodies except at their urgent request. While they may be governmental measures in theory, they are in fact regarded as privileges of great value, and the franchises they confer are usually sought for with much earnestness before granted. The surrender by the government to the municipality of a portion of its sovereign power, if accepted by the latter, may with propriety be considered as affording ample consideration for an implied undertaking on part of the corporation to perform with fidelity the duties which the charter imposes."

Likewise in *Texas* the court in *Galveston v. Posnainsky*, 62 Tex. 118, 50 Am. Rep. 517, said: "Persons or corporations that voluntarily assume and undertake the performance of a work, even though it be quasi public in its character, ought to be held to impliedly contract that they will exercise due care in its performance, and for a neglect in this respect should be liable for the resulting damage.

"We do not wish, however, to be understood to assert that there is a contract between the state and a municipal corporation accepting a charter, but simply to assert that when such a corporation accepts a charter giving defined powers, the law imposes the duty of faithfully exercising them and gives an action for misfeasance or neglect in this respect to any person who may be injured by such failure of duty."

Hence it is said that a municipal corporation is liable for injuries caused by its negligence, in the discharge of ministerial or specified duties assumed by its charter: *Gibson v. Huntington*, 38 W. Va. 177, 45 Am. St. Rep. 852, 18 S. E. 447, 22 L. R. A. 561. And it is said that where a city is merely authorized by way of special privilege to perform some acts pertaining to the administration of government by way of special privilege, in part for its corporate benefit and the benefit of its inhabitants; the municipality is not clothed with the immunities attaching to governmental acts: *Hourigan v. Norwich*, 77 Conn. 358, 59 Atl. 487. Hence it was held where a municipal corporation accepts a statute authorizing it to lay and maintain water pipes and to supply its inhabitants with water and to receive payment therefor, it is liable for negligence in carrying out the work undertaken by it: *Lockwood v. Dover* (N. H.), 61 Atl. 32. And it was also held, though a charter did not confer upon a city the power of lighting its streets, the assumption of that duty under the authority of the code authorizing it makes it liable: *Winchester v. Carroll*, 99 Va. 727, 40 S. E. 37.

Likewise it was said in *Bowden v. Kansas City*, 69 Kan. 587, 105 Am. St. Rep. 187, 77 Pac. 573, 66 L. R. A. 181, in speaking of this principle of law, that: "When a municipal corporation assumes the performance of a public duty which was permissive only, and enters upon the discharge of such duty, and through the negligent performance thereof by its authorized agents one is injured either in person or in property, the corporation cannot escape liability by saying that the performance of this duty was not imperative."

But in *Springfield etc. Ins. Co. v. Keeseville*, 148 N. Y. 46, 51 Am. St. Rep. 667, 42 N. E. 405, 30 L. R. A. 660, it was held that a municipality in assuming the duty of providing and maintaining a system of waterworks to furnish water for private and domestic purposes and also for public purposes, acts for the benefit of the public and therefore in a governmental capacity, even though it receives compensation for the water furnished. The court, in rendering its opinion, said: "When, in addition to those general powers which are prescribed upon the creation of a municipal corporation, general statutes permit the assumption of further powers as a means of benefiting the portion of the public in the particular locality, they invest the corporation availing itself of the permission with just so much more governmental power. Just as the general powers deposited with the various municipalities are exercised by them in a quasi sovereign capacity, so would any added powers designed for the general public good, though optional with the corporation as to their assumption and in their exercise and performance local, be exercised. They are not special, as being designed for and granted to, a particular municipality; for they are applicable to every part of the body politic where municipal government exists. Such powers, in legal contemplation, appertain to the municipal corporation as such, and may be adopted as a part of the governmental system."

We do not think that the reasoning of the New York court was applicable to the facts to which it was applying them. It would seem that the test as to whether the maintenance of the waterworks system was governmental or ministerial ought not to be made dependent upon the proposition that it was a matter of discretion with the municipality as to whether it would undertake to maintain such a system, but rather upon the character of the work itself which the municipality was given the option to undertake or reject as it saw fit. If the principle announced by the New York court is correct then it would seem that a municipality could operate a railroad or any other commercial business free from any of the liabilities which a private individual or corporation would be subjected to in maintaining and operating railroads and the like.

In *Curran v. Boston*, 151 Mass. 505, 21 Am. St. Rep. 465, 24 N. E. 781, 8 L. R. A. 243, it was held that a municipal corporation maintaining a workhouse, when authorized but not required to do so, does not become answerable for the negligence of its officers on the

ground that it voluntarily assumed the duty of maintaining such workhouse nor because it receives a partial remuneration for its expenditure out of a special class in the community, so that the entire expense is not met by taxation. It would seem, however, that the above case is distinguishable from the New York case on account of the character of the institution.

In *Sullivan v. Helena*, 10 Mont. 134, 25 Pac. 94, it was held that a municipal corporation is liable for defective streets under a charter which declared that "said city of Helena hereby assumes for itself the care and responsibility of streets, avenues and alleys." This case was distinctly approved in the recent case of *Snook v. Anaconda*, 26 Mont. 128, 66 Pac. 756.

g. Effect Where Municipality has Exclusive Control of Streets.—

It has been declared to be the positive duty of a municipal corporation having exclusive control of its streets and sidewalks and having the means within its power to keep them in reasonably safe condition for travel: *Blyhl v. Waterville*, 57 Minn. 115, 47 Am. St. Rep. 596, 58 N. W. 817; *Sutton v. Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 266; *Lorence v. Ellensburg*, 13 Wash. 341, 52 Am. St. Rep. 42, 43 Pac. 20; *Frankfort v. Coleman*, 19 Ind. App. 368, 65 Am. St. Rep. 412, 49 N. E. 474; *Pettengill v. Yonkers*, 116 N. Y. 558, 15 Am. St. Rep. 442, 22 N. E. 1095; *Shearer v. Buckley*, 31 Wash. 370, 72 Pac. 76. So, also, it is held that a municipal corporation having exclusive power over its streets cannot escape responsibility when it authorizes obstructions thereon for private purposes: *Mischke v. Seattle*, 26 Wash. 616, 67 Pac. 357. And a city is held liable for the negligent maintenance of sidewalks, where the municipal authorities took control of the street on which the sidewalk was located and invited the public to use it: *Bromley v. Bodkin* (Ky.), 77 S. W. 696. And under a code provision that cities and towns shall have the care and custody of all public highways and streets, and shall cause them to be kept in repair and free from nuisance, a city is liable for injuries received on its sidewalks by reason of a platform overhead the sidewalk, since the duty enforced by the code is mandatory and not discretionary: *Parmenter v. Marion*, 113 Iowa, 297, 85 N. W. 90. It has also been said that municipal corporations are liable for negligence in the performance of a public duty by their agents and servants under their direction and control: *Rhobidas v. Concord*, 70 N. H. 90, 85 Am. St. Rep. 604; *Inman v. Tripp*, 11 B. L. 520, 23 Am. Rep. 520, 47 Atl. 82. In *Bowden v. Rockland*, 96 Me. 129, 51 Atl. 815, a city was held not to be liable for the negligence of a street commissioner in setting up a derrick used by him in rebuilding a retaining wall for a public street where it did not appear that the city assumed the direction of the work and of the commissioner. But in *Sullivan v. Holyoke*, 135 Mass. 273, a city was held liable for the negligence of its agents employed to care for naphtha used in lighting its street lamps, if it had control of the agent.

h. Effect of Lack of Funds on Question of Liability.—In the principal case (*Carson v. Genesee*, ante, p. 127), it was held where the legislature has granted ample authority to the city to raise revenue to keep its streets open and in repair it cannot excuse its neglect in that respect by saying it has done what the legislature had in mind, and that it is without revenue to pay for its torts. See, also, *Chicago v. Norton Milling Co.*, 97 Ill. App. 651; *Kent v. North Tarrington*, 26 Misc. Rep. 86, 56 N. Y. Supp. 885; *Dallas v. Strayer* (Tex. Civ.), 73 S. W. 980, to the same effect. Consequently, it is said where a city has the power to raise funds to repair its streets and has not exhausted that power, lack of funds is no defense to a suit for injury from a defective sidewalk: *Lord v. Mobile*, 113 Ala. 360, 21 South. 366. See, also, monographic note to *Browning v. Springfield*, 63 Am. Dec. 355. It was said in *Carney v. Marseilles*, 136 Ill. 401, 29 Am. St. Rep. 328, 26 N. E. 491, that where a city is unable to repair a bridge because of lack of funds with which to do so, that it should close the bridge instead of keeping it open for travel as part of one of its highways.

i. Application of the Doctrine of Respondeat Superior to Municipalities.—While a municipal corporation sustains no liability to one suffering injury from the negligent exercise of its legislative or governmental powers, the contrary is true as respects the performance and exercise of mere corporate duties. With respect to matters of the latter class the rule of respondeat superior applies, and the municipality will become liable for the acts of its servants or agents which it has authorized or adopted: *Hollman v. Platteville*, 101 Wis. 94, 70 Am. St. Rep. 899, 76 N. W. 1119. Thus the doctrine of respondeat superior was held to apply in *Minnesota* to the duty of a municipality to care for and supervise the condition of its streets: *Hall v. Austin*, 73 Minn. 134, 75 N. W. 1121.

The reason why the doctrine of respondeat superior does not apply to governmental acts is because the agent of the state is not the superior, since the real superior is the state itself under such circumstances: *Platt v. Waterbury*, 72 Conn. 531, 77 Am. St. Rep. 335, 45 Atl. 154, 48 L. R. A. 691; *Hourigan v. Norwich*, 77 Conn. 358, 59 Atl. 487.

“The rule of respondeat superior is based upon the right which the employer has to select his servants, to discharge them if not competent, or skillful or well-behaved, and to direct and control them while in his employ: *Kelly v. Mayor*, 11 N. Y. 432. The rule has no application to a case in which this power does not exist: *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Rep. 304. It results from the rule being thus based, that there can be but one superior at the same time and in relation to the same transaction (*Laugher v. Pointer*, 5 Barn. & C. 560), as the law does not recognize two principals who are unconnected and severally responsible: *Hobbit v. L. & N. W. Ry.*, 4 Ex. 253; *Pack v. Mayor*, 8 N. Y. 222. And yet there may be subagents,

servants under a servant; and whether they be appointed by the master or principal directly or intermediately through the intervention of an agent authorized by him to appoint servants for him can make no difference: *Quarman v. Burnett*, 4 Mees. & W. 499. That a municipal corporation, as is the defendant, may be placed by the facts of a certain case under the effect of this rule, and made answerable for the negligent use of its well-adapted personal property by its servants or subservant, need not be denied: *Lee v. Sandy Hill*, 40 N. Y. 442; *Clark v. Washington*, 12 Wheat. 40, 6 L. ed. 544; *Scott v. Mayor, etc.*, 37 Law & Eq. 495. The difficulty is not here; it is in determining, in a particular case, whether the negligent employé is the servant of the municipality, for it is not everyone who has in charge personal property owned by the municipality, and sets about some lawful act with it, within the municipal bounds, that is its servant; nor even if his appointment comes intermediately or immediately from the municipality itself": *Maxmilian v. Mayor etc. New York*, 62 N. Y. 160, 20 Am. Rep. 468.

It was sought to apply the doctrine of respondeat superior to the city with respect to certain changes in the grade of a street in *Sievers v. San Francisco*, 115 Cal. 648, 56 Am. St. Rep. 153, 47 Pac. 687, but Justice Henshaw, in response to the contention that the city should be responsible for the error of the surveyor and superintendent of the streets in fixing the grade level, said: "But the doctrine respondeat superior has found little favor in this state when it has been invoked against municipal corporations for dereliction or remissness of its agents in the performance of public or governmental functions of the city, or in the performance of duties imposed upon those officers and presented and limited by express law. In the performance of its governmental or public functions, the corporation is either deemed a public agency, a mandatory of the state, as in *Barnett v. Contra Costa Co.*, 67 Cal. 77, 7 Pac. 177, and, therefore, not liable to be sued civilly for damages, or it is considered in the performance of these functions to be clothed with sovereignty and therefore not liable in an action: *Lloyd v. Mayor of New York*, 5 N. Y. 369, 55 Am. Dec. 347. Where the injury results from the wrongful act or omission of an officer charged with a duty prescribed and limited by law, the officer is not treated as the servant or agent or the corporation in the performance of these duties thus expressly enjoined, but is held to be the servant and agent of, and controlled by, the law, and for his acts the municipality will not be held liable."

j. Effect of Mode of Election or Appointment of Officer or Agent on Liability of Municipality.—The responsibility of a city for the acts of its officers or agents does not depend upon the manner of their appointment, but upon the duty imposed upon them: *Esberg Cigar Co. v. Portland*, 34 Or. 282, 75 Am. St. Rep. 651, 55 Pac. 961, 43 L. R. A. 435. See, also, *Maxmilian v. Mayor etc. of New York*, 62 N. Y. 160, 20 Am. Rep. 468; *Denver v. Peterson*, 5 Colo. App. 41,

36 Pac. 1111, to the same effect. It was held by the United States supreme court in a suit for injuries from a defective street in the city of Washington that the liability of a municipality is not affected by the question whether the persons charged with the duties connected with the streets are elected or not: *Barns v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440.

k. Status of Various Boards, Commissions, and Bureaus as Agents of the Municipality.—A municipal corporation is liable for negligence only in cases where the negligence or nonfeasance of its ordinary agents and servants, as distinguished from that of its officers, caused the injury, or where the loss results from acts merely ministerial, as distinguished from such as are legislative and governmental in character, executed for the sole and immediate benefit of the public, or where the corporation, as a corporation, is exercising its private franchise, powers and privileges which belong to it for its immediate corporate benefit, or is dealing with property held by it for its corporate advantage, gain or emolument, though inuring ultimately to the benefit of the general public: *Wright v. Augusta*, 78 Ga. 241, 6 Am. St. Rep. 256. But where an injury results to a property owner from a wrong or omission of an officer of a municipality, charged with a duty prescribed and limited by law, he is not treated as a servant or agent of the corporation and is not liable for his error or omission: *Sievers v. San Francisco*, 115 Cal. 648, 56 Am. St. Rep. 153, 47 Pac. 687.

From what has been said, it will be seen that it is quite largely a question whether a board, commission, etc., is performing governmental or ministerial duties, in determining whether the municipality should be held liable for the defective condition of public places caused by their negligence. Thus, the court in *Esberg Cigar Co. v. Portland*, 34 Or. 282, 75 Am. St. Rep. 651, 55 Pac. 961, 43 L. R. A. 435, in holding the city responsible for the proper maintenance of its waterworks system, although the legislature had appointed a water committee to control the works, said: "Accordingly, it has been held that municipal corporations are not responsible for the negligence or wrongful acts of health officers or boards of health: *Bryant v. St. Paul*, 33 Minn. 289, 53 Am. Rep. 31, 23 N. W. 220; *Ogg v. Lansing*, 35 Iowa, 495, 14 Am. Rep. 499; *Brown v. Vinalhaven*, 65 Me. 402, 20 Am. Rep. 709; *Barbour v. Ellsworth*, 67 Me. 294; or of employes of the commissioners of public charities and correction: *Maxmillian v. Mayor etc. of New York*, 62 N. Y. 160, 20 Am. Rep. 468; or of officers or members of their fire or police departments: *Hafford v. New Bedford*, 16 Gray, 297; *New Orleans v. Abbagnato*, 23 U. S. App. 533, 62 Fed. 240; *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196; *Burrill v. Augusta*, 78 Me. 118, 57 Am. Rep. 788; *Wilcox v. Chicago*, 107 Ill. 334, 47 Am. Rep. 434; *Richmond v. Long*, 17 Gratt. 375, 94 Am. Dec. 461; *Elliott v. Philadelphia*, 75 Pa. St. 347, 15 Am. Rep. 591; *Gillespie v. Lincoln*, 35

Neb. 34, 52 N. W. 811, 16 L. R. A. 349; Colwell v. Boone, 51 Iowa, 687, 33 Am. Rep. 154, 2 N. W. 614; nor for the negligent construction, maintenance or use of appliances for the extinguishment of fires: Hayes v. Oshkosh, 33 Wis. 314, 14 Am. Rep. 760; Springfield etc. Ins. Co. v. Keeseville, 148 N. Y. 46, 51 Am. St. Rep. 667, 42 N. E. 405, 30 L. R. A. 660; Edgerly v. Concord, 62 N. H. 8, 13 Am. St. Rep. 533; Tainter v. Worcester, 123 Mass. 311, 25 Am. Rep. 90; or for an injury caused by a negligent defect in a school building: Ham v. Mayor of New York, 70 N. Y. 459; Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332; or for an injury received by the giving way of the floor of a town house used for holding town meetings and other public purposes: Eastman v. Meredith, 36 N. H. 284, 72 Am. Dec. 302."

The Brooklyn bridge trustees were held to be the agents of both the cities of New York and Brooklyn, and hence the cities were held liable: Walsh v. New York, 107 N. Y. 220, 13 N. E. 911.

The board of public works of Denver, though appointed by the governor of the state, was held to be the agent of the city for the transaction of its corporate business, and it was held that if through the negligence or malfeasance of this board or of its servants and employes, a cause of action accrues that the city is responsible: Denver v. Peterson, 5 Colo. App. 41, 36 Pac. 111.

A street grading contract with the superintendent of streets was held to be a contract "by the authority of a municipal government": Drew v. Smith, 38 Cal. 325.

The board of street commissioners of a city act in a ministerial capacity and were held individually liable for injury to a person caused by the negligence of their employes in repairing and reconstructing a bridge: Robinson v. Rohr, 73 Wis. 436, 9 Am. St. Rep. 810, 40 N. W. 668, 2 L. R. A. 366. But in New York the commissioner of street cleaning of the city of New York was held to be the agent of the city and not an officer of the general public, and hence that the city was liable for his negligence in acts done in the course of his official duty: Barney Dumping Boat Co. v. New York, 40 Fed. 50. In McCann v. Waltham, 163 Mass. 344, 40 N. E. 20, the charter created a board of street commissioners, and in terms took away the power of the city to superintend and direct the board in detail. A person was injured through the negligence of the assistant superintendent of street by the falling of a gravel bank while digging gravel from the city's land to be used in repairing its streets. The court said: "The superintendent and assistant superintendent are only the hands of the street commissioners, and a part of the organization which, as a whole, takes the place of a surveyor of highways. As is well known, a town is not answerable for the acts of surveyors of highways." The court held the city not liable in accordance with the rule followed in that state.

The fact that the control of a city boulevard is vested by the statute in the board of commissioners of parks and boulevards, rather than in the common council, does not make the boulevard any less a city enterprise; a city may act through such agencies as the legislature directs: *Burridge v. Detroit*, 117 Mich. 557, 72 Am. St. Rep. 582, 76 N. W. 84, 42 L. R. A. 684.

A board of water commissioners is generally held to be such an agent of the city for the negligence of which the city is held responsible: See *St. Germain v. Fall River*, 177 Mass. 550, 59 N. E. 447; *Fox v. Chelsea*, 171 Mass. 297, 50 N. E. 622; *Hourigan v. Norwich*, 77 Conn. 358, 59 Atl. 487; *Deyoe v. Saratoga Springs*, 1 Hun. 341. But in several instances such boards have been held to be independent bodies from the municipality: See *Gross v. Portsmouth*, 68 N. H. 266, 73 Am. St. Rep. 586, 33 Atl. 256; *Ashby v. Erie*, 85 Pa. St. 286.

It seems that in the absence of statutory provisions a municipal corporation is not liable for the negligence of members of its fire department: *Howard v. San Francisco*, 51 Cal. 52. But in *Wagner v. Portland*, 40 Or. 389, 67 Pac. 300, it was held that the board of fire commissioners of the city of Portland stood in the place and stead of the common council, exercising the authority of that body, and hence that its acts were those of the city.

And where an electrical bureau of a municipality pays its revenues into the city treasury, it was held that the city is liable for its acts of negligence: *Bodge v. Philadelphia*, 167 Pa. St. 492, 31 Atl. 728.

VII. Application of the Rule to Various Public Places.

a. **Municipal Water and Gas Works.**—"It is quite universally held," says the court in *Esberg Cigar Co. v. Portland*, 34 Or. 282, 75 Am. St. Rep. 651, 55 Pac. 961, 43 L. R. A. 435, "that when a municipal corporation voluntarily undertakes to construct and maintain water or gas works in pursuance of statutory authority, for the purpose of supplying the inhabitants thereof with water or gas at rates established by the city, it is liable for an injury in consequence of its acts in constructing and maintaining such works, the same as a private corporation or individual. 'A municipal corporation, owning waterworks or gas works which supply private consumers on the payment of tolls,' says Mr. Dillon, 'is liable for the negligence of its agents and servants the same as like private proprietors would be': 2 Dillon on Municipal Corporations, sec. 954.

"The doctrine is well stated by Lewis, C. J., in *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. St. 183, 72 Am. Dec. 730, in speaking of a municipal corporation as the owner of gasworks. 'The supply of gaslight,' he says, 'is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is

granted to a borough or a city, it is a special, private franchise, made as well for the private emolument and advantage of the city as for the public good. The whole instrument is the private property of the city, as much so as the lands and houses belonging to it. Blending the two powers in one grant does not destroy the clear and well-settled distinction, and the process of separation is not rendered impossible by the confusion. In separating them, regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation quoad hoc is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom like special franchises had been conferred.' To the same effect see, also, *Bailey v. Mayor of New York*, 3 Hill, 531, 38 Am. Dec. 669; *Hand v. Brookline*, 126 Mass. 324; *Perkins v. Lawrence*, 136 Mass. 305; *Stoddard v. Winchester*, 157 Mass. 567, 32 N. E. 948; *Aldrich v. Tripp*, 11 R. I. 141, 23 Am. Rep. 434; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; *Scott v. Manchester*, 2 Hurl. & N. 204; 2 *Beach on Public Corporations*, sec. 1140; 1 *Dillon on Municipal Corporations*, 3d ed., sec. 58. Unless, therefore, there is something in the facts of this case to take it out of the general rule, the liability of the defendant to persons injured by the negligent manner in which the waterworks in question were constructed or are maintained cannot be questioned."

So, also, in *Ysleta v. Babbitt*, 8 Tex. Civ. 432, it was held that a waterworks system being a matter of purely local benefit, a city should be held liable for the acts of its officers in wrongfully denying a citizen the proportion of water to which he is entitled; and see *Wagner v. Rock Island*, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519, to the same effect. "When a municipal corporation transacts business as a vender and distributor of water, the relation of her employes is that of servants to her, and the maxim respondeat superior applies to their acts and negligence in conducting this business": *Philadelphia v. Gilmartin*, 71 Pa. St. 140. See, also, *Fox v. Chelsea*, 171 Mass. 297, 50 N. E. 622; *Lynch v. Springfield*, 174 Mass. 430, 54 N. E. 871; *Hourigan v. Norwich*, 77 Conn. 358, 59 Atl. 487, to the same effect.

So, also, in *Chicago v. Selz*, 202 Ill. 545, 67 N. E. 386, it was held that where a waterworks system is operated by a municipality in part for profit, even if principally for public purposes, the municipality is liable for damages caused by negligence in its management. In *Augusta v. Mackey*, 113 Ga. 64, 38 S. E. 339, the city was held liable for the negligence of its employes in leaving a highway outside of the city limits in a defective condition after removing water pipes belonging to the city waterworks.

But in *Miller v. Minneapolis*, 75 Minn. 131, 77 N. W. 788, it was said that in maintaining a water plant and service for the use of its fire department, a city is performing a public or governmental function, and is not liable for the negligence of its officers or agents in permitting the plant to be out of repair. In this connection see, also, *Mendel v. Wheeling*, 28 W. Va. 233, 57 Am. Rep. 665, and *Springfield etc. Ins. Co. v. Keeseville*, 148 N. Y. 46, 51 Am. St. Rep. 667, 42 N. E. 405. 30 L. R. A. 660. And on the general subject of municipal water-works, see *Coyle v. McIntire*, 7 Houst. 44, 40 Am. St. Rep. 109, 30 Atl. 728; *New York v. Bailey*, 2 Denio, 433; *McAvoy v. New York*, 54 How. Pr. 245; *Stock v. Boston*, 149 Mass. 410, 14 Am. St. Rep. 430, 21 N. E. 871; *Watson v. Needham*, 161 Mass. 404, 37 N. E. 204, 24 L. R. A. 207.

In *Stockwell v. Rutland*, 75 Vt. 76, 53 Atl. 132, it was held that a town (though it does not clearly appear whether the rule would be different had it been a city) is not liable to a person injured by falling into an unguarded and unlighted ditch dug for the purpose of removing iron pipes used as an aqueduct.

The city was held not responsible for impure and deleterious water in a well owned by it which was used gratuitously by the public, where it was not claimed that either the well or pump was improperly constructed or out of repair, or that the water became impure by reason of any external exposure which could, by the exercise of any reasonable care, have been avoided: *Danaher v. Brooklyn*, 119 N. Y. 241, 23 N. E. 745, 7 L. R. A. 592. In this general connection see, also, *Sherwood v. District of Columbia*, 3 Mackey, 276, 51 Am. Rep. 776.

b. Police and Fire Departments.—Of course, it does not seem to be questioned that the police department is one of the governmental departments. But in *Twist v. Rochester*, 37 App. Div. 307, 55 N. Y. Supp. 850 (affirmed in 165 N. Y. 619, 59 N. E. 1131), it was held that a city was responsible for allowing a fallen police patrol wire on the street, on the theory that the stringing of the patrol wire was done through some business arrangement on the business side of the municipality, and in no sense in furtherance of a public duty.

As to the fire department of a municipality it was held in *Fredrick v. Columbus*, 58 Ohio St. 538, 51 N. E. 35, that a city is not liable for negligence in furnishing defective fire apparatus, in the absence of a statutory liability. But it was held in *Wagner v. Portland*, 40 Or. 389, 67 Pac. 300, that a municipality engaged in repairing its fire alarm system through private and corporate agencies is acting in its corporate capacity in performance of ministerial acts. And see *Mulcairns v. Janesville*, 67 Wis. 24, 29 N. W. 565, to the same effect.

But a city is not liable for the negligent act of its firemen in so opening the door of an engine-house as to strike and injure a pedestrian on the sidewalks, the doctrine of *respondeat superior* not ap-

plying in such a case: *Kies v. Erie*, 135 Pa. St. 144, 20 Am. St. Rep. 867, 19 Atl. 942. But it has, on the other hand, been held that a municipal corporation is performing a ministerial duty in maintaining a fire station, and it is liable in damages for injuries from its negligence in failing to furnish a fireman a reasonably safe place in which to work: *Bowden v. Kansas City*, 69 Kan. 587, 105 Am. St. Rep. 187, 77 Pac. 573, 66 L. R. A. 181.

c. *Bridges*.—A city owes to the public the duty of keeping its bridges in a reasonably safe condition and is responsible for injuries resulting from their defective condition: *Buechner v. New Orleans*, 112 La. 599, 104 Am. St. Rep. 455, 36 South. 603, 66 L. R. A. 334; *Connerville v. Snider*, 31 Ind. App. 218, 67 N. E. 555. It being said in the case last cited that the liability exists where the municipality has the exclusive power over streets, highways and bridges, and has the power of taxation for general purposes. In *Conrad v. Ithaca*, 16 N. Y. 158, a city was held responsible for a defective bridge built by trustees of a village, who are by its charter commissioners of highways.

In *Levy v. Salt Lake City*, 3 Utah, 63, 1 Pac. 160, it was said: "The waters of a stream running through a city do not belong to the corporation, but if it, in the performance of a public duty, builds a bridge over the stream in an improper and unskillful manner, or if, having built it in all respects in a proper and skillful manner, it ceases to have a just regard for the rights of private owners of adjoining estates, and becomes negligent in sustaining and keeping the same in good repair, and thereby private property is damaged, it cannot escape the just responsibility for its negligence."

In *French v. Boston*, 129 Mass. 572, 37 Am. Rep. 393, it was held that a municipal corporation upon whom the duty is imposed by statute of maintaining a drawbridge as a public highway is not liable for negligence in having the opening sufficiently wide, unless the action is expressly given by statute.

It was said in *Daly v. New Haven*, 69 Conn. 644, 38 Atl. 397, that the duty of a municipal corporation to build and operate a drawbridge as part of a public highway and for the benefit of the public highway up and down the river was a governmental duty, but the court observed: "The duty to keep the bridge in sufficient repair for public travel is quite distinct from the duty to provide and properly operate the draw. The former relates to the bridge as and when it forms part of a public highway open for the passage of persons, animals and vehicles; the latter to the movable part of the bridge when it has, in aid of navigation, temporarily ceased to be a part of such highway; and it does not necessarily follow that the party charged with the former duty is also charged with the latter."

But in *Gray v. Gatesville* (Ark.), 86 S. W. 295, the municipality was held not liable for injuries caused by a defective bridge which it has negligently failed to repair. But it may be remarked in re-

spect to this decision, that Arkansas is one of the states which holds to the nonliability doctrine with respect to streets.

d. *Gutters, Drains and Sewers.*—In *Chicago v. Seben*, 165 Ill. 371, 56 Am. St. Rep. 245, 46 N. E. 244, the court, after referring to the terms of the city and village act with reference to gutters, drains and sewers, said: "The city, being thus required by law not only to construct but to keep in repair its culverts, drains, sewers, and cess-pools is liable in damages for a neglect to perform said duties. It has always been the doctrine of this court that while the legal obligation of the city to construct gutters and grade and pave streets is one voluntarily assumed, yet that when the city constructs these improvements for the benefit of the public, it then becomes the duty of the city to see that they are kept in repair"; citing numerous Illinois authorities.

But a municipal corporation planning and constructing a sewer under its chartered power is not responsible for damages from defects in the plan or in the method of construction: *Willett v. St. Albans*, 69 Vt. 330, 38 Atl. 72. But in this connection see *Beatrice v. Leary*, 45 Neb. 149, 50 Am. St. Rep. 546, 63 N. W. 370. So, also, where a municipal corporation negligently constructs a sewer or maintains it so as to constitute a nuisance it is said to be liable to one injured thereby: *Langley v. Augusta*, 118 Ga. 590, 98 Am. St. Rep. 133, 45 S. E. 486; *Knoxville v. Klasing*, 111 Tenn. 134, 76 S. W. 814. And it is said that the board of aldermen of a city are its agents in the construction of sewers which become the property of the city and the expenses of the construction of which may be assessed upon the lands benefited: *Murphy v. Lowell*, 124 Mass. 564. And it is also held that a municipality is liable for the resulting damages where it allows its drains and sewers to fall out of repair and become clogged: *Brunswick v. Tucker*, 103 Ga. 235, 68 Am. St. Rep. 92, 29 S. E. 701. But it has also been held that a town is not liable for the act of its superintendent of streets, done outside the limits of the highway, whereby water is allowed to flow upon it by reason of the opening of a culvert: *Tyler v. Revere*, 183 Mass. 98, 66 N. E. 597.

And in *Semple v. Vicksburg*, 62 Miss. 63, 52 Am. Rep. 181, it was held that the action of an employé of the city whereby he, in attempting to fix an entrance from a house to the sewer, performed his work so as to cause injury, was a purely mechanical act of a ministerial character.

e. *City Wharves and Ferry-boats.*—The power conferred upon a city to own a wharf and to charge and collect tolls and wharfage for its use is a corporate duty and not a governmental one. Hence the city is liable for the loss of a steamer wrecked by striking upon an iron cylinder negligently permitted to lie on the wharf, but concealed at the time by the water: *Memphis v. Kimbrough*, 12 Heisk. 133. See, also, *Pittsburgh v. Greer*, 22 Pa. St. 54, 60 Am. Dec. 65, for a case with almost similar facts and to the same effect.

In *Townsend v. Boston*, 187 Mass. 283, 72 N. E. 991, the city of Boston was held to be liable to the ordinary duties and liability of a common carrier where it owned and operated a ferry-boat for hire.

f. **Schoolhouses and Parks.**—A city is not liable for the death of a pupil of its public schools caused by the escape of sewer gas into the school building from a sewer which had negligently and with knowledge of the city authorities been allowed to become out of repair and clogged up, since the city in maintaining the schools is performing a public duty: *Folk v. Milwaukee*, 108 Wis. 359, 84 N. W. 420.

A municipal corporation in improving and caring for a public park is exercising a franchise conferred on it for the public good and not for private advantage, and therefore is not liable for injuries received by a laborer in such part through the negligence of its officers: *Russell v. Tacoma*, 8 Wash. 156, 40 Am. St. Rep. 895, 35 Pac. 605.

g. **City Halls, Prisons and Pounds.**—The duty of maintaining a city hall and courthouse building for the use of city and county officers is a public and governmental use, for negligence in the maintenance of which the city is not liable: *Snider v. St. Paul*, 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 151. But in this connection see, also, *Chicago v. Dermody*, 61 Ill. 431; *McCaughy v. Tripp*, 12 R. I. 449. In *Little v. Holyoke*, 177 Mass. 114, 58 N. E. 170, 52 L. R. A. 417, a city was held liable for injuries from a defectively lighted stairway in a city hall building, which contained a large hall which the city let to private persons for public gatherings.

A city is not liable for injuries sustained while confined in a city prison, by reason of the improper construction or negligence in maintenance of such prison: *Gray v. Griffin*, 111 Ga. 361, 36 S. E. 792, 51 L. R. A. 131. See, also, *Gullikson v. McDonald*, 62 Minn. 278, 64 N. W. 812, and *New Kiowa v. Craven*, 46 Kan. 114, 26 Pac. 426, in this connection.

For any negligence of its agents in the construction of a city pound, or in any purely ministerial duty under the pound ordinance, a municipality is liable in the same manner as a private person: *Greencastle v. Martin*, 74 Ind. 449, 39 Am. Rep. 93.

h. **City Cemetery.**—In *Toledo v. Cone*, 41 Ohio St. 149, an employé while employed in working on a vault in a cemetery owned by the city of Toledo was injured by the negligence of the superintendent of such cemetery whose orders and directions he was required to obey. The court held the city liable upon the ground that the cemetery and vault were a source of benefit and advantage to the municipality and involved the same responsibility for their unsafe and improper management which a similar pecuniary and proprietary interest would impose upon natural persons.

i. **City Quarry and Electric Lighting Plant.**—Where a quarry owned by the city was used to furnish rock used in making im-

provements on its streets, it was held that the city was liable for negligence in its operation: *Angusta v. Owens*, 111 Ga. 464, 36 S. E. 830.

A city is liable for negligence in the construction and repair of its electric lighting plant, since the maintenance of such a plant is not the exercise of governmental powers but of proprietary powers for the private advantage of the city: *Bullmaster v. St. Joseph*, 70 Mo. App. 60.

FIRST NATIONAL BANK v. STEERS.

[9 Idaho, 519, 75 Pac. 225.]

CHATTEL MORTGAGES—Possession of Mortgaged Property—Claim and Delivery.—A stipulation contained in a chattel mortgage providing that upon the happening of certain contingencies named, "the mortgagee may take possession of the mortgaged property, using all necessary force to do so, and may immediately proceed to sell the same in the manner provided by law," is valid and enforceable, and upon the happening of such contingency the mortgagee may maintain an action of claim and delivery for the recovery of the mortgaged property from an officer claiming to hold it under a writ of attachment levied subsequently to the inception of the mortgage lien. (p. 177.)

C. Jones, Rice & Thompson and W. E. Borah, for the appellant.

Wallis & French and F. S. Lietrich, for the respondent.

⁵²¹ **AILSHIE, J.** This action was commenced by the plaintiff in claim and delivery to recover the possession of a band of three thousand one hundred head of sheep and seven hundred and fifty head of lambs. Plaintiff filed its complaint alleging that on or about the seventeenth day of October, 1902, one J. M. Jolly was the owner and in possession of a certain band of sheep, and was then indebted to the plaintiff in the sum of five thousand dollars; that upon said date Jolly made, executed and delivered to plaintiff his two certain promissory notes for the sum of five thousand dollars, and secured the same by chattel mortgage upon the above-mentioned personal property. It is further alleged that on the thirteenth day of June, 1903, and while the notes and mortgage were yet unpaid, the defendant, sheriff of Bingham county, levied an attachment upon the property covered by the chattel mortgage, and that at the time of the commencement of plaintiff's action herein the defendant was still wrongfully and unlawfully

withholding possession of the mortgaged property against the will and without the consent of the plaintiff. The mortgage was attached to the complaint and made a part thereof, and contains the following provision:

"It is also agreed that if the mortgagor shall fail to make any payment as in said promissory note provided, or if the said mortgagor shall attempt to sell the property herein described, or any part thereof, without the written permission of the mortgagee or if the said property shall be levied upon by attachment or execution, or if the mortgagor shall attempt to remove the property from the county in which it is situated without the written consent of the mortgagee, the said debt shall at once become due and the mortgagee may take possession of said property, using all necessary force to do so, and may immediately proceed to sell the same in the manner provided by law."

523 To this complaint the defendant filed a general demurrer, which was sustained by the trial court, and the plaintiff refused to amend. Thereupon a judgment was entered dismissing the action and for costs in favor of the defendant. From such judgment the plaintiff has appealed. The only question presented here and upon which we are asked to pass is: Can a mortgagee maintain the action of replevin, or claim and delivery, as it is designated by our statute, for the recovery of possession of personal property covered by his mortgage? It will be seen that in this case the mortgagor contracted with the mortgagee that upon the happening of certain contingencies named therein the mortgagee might take possession of the property. It is contended by the respondent here that a provision of this kind in a mortgage cannot be lawfully made under the laws of this state. This contention is based upon the fact that a mortgage of personal property within this state does not pass any title to the mortgagee, and does not entitle him to the possession of the property, and that therefore the mortgagee obtains no such right of property or right of possession under the chattel mortgage as will authorize him, under any possible contingency to maintain the action of claim and delivery. Sections 3386 and 3387 of the Revised Statutes were amended in 1899 (Sess. Laws 1899, p. 121), and it is provided by these sections that all mortgages of personal property, in order to be valid as against subsequent purchasers and encumbrancers, shall, among other things, be acknowledged and filed for record with the recorder of the county where the property is located. It is not con-

templated by the laws of this state that the possession or right of possession of personal property mortgaged shall be transferred from the mortgagor to the mortgagee and such is not necessary to the validity of the mortgage; but section 3387, *supra*, as amended, closes with the following sentence: "Provided, further that if the mortgagee receive and retain actual possession of the property mortgaged, he may omit the filing of his mortgage during the continuance of such actual possession."

The statute therefore recognizes the right of the mortgagor to contract with the mortgagee, whereby the latter may have ⁵²³ the actual possession of the property mortgaged. In face of the expressed recognition of this right as embodied in the statute, we do not think the court would be justified in holding a stipulation in the mortgage invalid which authorizes the mortgagee upon named contingencies taking possession of the mortgaged property.

It is insisted by the respondent that the judgment of the lower court in this case is authorized and supported in *Rein v. Callaway*, 7 Idaho, 634, 65 Pac. 63, and *Marchand v. Ronaghan*, 9 Idaho, 95, 72 Pac. 731. It may be fairly said that some of the expressions used in each of these cases, if considered apart from the particular facts before the court in each case, would, to a certain extent, justify the conclusion of respondent; but when read in connection with the questions directly under consideration in each of these cases, we think the conclusion drawn therefrom by respondent is not justified. In *Rein v. Callaway* the court was considering the validity of a stipulation in a chattel mortgage, whereby the mortgagee was authorized to seize and sell the mortgaged property without resorting to foreclosure proceedings. The court there held that the mortgagor cannot legally authorize the mortgagee, by provision in the mortgage, to take possession of the mortgaged property and sell it in any other manner than that provided by law for foreclosure of such mortgages.

The validity of a contract authorizing the mortgagee to take possession of the mortgaged property upon breach of any of the terms thereof was not under consideration in that case, and was not passed upon by the court.

In *Marchand v. Ronaghan* there was no provision in the mortgage authorizing the mortgagee to take possession of the property upon breach, and such question was not considered in that case. There the mortgagee had seized the mortgaged

property and sold a large portion of it, and at the time the case was tried still had a small portion thereof in his possession. It was held that he could not foreclose his mortgage in that way, and that he was therefore guilty of conversion and liable to the mortgagor for the value of the property so converted. It will be seen that in both of these cases this court ⁵²⁴ held directly that the mortgagee cannot seize and sell the mortgaged property in any other manner than that provided by statute for the foreclosure of such mortgages. On the other hand, it has never been held by this court that a mortgagee cannot take possession of the mortgaged property when so authorized by stipulation in the mortgage.

It is argued by respondent that the action of claim and delivery for obtaining possession of such property should not be allowed, for the reason that under such stipulation, upon the happening of the contingencies named, the debt becomes due and the mortgagee immediately has the right of foreclosure, which is a more speedy remedy for collection of the debt secured, and that therefore the creditor should not be allowed to maintain one action for the possession of the property and then another for the foreclosure of his mortgage when a single action would suffice for both. It would seem that the foreclosure proceedings would in most cases answer the double purpose of securing possession of the property and making the mortgage debt, but we can conceive of exceptions to this general proposition and of cases arising where it would be necessary to resort to the writ of replevin to enable the officer to get possession of the property before a foreclosure could be had. As soon as he obtains possession of the property he will be obliged to pursue his remedy by foreclosing the mortgage.

An action of claim and delivery merely looks to the recovery of possession of the property described in the mortgage, and cannot in any sense be termed an action for the recovery of the debt secured by the mortgage: *O'Neil v. Whitcomb*, 3 Idaho, 624, 32 Pac. 1133.

It has been suggested that in view of the laws of this state it would be contrary to public policy for the court to sustain a stipulation in a mortgage such as the one here under consideration. No reason has been shown us which we think would justify holding this contract contrary to public policy. This phase of the case is very ably discussed and clearly stated by the supreme court of Texas in *Singer Mfg. Co. v. Rios*, 96 Tex. 174, 97 Am. St. Rep. 901, 71 S. W. 275, 60 L. R. A. 143,

and the court there concludes that there are no reasons of public policy why such contracts should not be upheld.

⁵²⁵ It is true, as argued by respondent, that very few, if any, of the states have statutes exactly like ours with reference to mortgages upon personal property and the foreclosure of the same, but we find nothing in our statute which by any inference precludes the application of the general principle so uniformly applied throughout this country that the mortgagee may in such cases as the one here discussed maintain his action in replevin to recover possession of the mortgaged property.

The following are some of the authorities upholding this principle: *Flinn v. Ferry*, 127 Cal. 648, 60 Pac. 454; *Rankine v. Greer*, 38 Kan. 343, 5 Am. St. Rep. 75, 16 Pac. 680; *Bank of Woodland v. Duncan*, 117 Cal. 416, 49 Pac. 414; *Mayes v. Stephens*, 38 Or. 512, 63 Pac. 760, 64 Pac. 319; *Miller v. Adamson*, 45 Minn. 99, 47 N. W. 452; *Wood v. Weimar*, 104 U. S. 786, 26 L. ed. 779; *Jones on Chattel Mortgages*, secs. 442, 706; *Cobbey on Replevin*, secs. 191, 194.

We therefore conclude that the action of claim and delivery may be maintained in such case. The only thing called to our attention as to the insufficiency of the complaint in this case is the validity of the foregoing stipulation contained in the mortgage, and that question is therefore the only matter we pass upon in this opinion.

Judgment reversed and cause remanded, with directions to the lower court to take further action in accordance with the views herein expressed. Costs awarded to appellant.

Sullivan, C. J., and Stockslager, J., concur.

A Provision in a Chattel Mortgage authorizing the mortgagee to take possession on default in payment of the debt is valid: *Singer Sewing Machine Co. v. Rios*, 96 Tex. 174, 97 Am. St. Rep. 901, and see the cases cited in the cross-reference note thereto.

The Right of a Mortgagee to Maintain Replevin for the recovery of the encumbered property is discussed in the monographic note to *Sinnott v. Feiock*, 80 Am. St. Rep. 747-749.

BEAR LAKE COUNTY v. BUDGE.

[9 Idaho, 703, 75 Pac. 614.]

CONSTITUTIONAL LAW—Constructive Service of Process.—

The remedy by due course of law guaranteed by constitutional provisions requires that before there is a judicial determination affecting any adversary right of persons in property, process to obtain jurisdiction of the person claiming such right shall be issued and served personally, except that the legislature may provide for a substituted or constructive service to be made when actual service is impracticable, but in order to justify constructive service some necessity therefor must appear. (pp. 183, 184.)

CONSTITUTIONAL LAW—Constructive Service of Process.—

A statute which provides for constructive service of summons in certain actions, but fails to require personal service thereof in such actions on known defendants residing within the county or state, is void as being in conflict with constitutional provisions requiring that no person shall be deprived of life, liberty or property except by due process of law. (pp. 184, 185.)

CONSTITUTIONAL LAW—Constructive Service of Process.—

A constitutional provision declaring that no person shall be deprived of life, liberty or property without due process of law, prohibits the legislature from dispensing with personal service of summons in actions to quiet title or settle private adverse rights to property, when such service is practicable and usual under the general laws of the state. (pp. 185, 186.)

CONSTITUTIONAL LAW—Constructive Service of Process.—

A statute dispensing with personal service of summons on known resident defendants in certain cases to quiet title or to settle private adverse rights to property and providing for constructive service upon all defendants in such actions, is unconstitutional as a special law for special cases, contrary to the general law providing for the service of summons, and as violative of a constitutional provision that all laws relating to courts shall be general and of uniform operation throughout the state and that the organized judicial powers, proceedings and practices of all the courts of the same class or grade shall be uniform. (p. 186.)

CONSTITUTIONAL LAW—Costs.—

The legislature has no power to compel a county to pay costs, disbursements and attorney fees in a suit to settle and adjudicate the private rights of persons in and to the use of waters appropriated under the laws of the state. (p. 187.)

CONSTITUTIONAL LAW—Police Power—Constructive Ser-

vice of Process.—Under the police power of the state the legislature has no power to authorize a public officer to bring suit to settle the rights of conflicting claimants to private property in certain cases and to provide for the service of notice or summons by publication upon known resident defendants. (p. 188.)

J. A. Bagley, attorney general, J. E. Babb, E. M. Wolfe and J. R. S. Budge, for the petitioner.

N. M. Ruick and Standrod & Terrell, for the respondent.

707 SULLIVAN, C. J. This is an application for a writ of prohibition to the judge of the fifth judicial district of the state of Idaho. The writ is sought to prohibit the judge of said court from further proceedings in an action pending in Bear Lake county, wherein one Edward J. Turner, as water commissioner for the first district of Idaho, is plaintiff, and 708 all claimants to the use of water of a certain creek known as Dairy Canyon creek, situated in said county, were defendants, none of which defendants are named in said action. The petition or affidavit for said writ sets forth, among other facts, that the said Edward J. Turner is the duly appointed, qualified and acting water commissioner of said water division No. 1 of the state of Idaho; that under and by virtue of an act of the legislature of the state of Idaho, entitled "An act to regulate the appropriation and diversion of the public waters and to establish rights to the use of such waters and the priority of such rights," approved March 11, 1903, the said water commissioner, as plaintiff, did, on or about the fifteenth day of June, 1903, commence in the district court of the fifth judicial district, in and for Bear Lake county, said action. It is also alleged in said affidavit that said suit was brought for the purpose of quieting title to the right to the use of the waters of said stream among the claimants thereof; that said Turner, as such water commissioner, in order to bring and prosecute said action and to carry out and enforce the provisions of the act aforesaid, did, under the powers therein conferred, employ as his attorneys therein, D. W. Standrod and Thomas F. Terrell, Esqs., that said Turner, as water commissioner, caused to be published in the "Paris Post," a weekly newspaper published at Paris, Bear Lake county, Idaho, a notice of the nature and pendency of said action in the manner and form and for the time required by said act, and after due return of said notice and proof of publication thereof in said court, said action was placed upon the calendar of said court for trial, and the same was set for trial on the thirtieth day of October, 1903. It is further alleged that under the provisions of said act and by the bringing of the action aforesaid, heavy costs and attorney's fees are sought to be charged against said county of Bear Lake, and that the same will be charged against said county and judgment rendered against it for such costs and fees if said action is permitted to be tried by said court; that such costs consist of clerk's fees, attorneys' fees, charges for the publication of the notice aforesaid, and other fees necessarily incidental to the trial of said action; it is also alleged

that said act of the legislature ⁷⁰⁹ is unconstitutional and void, and confers no power upon said district court to hear said cause, and that said court is without jurisdiction to hear and determine the same, for the reason that said act seeks to have determined by judicial decision the rights of claimants in and to the waters of said creek without due process of law, and imposes costs and expenses of the litigation involved in said action upon Bear Lake county, which county is not a party to said action and is nowise interested therein. And, after stating other facts, the affiant prays for the issuance of said writ of prohibition against the defendant.

Upon the presentation of said petition or affidavit, the court issued the alternative writ of prohibition, to which writ the said judge, by his counsel, filed a general demurrer, thus admitting that the allegations of said petition were true.

The question submitted for decision involves the constitutionality of the act above referred to, and particularly that part of said act which authorizes the bringing of said action: See Sess. Laws 1903, p. 223. Said act is divided into forty-two sections, and by its varied provisions it is sought to regulate the appropriation and diversion of the public waters of the state and to establish rights to the use thereof and the priority of such rights. The constitutionality of said entire act is questioned on numerous grounds by counsel for plaintiff. But the court has concluded that the question presented by the petition, and the only one in which the plaintiff county is interested, can be disposed of by passing upon the sections of said act that authorize the bringing and maintenance of suits like the one now pending before the defendant judge, and to prevent the trial of which the writ of prohibition is sought in this proceeding. Said sections are numbered 34, 35 and 36, inclusive, and may be stricken from said act, and leave the remaining part of said act a complete and operative act; and we shall not in this opinion pass upon the constitutionality of any part of said act except the three sections above numbered. We shall consider three questions as follows: 1. The sufficiency of the service of summons as provided by said section 34; 2. The provisions of section 35 requiring the costs and disbursement ⁷¹⁰ incurred in the prosecution of said suit and attorneys' fees to be paid, in the first instance, by the county; and 3. Whether the provisions of said three sections come within the police powers of the state. Then (1) as to the provisions of said section 34 authorizing

the service of summons by publication thereof. Said section is as follows:

"Sec. 34. In cases where the waters of any stream used for irrigation, domestic or milling purposes have, by a decree of a court of competent jurisdiction, been adjudicated and allotted, it is hereby made the duty of the water commissioner of the district in which such stream is situated, within three months after the taking effect of this act, to forthwith institute an action in the district court of the county wherein such decree was entered and recorded, and if in more than one county, then the county to be selected by such water commissioner, against any and all persons claiming a right to the use of the waters of said stream or streams, or either of them, for purposes of irrigation, or for domestic or other purposes, and which persons shall not, for any reason, have been included in, or his right shall not have been settled and adjudicated by said decree, and against each and every party to said decree who shall claim or assert any right in addition, or of a date subsequent to the date of such decree. In entitling said action, it shall be sufficient to refer to the defendants as 'all claimants of a right to the use of the water of . . . (giving the name of the stream as given in said decree) whose rights have not yet been adjudicated.' Service of summons upon said parties shall be by publication in a newspaper of general circulation published in the county where such decree is entered and through which said stream flows, and if in more than one county, then in some newspaper of general circulation published in each of said counties, in the same manner and for the same length of time as is now provided for publication of summons out of the district court, except that no affidavit to obtain order for publication of said summons, and no order for the publication of the same shall be required, and the affidavit of the publisher, proprietor, business manager or editor of such newspaper that such summons has been duly published in such newspaper at ⁷¹¹ least once a week for a period of not less than one month, shall be conclusive evidence of such publication and of due service of said summons upon each and every of the defendants."

It is contended that the service of summons as provided by said act is unconstitutional and void, and does not give the court jurisdiction of the defendants, and would result in depriving a person of property without due process of law in contravention of the state and federal constitutions, and that said provision for the service of summons by publication is

not uniform with the provisions of the statute of the state for service of summons in other actions.

The state as well as the federal constitution prohibits the deprivation of private property without due process of law. They contemplate reasonable service of summons upon all defendants. And reasonable service of summons is actual service upon all known defendants who reside in and can be found in the county when the suit is brought; and we think it requires personal service upon all known defendants residing within the state if such defendants can be found therein. The act in question does not require the defendants to be named in the complaint, and in the case pending before the defendant judge the defendants in that suit are designated as follows: "All claimants to the right to the use of water of Dairy Canyon creek whose rights have not yet been adjudicated." The summons in said action designates the defendants in the same manner and does not contain the name of any defendant and provides for constructive service thereof without any showing whatever for its necessity. No doubt personal service might be had upon many of the defendants, if not all of them, in the county, where such suit is pending or through which the decreed stream runs. We know of no precedent for service of summons as provided in this act where the title to property is directly involved between private individuals.

We are not without authority on this question. In *State v. Guilbert*, 56 Ohio St. 575, 60 Am. St. Rep. 756, 47 N. E. 551, 38 L. R. A. 519, it is held that "The remedy by due course of law guaranteed by section 16 of the Bill of Rights extends to all the adversary rights of persons in property, and requires ⁷¹² that, before there is a judicial determination affecting such right, process to obtain jurisdiction of the person claiming it shall be issued and served, except that the legislature may provide for a substituted or constructive service to be made when actual service is impracticable." The above doctrine was approved by the supreme court of Illinois in *People v. Simon*, 176 Ill. 165, 68 Am. St. Rep. 175, 52 N. E. 910, 44 L. R. A. 801.

The former case arose under an act to provide for the registration of land titles. By the provisions of that act one known to claim the title in fee need not be named in the application nor receive a copy of the notice though his place of residence was within the county and known. As to him the only requirement was that he might have a chance to see a notice signed by the applicant addressed "To whom it may

concern." After stating the above facts, among others, the court then propounded the following question: "Is it such notice as the law of the land requires to be given to persons claiming interests in property of the pendency of a judicial proceeding, in which such interests are to be the subject of adjudication and in which unless they appear a decree will be entered precluding their further assertion?" The court then proceeds to answer that question as follows:

"It is said that it is because the proceeding to register land under the act is in rem. Whether it is in rem or in personam is determined by its nature and purpose. To say that the legislature may prescribe such notice as is appropriate to proceedings in rem, and thus invest the proceeding with that character, is to affirm its power to annul the constitutional requirement. In this aspect of the case, and considering the effect of registration upon interests adverse to those of the applicant, the proceeding to register does not, in any substantial respect, differ from a suit quia timet to settle title. It bears the least possible analogy to a proceeding in rem. The res is not taken into the possession of an officer of the court. No charge or lien is asserted against it. It is not to be sold with a view to the distribution of its proceeds, and partakes, therefore, less of the nature of a proceeding in rem than does the foreclosure of a mortgage."

⁷¹³ In *Brown v. Board*, 50 Miss. 468, the court held that the provision of the Bill of Rights "that no person shall be deprived of life, liberty or property without due process of law," inhibits the legislature from dispensing with personal service, where it is practicable, and has been usual under the general law.

In *Tyler v. Judges*, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433 (which was a proceeding for a writ of prohibition and involved the registration laws of that state), referring to the service of notice, the court said: "It would hardly be denied that the statute takes great precautions to discover outstanding claims, as we have already shown in detail, or that notice by publication is sufficient with regard to claimants outside the state. With regard to claimants living within the state, and remaining undiscovered, notice by publication must suffice, of necessity."

It cannot be said that the section under consideration takes great precaution to discover the unnamed defendants residing in the county where the suit is pending. It fails to require the personal service of summons on known defendants resid-

ing in such county, and is in conflict with those provisions of our state constitution as well as the constitution of the United States which provide that no person shall be deprived of life, liberty or property except by due process of law. Those provisions prohibit the legislature from dispensing with the personal service of summons when it is practicable. That is required to give courts jurisdiction under the general laws of the state in regard to procedure in suits brought to quiet title or to settle adverse rights.

This act, so far as actions are concerned, proceeds upon the hypothesis that it is necessary for a public officer to go into court and ascertain and settle titles to water rights between private parties, whether the private owners desire to have them settled or not. And said act provides that the court shall obtain jurisdiction of the persons and property of such private owners without naming them in the complaint or summons, and without personal service thereof, even though their names and residences are known and they reside in the county where such ⁷¹⁴ action is pending and when personal service of summons may be readily and easily made. It thus establishes a different rule for the service of summons than exists for the service of summons when the suit is brought by one of the private owners against others claiming rights to the use of water from the same stream, and for that reason is a special law for special cases.

The court is authorized, by said act, to procure jurisdiction of the person and to settle by judgment and decree valuable property rights; not by due process of law; not by service of summons as provided by the general law of the state for the service thereof, which operates alike upon all citizens of the state and others desiring to have their titles quieted, but by a special, limited and constructive service that is not permitted by the general law of the state. Of course if defendants are in reality unknown, or if known and reside outside of or cannot be found, within the state, publication of summons must, of necessity, be sufficient as provided by our statutes. But in such cases when the name and postoffice address of the defendant is known, a copy of the summons and complaint must be sent to him by mail.

If the power assumed by the legislature in the provisions of this act in regard to the service of summons be sustained by this court, it would lead to most fearful results, as it would enable them by special and limited law to settle controversies over titles to private property and to take the property of one

person against his consent and give it to another. Whatever the legislature may have concluded, the exigencies that required the passage of said sections of said act to settle the conflicting claims of private individuals to the use of certain water, it had no right under said provisions of our constitution to pass a special and limited act confined to a particular class of individuals or case by which they could be deprived of their property in the way provided by said sections. The individual owners of water rights can only be divested of them by judicial proceedings which proceed according to the course of the general law of this state for settling such rights and titles.

We know that requirements less rigid than those above indicated ⁷¹⁵ may be found in cases of taxation and eminent domain, but we know of no precedent for such a notice as is provided in said act where the title to property is directly involved, and the object and purpose of the suit is to quiet titles and settle conflicting private claims to private property.

Said provisions for the service of summons clearly violate the provisions of section 26, article 5 of our state constitution, which provides that all laws relating to courts shall be general and of uniform operation throughout the state and the organized judicial powers, proceedings and practices of all the courts of the same class or grade shall be uniform. And is in violation of the provisions of paragraph 4 of section 19 of article 3 of our constitution, which prohibits special or local legislation regulating practice of courts of justice. We have a general law providing how a summons must be served in cases to quiet title to determine adverse interests to private property, and the provisions therefor in the act under consideration provides a different method in cases brought by a water commissioner for that purpose. Said provisions also violate the provisions of our statute which require suits to be brought in the name of the real party in interest. The water commissioner, a public official, is not the real party in interest in a suit to quiet title or to determine adverse interest in property not claimed by or belonging to him or the state.

As to the constitutionality of the provision requiring the county to pay costs, disbursements and attorneys' fees incurred in the prosecution of such suits: Section 35 of said act provides for the payment of such costs, disbursements and attorneys' fees, and is as follows:

"Sec. 35. Upon the filing of the said complaint by the said water commissioner, any person or persons, parties to said decree or claiming any right or rights thereunder, may appear by complaint in intervention, or answer, and contest the right of any or all of the parties defendant in said action to use the waters of said stream or any part or portion thereof, and the proceedings henceforth shall be conducted in the same manner as actions for the adjudication of water rights upon the streams of this state, and the decree rendered in said action shall be ⁷¹⁶ deemed a part of and supplementary to the original decree, to be enforced in the same manner. The costs and disbursements incurred by said water commissioner in the prosecution of said action, including a reasonable attorney's fee to be allowed by the court, shall be included in the sworn statement provided by law to be filed by the water commissioner with the auditor and recorder of the county or counties through or into which said stream or streams shall flow, and shall be apportioned, collected and paid in the same manner as the expenses of water-master and his deputies are apportioned, collected and paid, and the same shall constitute a lien upon real estate in the same manner and to the same extent as such expenses of the water-master and his deputies."

Said section provides that such costs, disbursements and attorneys' fees shall be included in the sworn statement provided by law to be filed by the water commissioner with the auditor, and shall be apportioned, collected and paid in the same manner as the expenses of water-masters are paid, and that the same shall constitute a lien upon real estate, etc.

In order to ascertain how water-master's expenses are paid, we must turn to sections 29 and 30 of said act, and there we find that they are paid out of the general expense fund of the county upon the sworn statement of the water-master, verified by the water commission, upon which the board of county commissioners shall order a warrant to be issued to the water-master.

We do not think the legislature has the authority to compel by legislation a county to pay the costs, disbursements and attorneys' fees in a suit to settle and adjudicate the private rights of persons in and to the use of waters appropriated under the laws of this state. But it is contended by counsel for defendant that the question of due process of law has no application to the act here involved; that the question is one purely of police power; and that being true, neither the fourteenth amendment of the federal constitution nor section

13, article 1 of the Declaration of Rights of the Idaho constitution has any application; that said prohibitions do not impose any restraint upon the exercise of police power of the state in cases where such power ⁷¹⁷ is properly invoked. We cannot consent to that contention of counsel. While it is a part of the history of this state that crimes have been committed in personal contests between claimants to the right to the use of water, that fact is not sufficient to authorize the state, under the police powers, to settle the rights of conflicting claimants to private property in a suit brought by a public official, and on the service of the notice or summons by publication upon known defendants residing in the county where such suit is brought and pending.

There is no doubt that the legislature has power to regulate, to a certain extent, the use of private property under what is denominated the police power of the state. But under the act in question it has attempted to go beyond its legitimate police power and sought to determine private rights to private property, without due process of law, which it is prohibited from doing by the fourteenth amendment of the federal constitution, and that provision of our state constitution which provides that no person shall be deprived of life, liberty or property except by due process of law. If we were to concede that said provisions were intended as a police regulation, that would not permit the settlement of adverse interest or titles to private property without reasonable notice to the parties interested.

For the reasons above given, said sections 34, 35 and 36 of said act are unconstitutional and void, and the court declines to pass upon the constitutionality of any other sections or provisions of said act, for the reason it is not necessary to do so in order to decide all questions raised by the pleadings in which Bear Lake county is directly interested.

The peremptory writ of prohibition is granted and directed to issue as prayed for in the petition.

Stockslager and Ailshie, JJ., concur.

For Recent Decisions bearing upon the question involved in the principal case see *McClymond v. Noble*, 84 Minn. 329, 87 Am. St. Rep. 354, and note; *State v. Westfall*, 85 Minn. 437, 89 Am. St. Rep. 571; *Parish v. East Coast Cedar Co.*, 133 N. C. 478, 98 Am. St. Rep. 718; *Cunnius v. Reading School Dist.*, 206 Pa. St. 469, 98 Am. St. Rep. 790; *Hubbard v. Hubbard*, 77 Vt. 73, 107 Am. St. Rep. 653.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

IN RE ESTATE OF SPEED.

[216 Ill. 23, 74 N. E. 809.]

CORPORATIONS, FOREIGN.—Statutes Granting Powers, Privileges and Immunities to corporations must be held to apply only to corporations created under the authority of the state, unless the intent that such statutes shall apply to other than domestic corporations is plainly expressed. (p. 191.)

INHERITANCE TAXES are not laid upon the property inherited or devised, but upon the right to take the property by devise or descent. This right owes its existence to statutory enactment and is subject to legislative abrogation or regulation. (p. 192.)

INHERITANCE TAXES, Regulation of Amount of.—In laying an inheritance tax the legislature may consider the relation which the person or corporation given the right of succession sustains to the deceased, to the property or to the state, and may regulate the amount of the tax to be required in view of such relation. (p. 192.)

INHERITANCE TAXES—Distinction Between Classes.—If the constitutional principle that taxes must be uniform as to the classes upon which they operate is observed, the legislature may lay taxes upon the right of one class of persons and corporations to succeed to property of deceased persons and exempt the right of other classes of persons or corporations from such taxation. (p. 193.)

INHERITANCE TAXES—Constitutional Law.—A statute exempting from an inheritance tax property devised to the use of religious, educational or charitable institutions or corporations, does not violate constitutional requirements of uniformity of taxation by reason of a failure to extend immunity to foreign corporations. (p. 193.)

CONSTITUTIONAL LAW.—Corporations are not "Citizens" within the meaning of the constitution of the United States, declaring that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states. (p. 194.)

CONSTITUTIONAL LAW.—Foreign Corporations are not, as to any other state than that of their creation, "persons within its jurisdiction" within the meaning of the fourteenth amendment to the constitution of the United States, until such corporations have complied with the laws of the state authorizing them to do business therein. (p. 194.)

INHERITANCE TAXES—Foreign Corporations.—A statute exempting from an inheritance tax property devised to the use of a religious, educational or charitable corporation, having no power to make dividends or distribute profits, does not apply to foreign corporations. (p. 195.)

C. H. Aldrich, H. S. McAuly and L. Maxwell, Jr., for the appellant.

W. H. Stead, attorney general, N. W. Pinckney and E. M. Ashcraft, for the appellee.

²⁴ BOGGS, J. Fannie Speed, deceased, late a citizen and resident of the state of Kentucky, by her last will and testament devised certain real estate in the city of Chicago to the board of education of the Kentucky Annual Conference of the Methodist Episcopal Church, a corporation organized under and existing by virtue of the laws of the state of Kentucky, with power to form an educational fund, to be styled the "Centenary Educational Fund," for the promotion of literature, education, art, morality and religion within the bounds of said conference, to be held and used exclusively for educational and religious purposes in the state of Kentucky, and ²⁵ it was stipulated that said corporation is not permitted to make dividends or distribution of profits or assets among its members or stockholders, and that said corporation does not have or maintain an office in the state of Illinois or engage in educational or religious work therein. The county court of Cook county ruled that under the provisions of "An act to tax gifts, legacies and inheritances in certain cases, and to provide for the collection of the same," approved June 15, 1895, and the act amendatory thereof approved May 10, 1901, said board of education was liable to pay the sum of six thousand two hundred and eighty dollars and fifty cents as a succession or inheritance tax on the right to take the property under said devise. This appeal questions the correctness of that ruling.

The amendatory act of 1901 was adopted for the purpose of relieving certain bequests, devises or gifts from the operation of the original act of 1895. The amendatory act reads as follows: "When the beneficial interests of any property or income therefrom shall pass to or for the use of any hospital, religious, educational, Bible, missionary, tract, scientific, benevolent, or charitable purpose, or to any trustee, bishop or minister of any church or religious denomination, held and used exclusively for the religious, educational or char-

itable uses and purposes of such church or religious denomination, institution or corporation, by grant, gift, bequest or otherwise, the same shall not be subject to any such duty or tax, but this provision shall not apply to any corporation which has the right to make dividends or distribute profits or assets among its members": Hurd's Stats. 1901, p. 1512.

There is nothing in this amendatory act to indicate that it was the legislative intent that its provisions should apply to corporations created under the laws of a sister state. It is a universally accepted rule of construction that an act of the General Assembly of a state granting powers, privileges or immunities to corporations must be held to apply only to corporations created under the authority of that state over which such state has the power of visitation and control, ²⁶ unless the intent that the act shall apply to other than domestic corporations is plainly expressed in the terms of the act: *Dos Passos on Inheritance Tax Law*, 2d ed., sec. 36; *People v. Western Seaman's Friend Soc.*, 87 Ill. 246; *Baille's Estate*, 144 N. Y. 132, 38 N. E. 1007; *Humphrey v. State*, 70 Ohio St. 67, 101 Am. St. Rep. 888, 70 N. E. 957, 65 L. R. A. 776.

The appellant board contends that the amendatory act of 1901, as construed as having operation only to exempt corporations organized under the laws of the state of Illinois, is inconsistent with the principles of taxation established by sections 1 and 2 of article 9 of the constitution of the state of Illinois. Section 1 of article 9 of the constitution of 1870 has reference only to general taxation, and it is conceded in no manner restricts the power of the General Assembly to lay a tax upon the right to succeed to the title to property within the state by inheritance from a deceased owner of such property, or by devises and bequests to be found in a will of such deceased owner. It is, however, contended that said section 1 establishes the principle that all taxation shall be uniform as to the class upon which it operates; that section 2 of article 9 limits the power of the General Assembly, when enacting statutes providing for the taxation of other objects or subjects than such as are referred to in section 1, to the extent of requiring that the principles of taxation established by said section 1 shall be observed, viz., that any tax so imposed shall be uniform as to the class upon which it operates. The argument further is: "Uniformity of taxation, as extending to persons or property in the same class, implies, necessarily, uniformity of exemption as to these same persons or property. Lack of uniformity in the latter re-

spect would be destructive of the former," and it is urged in the same behalf that under the construction given to the amendatory section of the inheritance law, property devoted to educational, religious or charitable purposes is to be subjected to the inheritance or succession tax if the corporation selected to administer the trust is one organized under the ²⁷ laws of another state than that of Illinois, and that property devoted to the same purposes shall be relieved of the tax if committed to the administration of a corporation created under the laws of the state of Illinois.

Inheritance or succession taxes are not laid on the property inherited or taken by devise or bequest, but on the right to inherit or to take such property. The right to take property in pursuance of the statute of descent or of the statute pertaining to wills is property, but only for the reason that the law-making body of the state has seen fit to create the right to so take by inheritance or by devise or bequest. No person or corporation can inherit property or can take by devise or bequest except when authorized so to do by an act of the legislature. Such right may at any time be abrogated prospectively, at the will of the legislature; or, in the exercise of the same power in quality, though lesser in degree, the law-making department of the state may modify, regulate or impose conditions on the right to succeed by inheritance or devise to property which was owned by a person who has died. Thus, the power of the legislature to lay a tax on the right of any person or corporation to take property by inheritance or by devise or bequest is found to be clear and undoubted. In laying such a tax the legislature may consider the relation which the person or corporation given the right of succession sustains to the deceased, to the property or to the state, and may regulate the amount of the tax to be required in view of such relation, and in exercising this power may lay a tax on the right of one class of persons or corporations to take, and may deem it wise to impose no tax upon the right of other classes or persons or corporations to take. Embraced within the power possessed by the legislature to abrogate the right to take is the power to qualify that right and to impose conditions and burdens upon it. If a burden in the nature of taxation is laid upon the right, the constitutional principle that taxes must be uniform as to the classes upon which they operate must be observed. Subject to this ²⁸ restriction the legislature may lay taxes upon the right of one class of persons and corpora-

tions to succeed to property of deceased persons and exempt the right of other classes of persons or corporations from such taxation.

A clear distinction exists between domestic corporations and corporations organized under the laws of other states. Such corporations fall naturally into their respective classes. Over the one—that which the state has created—the state has certain powers of control, and the other is beyond its jurisdiction. Those of its own creation have been endowed with corporate powers for the purpose of subserving the interests of the state and its people; those which have been given life by the laws of a sister state have entirely different ends and objects to accomplish. The law-making power would find many weighty considerations authorizing the classification of foreign and domestic corporations into different classes, and justifying the creation of liability on the part of foreign corporations to pay a tax on the right to take property by descent, devise or bequest, under the laws of the state, and at the same time leaving the right of a domestic corporation so to take, free of any such exaction.

Nor is the amendatory enactment, though so construed as to create a liability against a corporation existing in virtue of the laws of another state to pay taxes on the right to take property by bequest or devise, from the payment whereof home corporations are exempted, in conflict with the first clause of section 2 of article 4 of the constitution of the United States or of the first section of the fourteenth amendment thereto. Said first clause of section 2 of article 4 is as follows: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Section 1 of the fourteenth amendment reads as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges ²⁹ or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

It has frequently been declared to be a well-established principle of constitutional law that a corporation is not a "citizen," within the meaning of the first clause of section 2 of article 4 of the constitution of the United States, which

declares the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states: *Ducat v. City of Chicago*, 48 Ill. 172, 95 Am. Dec. 529, 10 Wall. 410, 19 L. ed. 972; 10 Cyc. 150; *Tatem v. Wright*, 23 N. J. L. 429; *Pembia Con. Silver Min. Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. Rep. 737, 31 L. ed. 650; *Humphrey v. State*, 70 Ohio St. 67, 101 Am. St. Rep. 888, 70 N. E. 957, 65 L. R. A. 776. It is very clear the word "citizen," as employed in the first section of the fourteenth amendment, has the same meaning as given the word in the first clause of section 2 of article 4 of the constitution. The first sentence of the first section of said fourteenth amendment is devoted to the definition of the meaning of the word "citizen." It declares that all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States. The subsequent declaration, preserving unabridged the privileges and immunities of citizens of the United States, has reference only to the natural persons declared to be citizens by the preceding sentence. A corporation is a "person" within the meaning of the concluding clause of the first section of the fourteenth amendment, which declares that no state shall deprive any person of life, liberty or property without due process of law or deny to any person within its jurisdiction the equal protection of its laws. A corporation is a mere creature of the local law whereby it has its existence. It is not a citizen of the United States, and has no right, because of its chartered powers, to exercise corporate power beyond the territorial limits of the state which created it. Any state of the Union may absolutely and entirely exclude corporations³⁰ organized under the laws of another state, or may impose such conditions for the admission of foreign corporations within the limits of its jurisdiction as its law-making body may consider to be requisite for the protection of its interests or policies: *Magoun v. Illinois Trust etc. Bank*, 170 U. S. 283, 18 Sup. Ct. Rep. 594, 42 L. ed. 1037. Foreign corporations are not "within the jurisdiction" of a state other than that which created them, within the meaning of those words as employed in section 1 of the fourteenth amendment, until they have fulfilled the conditions authorizing their admission into such state: *Blake v. McClurg*, 172 U. S. 239, 19 Sup. Ct. Rep. 165, 43 L. ed. 432. The state of Illinois has adopted certain requirements to be complied with by foreign corporations organized for pecuniary profit who

desire to transact business within the limits of this state, but we are not aware that authority has been granted by any enactment of the state authorizing a corporation organized, as is the appellant board, by a foreign state, to accumulate funds or income to be used for educational and religious purposes in the state in which such foreign corporation was created, to exercise its chartered powers in this state. The stipulated facts show the appellant board has never engaged in this state in the educational or religious work it was chartered to promote and advance; that it does not maintain and never had an office in this state, and that, in fact, it has no power to devote funds which it may receive to educational and religious purposes beyond the bounds of the limits of the state of Kentucky. It is not a "citizen" of the United States and not a person "within the jurisdiction of the state" of Illinois, and hence cannot invoke the benefit and protection of the provisions of the federal constitution here under consideration.

The judgment is affirmed.

Inheritance Taxes are discussed in the monographic note to *State v. Hamlin*, 41 Am. St. Rep. 580-585. Such taxes are not on the property, but on the succession: *Matter of Dows*, 167 N. Y. 227, 88 Am. St. Rep. 508. As to the necessity of a uniform operation of inheritance tax laws on different persons and properties generally, see *Estate of Johnson*, 139 Cal. 532, 96 Am. St. Rep. 161; *State v. Bazille*, 87 Minn. 500, 94 Am. St. Rep. 718, and cases cited in the cross-reference note thereto. A statute imposing an inheritance tax upon foreign charitable corporations operating to some extent within the state, as to property received by them therein by gift, bequest or devise, is not unconstitutional as an unlawful discrimination against them or as denying them the equal protection of the law: *Humphreys v. State*, 70 Ohio St. 67, 101 Am. St. Rep. 888.

CHRISTY v. ELLIOTT.

[216 Ill. 31, 74 N. E. 1035.]

APPEAL—Constitutionality of Statute.—The question of the constitutionality of a statute upon which suit is brought may be raised so as to entitle it to review on appeal, by an exception taken to an instruction based upon the provisions of such statute and stating them to be the law. (p. 199.)

AUTOMOBILES—Constitutional Law.—A statute which imposes certain reasonable duties upon drivers of automobiles and limits their speed upon public highways is valid as a police regulation and not unconstitutional as class legislation. (p. 200.)

CONSTITUTIONAL LAW—Automobiles—Title of Act.—The title of an act entitled "An act to regulate the speed of automobiles and other horseless conveyances upon the public streets, roads and highways of the state," is sufficient to embrace the subject as to when an automobile driver may be required to bring his machine to a full stop. (p. 204.)

AUTOMOBILES—Regulations—Construction of Statute.—A statute providing that the driver of an automobile shall stop his machine "whenever it shall appear that any horse driven or ridden by any person is about to become frightened," means whenever, by the exercise of reasonable care and diligence on the part of the automobile driver, it appears to him that such horse is about to become frightened. (p. 205.)

NEGLIGENCE—Measure of Damages—Instructions.—An instruction "that in determining the question as to whether the defendant was exercising reasonable care and diligence upon the occasion in question you have a right to take into consideration the situation and condition of the parties," is not objectionable as necessarily authorizing the jury to consider the wealth of the defendant and the poverty of the plaintiff in assessing the damages. (p. 206.)

NEGLIGENCE of Third Person.—If an injury is the result of the negligence of the defendant and that of a third person, the plaintiff, who is free from negligence, may recover if the negligence of the defendant was an efficient cause of the injury. (p. 207.)

AUTOMOBILES—Rights in Highways.—An owner of an automobile has a right to use the highways, provided he uses reasonable care and caution for the safety of others and does not violate the law of the state. (p. 207.)

AUTOMOBILES—Duty to Stop—Signals.—The duty of an automobile driver to stop his machine when he sees that horses are frightened does not depend upon his receiving a signal from the person in charge of such horses. (p. 209.)

The statute of Illinois, appearing in the Session Laws of Illinois of 1903, pages 301, 302, is entitled, and provides as follows:

"An act to regulate the speed of automobiles and other horseless conveyances upon the public streets, roads and highways of the state of Illinois.

"Section 1. That it shall be unlawful for any person or persons to drive, run, conduct or propel any automobile or

any other conveyance of a similar type or kind used for the purpose of transporting or conveying passengers or freight, or any other purposes, whether said automobile or conveyance or such other vehicle is propelled by steam, gasoline or electricity or any other mechanical power, at a rate of speed in excess of fifteen miles per hour upon any road or highway in the state of Illinois 'or any other rate of speed established by ordinance of any city or village of said state, upon any street within such city (or) village': Provided, that nothing in this section contained shall prohibit or prevent the running of such automobiles or vehicles at a greater speed than fifteen miles per hour upon such streets within incorporated cities or villages, as may be set apart for the use of such automobiles and other conveyances, and upon which said cities or villages may, by ordinance, permit a greater or require a less rate of speed than herein specified.

"Sec. 2. Whenever it shall appear that any horse driven or ridden by any person, upon any of said streets, roads or highways is about to become frightened by the approach of any such automobile or vehicle, it shall be the duty of the person driving or conducting such automobile or vehicles to cause the same to come to a full stop, until such horse or horses have passed.

"Sec. 3. Any person or persons violating the provision of the foregoing section one (1) or two (2) shall, upon conviction, be sentenced to pay a fine of not less than twenty-five (25) dollars nor more than two hundred (200) dollars, and may be confined in the county jail not to exceed three (3) months, or both, in the discretion of the court.

"Sec. 4. In any action brought to recover any damages, either to person or property caused by running such automobiles or vehicles at a greater rate of speed than designated by section 1, the plaintiff or plaintiffs shall be deemed to have made out a prima facie case, by showing the fact of such injury, and that such person or persons driving such automobiles or vehicles was, at the time of the injury, running the same at a speed in excess of that mentioned in section 1."

G. Shumway and W. T. Church, for the appellant.

W. J. Graham and H. E. Burgess, for the appellee.

²⁸ MAGRUDER, J. 1. It is strenuously insisted by the appellee that this court has no jurisdiction to entertain this cause, and that the appeal from the judgment of the circuit

court should have been taken to the appellate court. The ground upon which the cause is brought by the appellant to this court is that the constitutionality of the act, regulating the speed of automobiles, etc., set forth in the statement preceding this opinion, is involved in the cause. The appellee contends that inasmuch ³⁷ as the constitutionality of the act was not challenged or questioned by the appellant upon the trial below, nor until the written reasons were filed in support of the motion for new trial, the record is not in such condition as to present to this court the question of the constitutionality of the act. In the investigation of this subject we have entertained much doubt as to whether the case is properly here, and think there is much force in the position of appellee.

This court has held that the constitutionality of a statute may be raised by demurrer to the declaration: *Shepherd v. City of Sullivan*, 166 Ill. 78, 46 N. E. 720; *Woodruff v. Kellyville Coal Co.*, 182 Ill. 480, 55 N. E. 550. Here, however, no demurrer was filed to the declaration. This court has also held that the constitutionality of a statute may be raised by an objection to evidence offered under it: *Pearson v. Zehr*, 125 Ill. 573, 18 N. E. 204. Here, no objection was made to the introduction of any testimony by the appellant upon the ground that the statute was unconstitutional, so far as the bill of exceptions shows. After the verdict was rendered, however, the appellant made a motion for new trial, and filed fifteen written reasons in support thereof. The fourteenth reason was as follows: "The court erred in the giving of instruction for plaintiff No. 1, as the act of 1903 to regulate the speed of automobiles is void." The fifteenth reason was as follows: "The court erred in the giving of plaintiff's instruction No. 4, as section 2 of the act of 1903 to regulate the speed of automobiles is void, not being expressed in the title of said act." The position of the appellee is, that the question of the constitutionality of the act could not be raised for the first time on motion for new trial, inasmuch as no ruling had been asked of the trial court upon this question during the progress of the trial.

Appellant, however, excepted to the giving of instructions numbered 1 and 4 in behalf of the appellee. Instruction numbered 1 told the jury that the statutes of this state provide that it shall be unlawful for any person to drive, run, conduct or propel any automobile, whether propelled by ³⁸ steam, gasoline, or electricity, or any other mechanical

power, at a rate of speed in excess of fifteen miles an hour upon any road or highway in the state, unless the same was within some village or city where such speed was allowed by ordinance; and also instructed them that if they found from the evidence that, at the time the injuries in question occurred, the defendant was driving an automobile at a rate of speed in excess of fifteen miles an hour upon a public highway as described in the declaration, and that on account of the defendant so driving such automobile, the plaintiff was injured, as alleged in the first count of the declaration, and was then and there exercising reasonable care and caution in that behalf, they should find for the plaintiff, etc. The exception taken to the giving of this instruction raised the question whether the instruction correctly stated the law or not, and if the act limiting the speed of automobiles to fifteen miles an hour was unconstitutional, then the instruction did not state the law correctly.

Instruction numbered 4, given in behalf of appellee, told the jury that, if they believed from the evidence that the appellant was driving the automobile along the public highway, and that it appeared to him, or might by the exercise of reasonable diligence on his part have appeared to him, that the team of mules, drawing the conveyance in which the plaintiff was riding, was about to become frightened, and if they further found that the defendant did not thereupon cause the automobile to come to a full stop until said team had passed, and that plaintiff was himself exercising reasonable care and caution, and was injured by reason of the failure of the defendant to bring the automobile to a full stop, then the defendant was liable to the plaintiff for the loss and damages sustained by him by reason of such injuries, etc. The exception to the giving of this instruction raised the question whether or not it stated the law correctly, and if section 2 of the act is unconstitutional, for the alleged reason that the subject matter of the section is not expressed in the title of ³⁹ the act, then instruction numbered 4 did not state the law correctly. If a demurrer to a declaration, which sets up the provisions of a statute, under which suit is brought, raises the question of the constitutionality of such statute, it would seem that exception taken to an instruction based upon the provisions of a statute would also raise the question whether the statute was constitutional or not. We find in the record, among the reasons in favor of the motion for new trial, two reasons which expressly specify the unconstitution-

ality of the statute as grounds for challenging the correctness of the court's action in giving two of the instructions, which were specially excepted to by the appellant. We are inclined, therefore, to the opinion that the validity of the statute is involved upon the record.

2. The first section of the statute is challenged as being unconstitutional, upon the alleged ground that it is class legislation, because, as is insisted, it unjustly discriminates against automobiles, and other horseless conveyances, and, therefore, against manufacturers of the same. In other words, appellant contends that the owners of automobiles or horseless conveyances and drivers of the same are entitled to the same rights and privileges under the law, as the owners or drivers of any other vehicles, and that any law which deprives them of such rights or that restricts and limits such rights is unconstitutional as being in conflict with section 2 of article 2 of the state constitution, which provides as follows: "No person shall be deprived of life, liberty or property without due process of law." We are of the opinion that the act is not unconstitutional for the reason thus stated.

The passage of the act was clearly within the power of the legislature, because it is a police regulation. The legislature is entitled to exercise the police power wherever the public health or comfort or the safety or welfare of society requires it to do so. We have said: "The state inherently possesses, and the General Assembly may lawfully exercise, such power of restraint upon private rights as may be found ⁴⁰ to be necessary and appropriate to promote the health, comfort, safety and welfare of society. This power is known as the police power of the state. In the exercise of this power the General Assembly may, by valid enactments—i. e., 'due process of law'—prohibit all things hurtful to the comfort, safety and welfare of society, even though the prohibition invade the right of liberty or property of an individual": *Bailey v. People*, 190 Ill. 28, 83 Am. St. Rep. 116, 60 N. E. 98, 54 L. R. A. 838; *Booth v. People*, 186 Ill. 43, 78 Am. St. Rep. 229, 57 N. E. 798, 50 L. R. A. 762; *Ruhstrat v. People*, 185 Ill. 133, 76 Am. St. Rep. 30, 57 N. E. 41, 49 L. R. A. 181.

The act in question was designed to secure the safety of travelers upon the public highway. It is a matter of common knowledge that an automobile is likely to frighten horses. It is propelled by a power within itself, is of unusual shape and form, is capable of a high rate of speed, and produces a puffing noise when in motion. All this makes such a horseless

vehicle a source of danger to persons traveling upon the highway in vehicles drawn by horses.

Such laws as the act here in question have never been regarded as class legislation, simply because they affect one class and not another, inasmuch as they affect all members of the same class alike, and the classification involved in the law is founded upon a reasonable basis. "If these laws be otherwise unobjectionable, all that can be required in these cases is, that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the legislature must judge": Cooley's Constitutional Limitations, 6th ed., pp. 479-481. In *Barbier v. Connolly*, 113 U. S. 32; 5 Sup. Ct. Rep. 360, 28 L. ed. 923, the supreme court of the United States said: "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment," which amendment referred to by the court is the fourteenth amendment to the constitution of the United States, which provides that "no state shall . . . deny ⁴¹ to any person within its jurisdiction the equal protection of the laws."

"Laws public in their objects may be confined to a particular class of persons, if they be general in their application to the class to which they apply, provided the distinction is not arbitrary, but rests upon some reason of public policy growing out of the condition of business of such class": *Allen v. Pioneer-Press Co.*, 40 Minn. 120, 12 Am. St. Rep. 707, 41 N. W. 936, 3 L. R. A. 532. In *Minneapolis etc. Ry. Co. v. Beckwith*, 129 U. S. 29, 9 Sup. Ct. Rep. 208, 32 L. ed. 585, it was said: "The concluding clause of the first section of the fourteenth amendment simply requires that such legislation shall treat alike all persons brought under subjection to it. The equal protection of the law is afforded when this is accomplished. . . . The discriminations, which are open to objection, . . . are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges, under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the law." The statute in controversy in the case at bar certainly applies to all drivers of automobiles without distinction, and is, therefore, general as to that class, and, for

the reason that such horseless vehicles constitute a source of danger to travelers upon the highway, it cannot be said that the classification is not a reasonable one.

In *Gartside v. City of East St. Louis*, 43 Ill. 47, this court, in discussing an ordinance requiring certain teamsters, engaged in hauling coal through the city to pay a certain license, said (page 51): "From the extent and character of his business, these teams must have passed and repassed almost constantly. This, then, renders the repair of the streets more expensive and more necessary from the fact that his vehicles seem to be large and of considerable weight. For the comfort and convenience of the citizens of the place, as well as persons not residing therein, but traveling on its streets, it is necessary that they should be repaired and kept in good condition"; ⁴² and the ordinance, for the reasons stated, was upheld in that case.

In *Sanitary Dist. v. Bernstein*, 175 Ill. 215, 51 N. E. 720, this court held that a discrimination between different classes of litigants, which was merely arbitrary in its nature, is a denial of the right of litigants to equal protection of the law, but that, if there is a reasonable ground of distinction, the legislature has discretion to impose reasonable conditions or restrictions, which it deems in furtherance of justice. In *Lasher v. People*, 183 Ill. 226, 231, 75 Am. St. Rep. 103, 55 N. E. 664, 47 L. R. A. 802, it was said by this court: "The legislature have power to form classes for the purpose of police regulation, if they do not arbitrarily discriminate between persons in substantially the same situation. The discrimination must rest upon some reasonable ground of difference." In *Minneapolis etc. R. Co. v. Beckwith*, 129 U. S. 29, 9 Sup. Ct. Rep. 208, 32 L. ed. 585, the supreme court of the United States said: "When the calling or profession or business is attended with danger, or requires a certain degree of scientific knowledge upon which others must rely, then legislation properly steps in to impose conditions upon its exercise." It is certainly true that the business of the man, who operates and propels an automobile along the public highway, called a chauffeur, is such a business as is above alluded to. It is attended with danger and requires a degree of scientific knowledge upon which others must rely. These horseless vehicles are certainly capable of being propelled at a greater rate of speed than any ordinary vehicles known to the traveling public prior to their invention, and if they may travel at any rate of speed of which they are capable, per-

sons injured would have no remedy, except for such negligence as the common law gives a remedy for.

Statutes regulating the speed of persons traveling upon public highways have been upon the statute books of this state for many years and have never been regarded as invalid. A statute of this state provides that no person driving any carriage upon any public highway shall run his ⁴³ horses or carriage, or permit the same to run, etc.: 3 Starr & Curtis' Annotated Statutes, 2d ed., p. 3604. A statute of this state provides that it shall not be lawful for the driver of any carriage, used for the purpose of conveying passengers for hire, to leave the horses attached thereto while passengers remain therein, without making such horses fast, etc.: 3 Starr & Curtis' Annotated Statutes, p. 3605. It is provided by statute in this state that persons, traveling with carriages and meeting on any public highway, shall turn to the right: 3 Starr & Curtis' Annotated Statutes, p. 3604. A statute of this state also provides that persons in charge of any steam-engine, propelled over the highways of the state by steam power, shall stop the same whenever they meet persons going in the opposite direction on said highways with horses or other animals, until the latter shall have passed by: 3 Starr & Curtis' Annotated Statutes, p. 3628. While these enactments may not establish the constitutionality of the law under consideration, they at least show that the legislative department of the government has supposed that such legislation is not inhibited by the fundamental law, and the fact that the validity of such laws has not been questioned for a long series of years is no light consideration in passing upon the validity of a law: *Cairo etc. R. Co. v. Warrington*, 92 Ill. 157.

The court has recognized the validity of ordinances regulating the speed of trains, and of statutes requiring railroads to fence their tracks, and to bring their trains to a full stop before crossing another railroad. It has been held that "the safety of the traveling community demands that these police regulations shall be enforced": *Indianapolis etc. R. Co. v. People*, 91 Ill. 452; *Cairo etc. R. Co. v. Peoples*, 92 Ill. 97; *Chicago etc. R. Co. v. Reidy*, 66 Ill. 43; *Cairo etc. R. Co. v. Warrington*, 92 Ill. 157; *Chicago etc. R. Co. v. People*, 120 Ill. 667, 12 N. E. 207.

3. Section 2 of the act in question is said to be in conflict with section 13 of article 4 of the constitution, which provides that "no act hereafter passed shall embrace more ⁴⁴ than one subject, and that shall be expressed in the title. But if

any subject shall be embraced in an act, which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." The second section provides that the person driving an automobile shall cause the same to come to a full stop—whenever it shall appear that any horse driven or ridden by any person upon any street, road or highway is about to become frightened by the approach of any such automobile—until such horse or horses have passed. The title of the act is "An act to regulate the speed of automobiles and other horseless conveyances upon the public streets, roads and highways of the state of Illinois." It is said that speed means action, and is directly opposed to stopping, which is inaction, and that, therefore, stopping a machine does not come within the meaning of regulating its speed. The objection is hypercriticism. Section 13 of article 4 of the constitution was intended to put an end to certain vicious legislation, but its design is not to embarrass legislation by making laws unnecessarily restrictive in their scope and operation: *People v. Nelson*, 133 Ill. 565, 27 N. E. 217. Limitation of the speed of automobiles upon the public streets, roads and highways is for the protection of travelers and drivers of horse-drawn vehicles upon such highways. The requirement that the automobile driver shall under certain circumstances bring his machine to a full stop is reasonably connected with the purpose of such protection, as expressed in the title. The cessation of the speed of the automobile altogether, or its reduction to a scarcely perceptible movement, is not incongruous with the title of the act. This provision of the constitution must receive a liberal construction. Unless the provision in an act contains matter incongruous with the title, or having no proper connection with or relation to the title, it will not be void as not embraced therein: *Hudnall v. Ham*, 172 Ill. 76, 49 N. E. 985. All matters are properly included in the act, which are germane to the title. If all the provisions relate to the one subject indicated⁴⁵ in the title, and are parts of it, or incident to it, or reasonably connected with it, or in some reasonable sense auxiliary to the object in view, then the provision of the constitution under consideration is obeyed: *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 40 N. E. 454, 29 L. R. A. 79; *Boehm v. Hertz*, 182 Ill. 154, 54 N. E. 973, 48 L. R. A. 575. The stopping of an automobile when a horse appears to be frightened until such horse shall pass is embraced within the subject of regulating the speed of automobiles, as indicated

by the title. It cannot be said that the subject matter of section 2 is not reasonably connected with the subject mentioned in the title of the act. The stoppage of an automobile until a frightened horse has passed it is, certainly, in a reasonable sense, auxiliary to the object of regulating the speed of an automobile upon the public highway. We are of the opinion, therefore, that section 2 is not unconstitutional for the reason insisted upon.

4. Various errors are assigned upon the giving and refusal and modification of instructions by the trial court. In addition to the objection already mentioned to instruction numbered 4 given for appellee, that instruction is said to be erroneous upon the alleged ground that it requires the jury to find whether it "might, by the exercise of reasonable diligence on his part, have appeared to him [the automobile driver] that the team of mules drawing the conveyance in which plaintiff was riding was about to become frightened." Section 2 of the act says: "Whenever it shall appear that any horse driven or ridden by any person," etc., is about to become frightened, etc. The contention of counsel for appellant is that, under the act, it must appear to the driver of the automobile that the horse is about to be frightened, and that it was erroneous for the instruction to say: If it might so appear "by the exercise of reasonable diligence." The instruction is not erroneous for the reason thus indicated. If it might appear to the driver of the automobile, by the exercise of reasonable diligence upon his part, that the horse was about to become frightened, it would be his duty to stop, because ⁴⁶ otherwise he might shut his eyes and claim that it did not appear to him that the horse was about to be frightened. The construction contended for would permit the driver of the automobile to willfully evade the statute, and to take advantage of his own willfulness or gross negligence. Such a person might purposely refuse to look toward an approaching team, and, when put upon the witness-stand, could truthfully say that it did not appear to him to be frightened because he did not look toward it. He is equally at fault when such circumstance might appear to him, if he would exercise reasonable diligence to observe the condition of the team, which he was passing.

In *Shinkle v. McCullough*, 116 Ky. 960, 105 Am. St. Rep. 249, 77 S. W. 196, which was an action for injuries sustained by plaintiff by his horse having been frightened by the defendant's automobile, which was alleged to have been running

at an excessive rate of speed, the court of appeals of Kentucky said: "While automobiles are a lawful means of conveyance, and have equal rights upon the public roads with horses and carriages, their use should be accompanied with that degree of prudence in management, and consideration for the rights of others, which is consistent with their safety. If, as the jury found by their verdict, appellant knew, or could have known by the exercise of ordinary care, that the machine in his possession and under his control had so far excited appellee's horse as to render him dangerous and unmanageable, it was his duty to have stopped his automobile and taken such other steps for appellee's safety as ordinary prudence might suggest."

Objection is made to an instruction given for appellee because it told the jury "that in determining the question as to whether the defendant was exercising reasonable care and diligence upon the occasion in question, you have a right to take into consideration the situation and condition of the parties," etc. The objection made to the instruction is its use of the words, "the situation and condition of the parties." It is said that this authorized the jury to consider the wealth of ⁴⁷ the appellant, and the poverty of the appellee in assessing the damages. There is nothing in this point. There was no evidence of the financial condition of the parties on either side. The words used refer to the situation and condition of the parties at the time when the accident occurred, and in connection with the subjects of the exercise of care on the part of appellee and of negligence on the part of the appellant. In other words the language used refers to the general surroundings of the parties at the time of the accident. The instruction was based upon the common-law duty of drivers of automobiles upon the highways, and it was proper to authorize the jury to consider the probable effect of the movement of the automobile upon the horses driven upon the highway. Another instruction is objected to, because it conditions the action of the jury upon their finding that the appellee "was then exercising reasonable care and diligence for his own safety, as explained in the instructions," etc. It is said that by the use of the words, "as explained in the instructions," the questions of care and diligence and of negligence were taken away from the jury and made questions for the court. Such is not the proper construction of the instruction. All the instructions left it to the jury to determine whether or not the appellee was in the exercise of due care

for his own safety, and whether or not the appellant was guilty of negligence. The court has a right to explain to the jury what constitutes ordinary care as a matter of law. The language in question has reference to such an explanation, and not to a decision by the court upon a question of fact.

Objection is made to the instruction given for the appellee, which told the jury "that the negligence of William Parker in driving his team, if you believe from the evidence that he was negligent in that regard, would not amount to negligence upon the part of plaintiff, unless plaintiff was himself at fault or by his conduct contributed to such negligence." This instruction was merely intended to lay down the rule that, where the injury is the result of the negligence ⁴⁸ of the defendant and that of a third person, the plaintiff may recover if the negligence of the defendant was an efficient cause of the inquiry: *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215. In other words, where a defendant is guilty of negligence, which causes an injury, and the plaintiff is free from negligence contributing thereto, the fact that the negligence of a third party also contributed would not relieve the defendant from liability for his negligence. Another instruction is objected to as authorizing the jury to consider the effect of the injury upon the use of appellee's arm and leg, it being claimed by appellant that some of the witnesses testified that there was no injury to the leg, except the enlargement of the glands of the groin. There was, however, testimony of some of the witnesses for appellee, and of appellee himself, that his leg was injured by the accident; and the jury had a right to take into consideration such evidence.

The appellant asked the court to instruct the jury as follows: "The court instructs the jury that an owner of an automobile has the right to use the highway of this state, provided in using it he does not violate the law of the state." The court modified this instruction by changing it, so that the last clause read as follows: "provided in using it he uses reasonable care and caution for the safety of others and does not violate the law of the state." The modification was proper. The declaration was framed upon three theories: 1. That the machine was going at a speed in excess of the limit of fifteen miles an hour fixed by the statute; 2. That it was not brought to a full stop when the team showed fright; and 3. Upon the ground of common-law negligence. The instruction as offered would tend to make the jury believe that, if

there was no infraction of the statute, the appellant would not be liable, whereas, under the fifth and sixth counts, the appellant was liable if he was guilty of common-law negligence, or if he failed to perform his duty under the common law to avoid injury to the appellee. The modification of the instruction simply called attention to this ⁴⁰ common-law duty, in addition to the duty imposed by the statute.

Complaint is also made that the court refused instruction numbered 21 asked by the appellant. That instruction was as follows: "The court instructs the jury that where witnesses are otherwise equally credible, and their testimony otherwise entitled to equal weight, greater weight and credit should be given to those whose means of information are superior." Certain doctors were called on the part of the appellant as experts to testify that appellee suffered no injury to his leg from the accident, and this instruction was calculated to induce the jury to give greater consideration to the testimony of such experts than to the testimony of other witnesses, who differed with the experts, and who swore that appellee could not walk for seventeen days, nor after that time without having his hand on a chair, nor subsequently to that time without a cane. But the court gave on behalf of the defendant an instruction numbered 19, which embodied in it all that was material in the refused instruction numbered 21. Instruction numbered 19 was as follows: "The court instructs the jury that in determining the credibility of the witnesses you have a right to take into consideration the means of information of the several witnesses." In regard to this instruction, it is stated in the abstract: "which instruction the court gave of his own motion." This is not true, as the record shows that the instruction was given at the request of the defendant.

It is said that the court erred in refusing instruction numbered 22 asked by the appellant, which told the jury that if they believed from the evidence that the plaintiff knew, or had reason to believe, that the mules driven by Parker were about to become frightened and that there was danger of their running away, and that plaintiff had time to get out of the vehicle and thus be out of danger, and, instead of doing so, plaintiff concluded to risk the danger and stay in the vehicle, and by remaining in the vehicle he became injured by reason of not using the usual and ordinary care for his safety ⁵⁰ that an ordinarily reasonable and prudent man would under similar circumstances, then they should find the appellant not guilty. This instruction was embodied in several other in-

structions given for the appellant, which required the jury to find from the evidence that the plaintiff employed all reasonable means to prevent the injury, and used such care and caution for his own safety, or such care and caution as an ordinarily prudent man would have used under the circumstances. Instruction numbered 11 given for the appellant told the jury that, if they believed from the evidence that the plaintiff might, in the exercise of ordinary care and caution, have seen or have known the danger and avoided it, and his omission to do so contributed in any degree to his accident, then he was guilty of such negligence as would prevent a recovery. Other instructions were given requiring the jury to find appellant not guilty if they found that the appellee could, by the exercise of ordinary care and prudence have avoided the injury. In view of these instructions so given there was no error in refusing appellant's instruction numbered 22. It is also said that the court erred in refusing instruction numbered 23 asked by the appellant, which told the jury that, if they believed from all the evidence in the case that the plaintiff or others in the carriage did not indicate to defendant that Parker's mules were about to become frightened, and it did not appear to defendant that they were about to become frightened, it did not become the duty of defendant to stop his automobile. This instruction was properly refused. It cannot be said, as a matter of law, that the fact that if the appellee and those with him in the spring wagon did not give a signal to the appellant that Parker's mules were about to become frightened, the appellee failed to exercise due diligence for his own safety. There was evidence tending to show that the mules were frightened, and that the women in the wagon screamed, and if it appeared to the appellant from these circumstances that the mules were about to become frightened, he was obliged to stop his automobile under the ⁵¹ law, whether any signal was given to him by those in the wagon or not. The refusal of instruction numbered 24, asked by the appellant, was proper, because it singles out and unduly emphasizes particular evidence in regard to the speed of the automobile. The testimony of appellee's witnesses was to the effect that the automobile was traveling at the rate of about twenty-five miles an hour, while the testimony produced by the appellant tended to show that the automobile was going only from ten to twelve miles an hour. There was as much testimony on

one side of this question as upon the other, and it was a matter for the determination of the jury. We are unable to say that the weight of the evidence is against the finding of the jury upon this question.

5. Appellant claims that the court below erred in refusing to instruct the jury to find the appellant not guilty at the close of appellee's testimony and again at the close of all the testimony. The contention of the appellant upon this subject is, that the evidence does not tend to show negligence on his part. We do not agree with the appellant upon this subject. The evidence of appellee tends to show that the automobile was traveling at the rate of from twenty to thirty miles an hour, while that of appellant tends to show that it was going at the rate of only from ten to twelve miles an hour. The road was unobstructed, and it is impossible to believe that appellant did not know and could not see the people approaching him in the wagon from the north. The jury were justified in concluding that, if he did not see the team approaching, he could have done so by the exercise of ordinary prudence and care. The evidence is of such a character, too, that the jury were justified in believing that the appellant saw that the horses were frightened by the approach of his machine. This being so, it was his duty to stop his automobile. But the evidence is that he did not do so, nor did he slacken its speed, but proceeded upon his way without taking any notice whatever of the parties in the wagon, who were injured. The statute does not contemplate that the driver of ⁵³ an automobile can proceed until a team turns over the wagon and runs away, but is intended to prevent such occurrences. The testimony of the appellee is to the effect that, when the machine was three or four rods from them, the team turned backward and tried to run, and when the machine was just opposite them, their vehicle upset. Parker testifies that the mules were jumping against one another, and when they were about five or six rods from the machine they lunged forward and upset the vehicle just as the machine was opposite them. Such, substantially, also is the testimony of at least two of the women who were in the wagon with appellee. Such also was the testimony of one Irving Hoogner, who was an entirely disinterested witness. He swears that the team was going south, and that just as the automobile was even with them, they stuck up their ears and lunged to the west. In view of this evidence the jury were authorized in finding that the team was frightened by the approach of the automo-

bile. One witness, who was at work in the field sixty rods away, swears that he heard the women screaming, and yet appellant testifies that he heard nothing. It was for the jury to say who told the truth in reference to this matter.

6. We deem it our duty to call the attention of counsel to the abstract in this case. Rule 14 of this court requires the party bringing a cause into this court to "furnish a complete abstract or abridgment of the record, referring to the pages of the record by numerals on the margin." The abstract does not state the substance of the declaration, nor make any other reference to it than merely to say that there is a declaration on page 4 of the record. The declaration is a long document, consisting of six counts, and we have been obliged to go to the record to find out what its allegations are, receiving no aid whatever in this respect from the abstract. This is a clear violation of the rule. In addition to this, the abstract in certain respects misrepresents the evidence. For instance, in the abstract, Emma Peterson is represented as giving the following testimony: "I first saw Mr. Christy opposite ⁵³ the big tree half a mile south of the Wilcox place. We were one hundred and twenty rods north from that tree, and forty rods from the Wilcox place. We were going at the rate of four or five miles an hour, the forty rods to the Wilcox place. He passed us just as we turned in. He was going about the same rate of speed I should think." The witness is thus made to state that the appellant was going about the same rate of speed as she and those riding with her were going, to wit, at the rate of four or five miles an hour. The testimony, as found in the record, is as follows: "Q. Where did he pass you? A. Just as we drove into the Wilcox place, as we turned in. Q. Did you notice him as he went past? A. Yes, I noticed him. Q. How was his speed as he passed you compared with his speed as he had followed you up the road? A. About the same, I should think." The testimony of the witness was that appellant was going very fast, and that his speed as he passed her was about the same as the speed at which he had been going before he passed her. The witness did not say, by any means, that his speed was about the same as hers, to wit, four or five miles an hour. Again, the witness Amanda Hoogner, who was with Mrs. Peterson at the time said, as would appear from the abstract: "Saw Mr. Christy on that occasion.

... He was traveling fast in an automobile. He was, I should judge, one hundred and twenty rods back. We drove into the Wilcox place. I should judge we were driving eight miles an hour. The automobile passed us as we went in. It was going about the same rate of speed." The witness, Amanda Hoogner, is made to say that she and Mrs. Peterson were driving at the rate of eight miles an hour, and that appellant in his automobile was traveling at the same rate of speed. Amanda Hoogner, however, according to the record, did not so testify. The record is as follows: "Tell in miles how fast you were going. A. I should judge we would be going at least eight miles an hour, if not more. Q. Where did the automobile pass you? A. It passed us as we went in. We just ⁵⁴ got in when it went by us. Q. When it passed you how was its speed compared with the speed it had back of you? A. About the same." The testimony was that the speed of the automobile was the same when it passed them as it had been before it reached them, and not that the speed of the automobile and the vehicle which the witness was driving or riding in was the same. Such misinterpretation of the testimony of the witnesses, as presented by an abstract, does not commend itself to the favorable consideration of this court.

We find no error in the record which would justify us in reversing this judgment.

Accordingly, the judgment of the circuit court of Mercer county is affirmed.

LAW OF THE AUTOMOBILE.

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I. Introductory.

Although the use of the automobile as a means of conveyance both of persons and freight may be truly said to be as yet in its infancy, still the rules of law governing, and which must continue

to govern, such use are pretty generally fixed by judicial decision. These rules are found, upon investigation, to conform closely to the principles which already govern the use of all other vehicles upon the public streets and highways, although some slight departure from such principles is often found necessary because of the noise and speed attained by the horseless carriage, and the resulting danger to other vehicles arising from frightening horses or other cause, as well as the danger to pedestrians, caused by the speed attained by this new, or at least novel, means of conveyance.

II. Automobiles on Highways.

a. **Right to Use Street or Highway.**—Automobiles are lawful means of conveyance and have equal rights upon the public roads and streets with horses and carriages, but their use must be accompanied with that degree of prudence in management and consideration for the rights of others which is consistent with their safety: *Shinkle v. McCullough*, 116 Ky. 960, 105 Am. St. Rep. 249, 77 S. W. 196. And while a person may travel along a public highway with an automobile likely to frighten horses, he must, while doing so, exercise reasonable care to avoid accident and injury to others traveling along such highway: *Murphy v. Wait*, 102 N. Y. App. Div. 12, 92 N. Y. Supp. 253. In this connection it has been said that "since the automobile has come into use upon our streets and highways, accidents have become common, and actions to recover damages resulting therefrom have been frequent. These machines may be used upon the public highways, but horses will also continue to be used for a time at least. Both may be legally used as motive power in public travel. Since horses are frightened when they meet these machines, it is the duty of the persons, running the machines to exercise reasonable care to avoid accidents when horses become frightened. It is not pleasant to be obliged to slow down these rapid running machines to accommodate persons driving or riding slow country horses that do not readily become accustomed to the innovation. It is more agreeable to send the machine along and let the horse get on as best he may, but it is well to understand if this course is adopted and accident and injury result, that the automobile owner may be called upon to respond in damages for such injuries": *Murphy v. Wait*, 102 N. Y. App. Div. 124, 92 N. Y. Supp. 253. And wherever this question has been presented, it has been decided that the use of automobiles on public highways is not, as matter of law, negligence, and, so long as they are constructed and propelled in a manner reasonably consistent with the use of the highway, they have equal rights with other vehicles. Following this line of thought the supreme court of Indiana, in the case of *Indiana Springs Co. v. Brown (Ind.)*, 74 N. E. 616, said: "It cannot be said as matter of law that appellant was guilty of negligence for using an automobile as a means of conveyance on the public high-

way. The law does not denounce motor carriages, as such, on the public ways. For, so long as they are constructed and propelled in a manner consistent with the use of the highways and are calculated to subserve the public as a beneficial means of transportation, with reasonable safety to travelers by ordinary modes, they have an equal right with other vehicles in common use to occupy the streets and roads. Because novel and unusual in appearance, and for that reason likely to frighten horses unaccustomed to see them, is no reason for prohibiting their use. In all human activities the law keeps up with the improvement and progress brought about by discovery and invention, and in respect to highways, if the introduction of a new contrivance for transportation purposes, conducted with due care, is met with inconvenience and even incidental injury to those using ordinary modes, there can be no recovery, provided the contrivance is compatible with the general use and safety of the road. It is therefore the adoption and use, rather than the kind or form of conveyance, that concerns the courts. It is improper to say that easement, and each is equally restricted to the exercise of his rights of the driver of the automobile. Both have the right to use the easement, and each is equally restricted to the exercise of his rights by the corresponding rights of the other. Each is required to regulate his own use by the observance of ordinary care and caution to avoid receiving injury as well as inflicting injury upon the other, and in this the quantum of care required is to be estimated by the exigencies of the particular situation; that is, by the place, presence or absence of other vehicles and travelers; whether the horse driven is wild or gentle; whether the conveyance and power used are common or new to the road; the known tendency of any feature to frighten animals, etc."

A driver of an automobile is bound to anticipate that he may meet persons at any point in a public street, and must keep a proper lookout for them and have his machine under such control as will enable him to avoid a collision with another person, also using proper care and caution, and, if necessary, must slow up, and even stop: *Thies v. Thomas*, 77 N. Y. Supp. 276. It has been held that the fright of a gentle horse at the passing of an automobile driven with ordinary care and at reasonable speed is an event in the proper use of the highway, calling for its maintenance in a safe condition: *Upton v. Town of Windham*, 75 Conn. 288, 96 Am. St. Rep. 197, 53 Atl. 660; and a runaway caused by a horse taking fright at a steam motor carriage, with pneumatic tires, slowly approaching him, not differing in construction from ordinary motor carriages except that it has a smokestack which only emitted the usual amount of vapor, affords no cause of action to the owner of the horse for damages caused by the accident: *Nason v. West*, 31 Misc. Rep. 583, 65 N. Y. Supp. 651.

b. *Negligence in Use of.*—A person driving an automobile at an excessive rate of speed or otherwise, not exercising reasonable care for the safety of others and thereby causing an injury to a person either by collision or by frightening his horse or otherwise, is deemed guilty of negligence and must respond in damages. Thus, if a person, while operating an automobile on a highway at an excessive rate of speed and with much noise, thereby frightens a horse attached to a buggy, whereby the buggy is overturned and the occupant thereof injured, the operator of the automobile is guilty of negligence and liable for the injury: *Shinkle v. McCullough*, 116 Ky. 960, 105 Am. St. Rep. 249, 77 S. W. 196. And if the operator of the automobile upon the highway knows, or in the exercise of ordinary care should know, that his machine has so far excited and frightened a horse as to render it dangerous and unmanageable, it is the duty of such person to stop the machine and take such steps for the safety of the driver of the horse as ordinary prudence may suggest, otherwise he is guilty of negligence: *Shinkle v. McCullough*, 116 Ky. 960, 105 Am. St. Rep. 249, 77 S. W. 196. If, in an action to recover damages for personal injury, it appears that while the plaintiff was riding along a highway in a wagon drawn by a horse driven by her husband, the defendant's automobile came in view, that the horse becoming frightened, the plaintiff's husband got out of the wagon, went to the horse's head and motioned with his hand for the machine to stop, that it stopped once and then started on again toward the horse, that as it approached the horse became unmanageable, and reared and plunged, that the automobile nevertheless continued in its course and passed near the horse, not turning out at all, and that the horse forced the wagon from the road and turned it over, whereby the plaintiff was thrown out and injured, the jury is justified in finding that the driver of the automobile was negligent in not stopping the automobile altogether after turning out of the road and there remaining quiet until the horse had passed it: *Murphy v. Wait*, 102 N. Y. App. Div. 121, 92 N. Y. Supp. 253. And again, if a person drives his automobile at a speed of twenty miles per hour toward a person driving a horse on a narrow approach to a bridge, from whence he cannot escape without proceeding forward to a cross-cut, and though observing the frightened condition of his horse, and his signals to the driver of the machine to stop and allow him to escape, such driver refuses to slacken the speed of his machine, causing the horse to run away and injure the driver of the latter, it must be held that such conduct is an unwarranted use of the highway by the automobile, rendering its driver liable for the injury: *Indiana Springs Co. v. Brown (Ind.)*, 74 N. E. 615.

If an automobile comes upon a boy in the street under circumstances calculated to produce fright or terror arising from the speed of the machine and negligence of its driver, and such fright causes

an error of judgment, by which the boy runs in front of the automobile, he is not guilty of contributory negligence, and the driver of the machine remains liable: *Thies v. Thomas* (N. Y.), 77 N. Y. Supp. 276. If a person struck by an automobile because of the negligence and recklessness of its driver, is at the time standing in the highway talking to a friend, who had there stopped his team for the purpose of conversation, the pedestrian is not guilty of contributory negligence barring recovery: *Kathmeyer v. Mehl* (N. J.), 60 Atl. 10. But in an action to recover for injuries sustained by collision with an electric cab, a finding of negligence of the driver thereof is not warranted, when it appears that the person struck saw the cab, which was moving at a moderate rate of speed, before he left the curb, did not look for it again afterward and ran into it, striking it on the side: *West v. New York Transp. Co.* (N. Y.), 94 N. Y. Supp. 426.

In an action against a street railway for injury to an automobile, which was struck by a passing car, the evidence showed that a motorman upon a stalled car motioned for the driver of the automobile to pass in front of him. The driver of the machine stood up in it and saw the car with which he collided approaching at a distance of about seventy-five feet and nevertheless proceeded to cross the track at a slow rate of speed, and it was held that he was negligent in thus crossing or attempting to cross, and that the act of the car motorman in signaling him to cross was not negligent: *Hirsch v. Interurban Street Ry. Co.* (N. Y.), 94 N. Y. Supp. 330.

III. Negligence of Third Person.

In an action brought to recover damages for personal injury sustained by a person in consequence of his being struck by an automobile while crossing the street of a city, the fact that the defendant was owner of the machine and that the chauffeur in charge thereof was in his employ is sufficient to establish prima facie that the chauffeur was acting within the scope of his employment at the time; but if it further appears that at the time in question the chauffeur, in disobedience of such owner's express instructions, was using the automobile for his own pleasure, the defendant is not liable: *Stewart v. Baruch*, 103 N. Y. App. Div. 577. In *Reynolds v. Buck* (Iowa), 103 N. W. 946, it was shown that the defendant, who dealt in automobiles, decorated one for use in a parade, and after it was over directed that such machine, while standing in front of his store, be taken inside and there left. His son, employed by him as a clerk, coming upon the machine where it stood in the street, invited a lady friend to ride and while he was driving the machine plaintiff's horse took fright at it and caused plaintiff the injury complained of. The court held that under the circumstances the owner of the machine was not liable, even conceding his son's negligence.

The act of small boys, in turning the starting lever of an electric truck, left standing in the public street by its operator, with the

power off and the brake on, while making a delivery of goods to a customer, and the act of the boys causing the truck to start down the street, uncontrolled and to collide with a horse and wagon, must be deemed the proximate cause of the collision, and as the intervening act of third parties it exempts the owner of the truck from liability to the owner of the horse and wagon: *Berman v. Schultz*, 40 Misc. Rep. (N. Y.) 212, 81 N. Y. Supp. 647.

IV. Defects in Streets—Liability of Municipality.

The passing of an automobile driven with ordinary care and reasonable speed, and the fright and shying of a gentle horse thereat, constitute events in the proper use of a public highway or street, calling for its maintenance in a safe condition, and an injury done to a traveler by its unsafe condition in connection with such an event, is one of those dangers to which travelers are exposed by defects in the highway and for which indemnity is provided when the danger ripens into actual damage: *Upton v. Town of Windham*, 75 Conn. 288, 96 Am. St. Rep. 197, 53 Atl. 660. A person is not precluded from recovering from a municipality for injuries from a defect in a highway, dangerous to travelers in ordinary vehicles, on the ground that when injured he was traveling in an automobile: *Baker v. Fall River*, 187 Mass. 53, 72 N. E. 336. And if, in an action against a city to recover for injuries from an alleged defect in a highway, consisting of a rope stretched across from a stake at the side of a sewer trench in the middle of the street to a telegraph pole in the sidewalk on the right-hand side of the street as plaintiff was approaching in an automobile, it appeared from the evidence that plaintiff, in attempting to pass to the right of the trench, was struck by the rope, which could not be seen by him until within two or three feet of him while he was proceeding slowly and carefully, and that he tried to stop the machine and that its speed was diminished when he struck the rope, which was of a color not easily distinguishable, and that there was no warning or means used of attracting attention to the presence of such rope, together with evidence showing how long such obstruction had remained in the street, such evidence is sufficient to sustain a verdict against the city for maintaining a defect in the street causing the injuries complained of: *Baker v. Fall River*, 187 Mass. 53, 72 N. E. 336.

In an action brought against a city to recover for the death of plaintiff's intestate, it was shown that while the deceased was operating an automobile in one of the streets of such city, and while turning from one of the street-car tracks laid on such street to another, he ran into a fence erected at the side of the latter track for the purpose of guarding the excavation which had been made in the street for the purpose of building an underground railroad. It was alleged that the accident was due to the presence in the pavement between the tracks of a hole not exceeding six inches in depth into which the wheels of the automobile slipped, causing it to lurch

against the fence. It also appeared that the surface railway had laid its tracks under statutory authority and that the underground road was being laid under like authority, and that the city had no control over either of them, and there was evidence to show also that no hole or depression existed in the street prior to the time when the work for the underground road was commenced. It was held, under such circumstances, assuming that the accident was due to the hole in the pavement, the existence of such hole did not render the city chargeable with negligence nor make it liable for the result of the accident: *Morris v. Interurban Street Ry. Co.*, 100 N. Y. App. Div. 295, 91 N. Y. Supp. 479.

V. Speed Regulations.

A municipal corporation has the power to regulate the speed of automobiles within its limits and to require the use of reasonable safety appliances: *City of Chicago v. Banker*, 112 Ill. App. 94. Park commissioners have power to make rules for the use and government of parkways and streets under their control, and a rule made by them that "no person shall ride or drive" in such parkways or streets at a rate of speed exceeding eight miles per hour, is reasonable and valid. Such rule applies to automobiles, as one who is controlling the motive power of such a machine may be truly said to be driving it within the meaning of such rule: *Commonwealth v. Crowninshield*, 187 Mass. 221, 72 N. E. 963. A city ordinance regulating the speed of automobiles, and providing punishment for the violation thereof, and requiring each such machine operated in the city, to carry a registration number, does not violate constitutional provisions declaring that no person shall be compelled in any criminal proceeding to be a witness against himself, or be deprived of his liberty or property without due process of law: *People v. Schneider* (Mich.), 103 N. W. 172.

VI. Registration and License.

A statute requiring the registration of automobiles, the payment of a registration fee, and the marking of the registered number in Arabic numerals not less than four inches long, is constitutional, and the fee required to be paid for the registration of the automobile, if reasonable, is a license fee and not a tax: *Commonwealth v. Boyd*, 188 Mass. 79, 74 N. E. 255. A city charter authorizing the common council of the city to control, prescribe and regulate the use of its streets, confers power on such council to pass an ordinance requiring the registration and numbering of automobiles using such streets and imposing a fee of one dollar therefor to cover the cost of the figures composing the number, furnished by the city. The fee required for such number is not objectional as a license, it being at most a mere means of regulation, and not a license, for revenue: *People v. Schneider* (Mich.), 103 N. W. 172. A municipal ordinance requiring automobiles to be registered and to have attached to their rear end a number corresponding to their registration number is not a violation of constitutional provisions forbidding unreasonable searches: *People v. Schneider* (Mich.), 103 N. W. 172. Under a stat-

ute providing that anyone desiring to operate an automobile in a city must procure a license from the license commissioner, and if he desires to operate it in the county outside the city limits, he shall procure a license from the county clerk of such county, an automobile owner or operator is required to take out a license in each and every county over the roads of which he desires to run his machine: *State v. Cobb* (Mo. App.), 87 S. W. 551.

In the late case of *City of Chicago v. Banker*, 112 Ill. App. 94, it was held, but we think not wisely, that an ordinance of a city which requires the owners of automobiles to submit to examinations and take out licenses, as a condition precedent to operating them upon the streets of the city, in so far as it applies to owners of machines who use them for private business and pleasure only, is unconstitutional and void, as imposing a burden upon one class of citizens in the use of the streets which is not imposed upon others using the streets.

VII. Lien for Repairs or Storage.

Under a lien law giving a lien for reasonable charges for work and materials furnished in making repairs to personal property at the request or with the consent of the owner, the right of lien is dependent upon the continued possession of the property by the one claiming the lien, and, in the absence of express statutory provision a garage-keeper has no lien for the amount due for repairs to and supplies furnished for an automobile which the owner, during the time it was kept at the garage, had, and exercised the right to use at his pleasure; nor has such garage-keeper a warehouse lien on the automobile for housing it, as it is not "stored" within the meaning of such lien law: *Smith v. O'Brien*, 46 Misc. Rep. (N. Y.) 325, 94 N. Y. Supp. 672.

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[216 Ill. 354, 75 N. E. 108.]

EQUITY.—The Jurisdiction of a court of equity does not depend upon the sufficiency of the bill, and if the court has jurisdiction of the parties and of the subject matter, it does not lose it simply because the cause of action is defectively stated. (p. 221.)

JURISDICTION of the Subject Matter does not mean simple jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the class of cases to which that particular case belongs. (p. 221.)

JURISDICTION does not Depend upon the Rightfulness of the Decision, and is not lost because of an erroneous decision. (p. 222.)

JURISDICTION—Injunction.—If the court has jurisdiction of the parties and the bill alleges acts of the defendants sufficient to give the court jurisdiction to determine its sufficiency, the fact that the court may have erred in sustaining the bill and issuing a temporary injunction, does not affect the duty of all persons having notice to obey the injunction until the order granting it is set aside or reversed by a court of competent jurisdiction. (pp. 222, 223.)

JURISDICTION—Injunction.—Even if the terms of an injunction are broader than the allegations of the bill therefor, that fact is no defense in a proceeding to punish for contempt in violating such injunction. (p. 223.)

CONTEMPT—Collateral Attack on Judgment or Order.—In proceedings for contempt in failing to obey an order of court, the respondent may question the order he is charged with refusing to obey only in so far as he can show it to be absolutely void, and cannot be heard to say that it is merely erroneous, however flagrant the error may seem to be. Judgments and orders of court cannot be collaterally attacked for mere irregularities. (pp. 223, 224.)

INJUNCTION—Violation—Notice.—To render a person amenable to an injunction, it is not necessary that he should have been a party to the suit, so long as he had actual notice of the contents of such injunction. (p. 224.)

CONTEMPT.—Affidavit for Attachment for contempt in violating an injunction should show in what respect the injunction has been violated, but it need not specify the charge with that certainty required in an indictment or a bill of particulars. (p. 225.)

CONTEMPT—Civil Action.—Contempt of court in violating an injunction granted to protect business interests against unlawful acts of the defendants is of a civil nature and the defendants are not entitled to their discharge upon their sworn answer as in case of a criminal contempt. (p. 226.)

CONTEMPT—Criminal and Civil Proceeding.—If the defendant is attached for contempt of court for a criminal offense and files a sworn answer, that answer, if sufficient to purge him of the alleged contempt, may be taken as true and the defendant discharged. But this rule applies only when the proceeding is brought to vindicate the law or the dignity of the court, and does not apply to acts treated as contempts, for the enforcement of orders and decrees as part of the remedy sought to be enforced. (p. 226.)

CONTEMPT—Jury Trial.—A statute providing for a trial by jury in all cases where the judgment is to be satisfied by imprisonment does not apply to the case of proceedings for contempt of court, when it is sought to coerce defendant into the performance of the duty which the court has ordered him to perform. (p. 227.)

CONTRACTS for Labor—Duress.—Every person is entitled to be protected in the right to enter into contracts for or to labor, or in refusing to do so, as he shall deem best for his own interests, without interference from others, and any such contract executed by a person under circumstances depriving him of his free-will in the matter is voidable for duress. (p. 228.)

CONTRACTS for Labor—Coercion of Business.—No person or combination of persons can legally, by direct or indirect means, obstruct or interfere with another in the conduct of his lawful business, and any attempt to compel an individual, firm or corporation to execute an agreement to conduct his business through certain agencies, or by a particular class of employes, is not only unlawful and actionable, but is also an interference with the exercise of the highest civil right. (p. 228.)

CONTRACTS for Labor—Duress—Closed Shop.—An attempt to coerce a person to sign an agreement to conduct his business by employing only members of a labor union, under a threat of ordering a strike, is unlawful, and such an agreement is voidable for duress, and is violative of the legal rights of both the employer and the nonunion employe. (p. 229.)

CONTRACTS for Labor.—The right to enter into contracts for labor, or to labor, is both a liberty, and a property right. (p. 230.)

Darrow & Masters, for the plaintiff in error.

Tenney, Coffeen, Harding & Wilkerson, Allen & Wesemann, H. K. Tenney and J. H. Wilkerson, for the defendant in error.

³⁶³ **WILKIN, J.** The briefs and arguments in the case are exceedingly voluminous on behalf of plaintiffs in error. Thirteen distinct grounds of reversal have been urged, and many of these are subdivided into several heads. It would be impracticable within the reasonable limits of an opinion to even notice all of these points, even if it were profitable to do so. Most of them go to the sufficiency of the original order for the injunction and the petition to punish for contempt for the alleged violation of the writ, the right of trial by jury and of free speech, and of the guilt of the plaintiffs in error. These we will consider as far as we deem it necessary in the proper disposition of the case.

It is insisted that the injunction ordered is void because the bill of complaint states no jurisdictional facts but merely ³⁶³ the conclusions of the pleader. When the bill for injunction was filed the defendants were served with process. They failed to file answers and a writ of injunction was duly ordered to issue. From that order an appeal was prosecuted to the appellate court for the first district: Christensen v. Kellogg Switchboard etc. Co., 110 Ill. App. 61. The appellate court, in passing upon the case, held that the court had jurisdiction of the persons of the defendants and of the subject matter of the suit and that the bill was sufficient to sustain the injunction.

The chief argument against the jurisdiction of the court is that the allegations of the bill of complaint are not sufficient to sustain the prayer of the bill and do not set out specific facts which would give the court jurisdiction—in other words, that the bill would have been obnoxious to a demurrer. It is well settled that jurisdiction does not depend upon the sufficiency of the bill. If the court has jurisdiction of the subject matter and of the parties nothing further is required. The cause of action may be defectively stated, but that does not destroy jurisdiction. A bill may state conclusions, but if not demurred

to and the evidence supports a decree conforming to the general allegations of the bill and the decree is within the power of the court to render, the court has jurisdiction. Jurisdiction is the power to hear and determine the subject matter in controversy between the parties to a suit. If the law confers the power to render a judgment or decree, then the court has jurisdiction: *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. ed. 1233; *United States v. Anedondo*, 6 Pet. 709, 8 L. ed. 547; *Grignon's Lessees v. Astor*, 2 How. 338, 11 L. ed. 283; *Applegate v. Lexington Min. Co.*, 117 U. S. 267, 6 Sup. Ct. Rep. 724, 29 L. ed. 892. Jurisdiction of the particular matter does not mean simple jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the class of cases to which the particular case belongs: *State v. Wolever*, 127 Ind. 306, 26 N. E. 762; *Jackson v. Smith*, 120 Ind. 520, 22 N. E. 431; *Fields v. Maloney*, 78 Mo. 172; *Dowdy v. Wamble*, 110 Mo. 280, 19 S. W. 489. ³⁶⁴ Whether a complaint does or does not state a cause of action is, so far as concerns the question of jurisdiction, of no importance, for if it states a case belonging to a general class over which the authority of the court extends, then jurisdiction attaches and the court has power to decide whether the pleading is good or bad: 1 *Elliott's General Practice*, sec. 230; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Winningham v. Trueblood*, 149 Mo. 572, 51 S. W. 399. Jurisdiction does not depend upon the rightfulness of the decision. It is not lost because of an erroneous decision, however erroneous that decision may be: *Scherer v. Superior Court*, 96 Cal. 653, 31 Pac. 565; *Young v. Lorain*, 11 Ill. 624, 52 Am. Dec. 463; *Lane v. Bommelman*, 17 Ill. 95; *Cody v. Hough*, 20 Ill. 43; *Iverson v. Loberg*, 26 Ill. 179; *Feaster v. Fleming*, 56 Ill. 457; *Hobson v. Ewan*, 62 Ill. 146, 79 Am. Dec. 364; *Spring v. Kane*, 86 Ill. 580; *Allman v. Taylor*, 101 Ill. 185; *St. Louis etc. Coal Co. v. Sandoval Coal Co.*, 111 Ill. 32; *Reid v. Morton*, 119 Ill. 118, 6 N. E. 414; *Commercial Nat. Bank v. Burch*, 141 Ill. 519, 33 Am. St. Rep. 331, 31 N. E. 420; *State v. McMahon*, 69 Minn. 265, 72 N. W. 79, 38 L. R. A. 675; *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211.

In this case the bill alleged, as stated by counsel for the relator, that the strikers stationed themselves in the streets and alleys and approaches to complainant's place of busi-

ness and began to "intimidate" the employes, and began a systematic course of "intimidation," and "warned" the employes not to return to work, and assumed a "menacing and threatening" attitude, and now continue to "menace and threaten" said employes; that the employes were willing to work, but were so "frightened and intimidated" that they have refused to continue in the company's employ, and that the strikers have intercepted the employes and have induced them, by "threats and unlawful persuasion," not to enter the company's employ. It is urged that these are conclusions of the pleader, and that, consequently, the bill of complaint is insufficient. But with this contention we do not agree. The allegations sufficiently charge acts of the defendants to give the court jurisdiction to pass upon the sufficiency of the ³⁶⁵ bill. In such case, whether the court decided correctly or incorrectly could not affect the question of jurisdiction, nor the duty of all persons having notice, to obey the order until reversed by a court of competent jurisdiction. The court having jurisdiction of the general subject matter of the bill, the bill, if defective, could have been amended, and the rule is that judicial proceedings which are amendable are not void: *Rosenheim v. Hartsock*, 90 Mo. 357, 2 S. W. 473. Even if the terms of the injunction are broader than the allegations of the bill, that fact is no defense in a proceeding to punish for a contempt in violating the injunction: *Loven v. People*, 158 Ill. 159, 42 N. E. 82.

It is also urged that the intent with which an otherwise lawful act is done is not material to characterize the act itself. In a recent case where a malevolent purpose was alleged the supreme court of the United States said: "A purely malevolent act may be done even in trade competition." The court also said that in some cases justification "may depend upon the end for which the act is done. . . . It is not sufficient answer to this line of thought that motives are not actionable and that the standards of law are external. That is true in determining what a man is bound to foresee, but not, necessarily, in determining the extent to which he has foreseen": *Aikens v. Wisconsin*, 195 U. S. 194, 25 Sup. Ct. Rep. 3, 49 L. ed. —. In *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. Rep. 276, 49 L. ed. —, the court said: "A general allegation of intent may color and apply to all the specific charges of a bill which seeks relief against the act of July 2, 1890,

to protect trade and commerce against unlawful restraints and monopolies." Also: "It is suggested that the several acts charged are lawful and that intent can make no difference. . . . Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability ³⁰⁸ that it will happen: *Commonwealth v. Peaslee*, 177 Mass. 267, 272, 59 N. E. 55. But when that intent, and the consequent dangerous probability, exist, this statute, like many others, and like the common law in some cases, directs itself against that dangerous probability as well as against the completed whole. . . . The unity of the plan embraces all the parts."

We are, for the reasons stated, of the opinion that the court had jurisdiction of the subject matter and of the parties.

It is a well-known rule of law that in proceedings for contempt in failing to obey an order of court the respondent may question the order which he is charged with refusing to obey only in so far as he can show it to be absolutely void, and cannot be heard to say that it is merely erroneous, however flagrant it may appear to be. The judgments of courts cannot be attacked collaterally for mere irregularities: *Clark v. Burke*, 163 Ill. 334, 45 N. E. 235; *Leopold v. People*, 140 Ill. 552, 30 N. E. 348. Therefore plaintiffs in error cannot question in this proceeding the sufficiency of the bill upon which the writ of injunction was granted.

Immediately after the writ of injunction was issued the Kellogg company had five hundred copies of it posted in the immediate vicinity of its works. It also had copies served upon some of defendants personally by the sheriff, and sent copies to others through the mail. The fact that some of the plaintiffs in error were not parties to the injunction suit and were not served with process, and had no notice of the application for the injunction or were not served by the officer of the court with such injunction, is immaterial, so long as it is made to appear that they had actual notice of the contents of the injunction ordered and issued by the court. "To render a person amenable to an injunction it is not necessary that they should have been a party to the suit, so long as they had actual notice of the contents of such injunction": High

on Injunction, sec. 1444. With the exception of Fisher and Brent it is admitted that all of the other plaintiffs ³⁶⁷ in error knew of the injunction, and in view of the prominent part which they both took in the matter, it is unreasonable to suppose that they (Fisher and Brent) did not have knowledge of its existence. If they did not it was their duty to properly present that fact to the trial court upon the hearing, which they failed to do.

It is next insisted that the petition and affidavits upon which the attachment for contempt was based were not sufficient, for the reason that they did not clearly and specifically inform plaintiffs in error as to the offense with which they were charged. We do not think this position tenable. Courts of chancery have within themselves full power and authority to enforce their official mandates in a summary and effective manner. To say otherwise would render them powerless and inefficient. When the original bill for injunction was filed certain persons were made parties defendant and were duly served with process. As we have said, the court had jurisdiction of the persons and the subject matter of the suit and issued the injunction, which was not only binding upon the persons who were actual parties defendant to the bill, but was also binding upon all persons who had actual notice of the contents of the writ, and the decree granting the injunction could only be attacked in a collateral proceeding upon the ground that it was absolutely void. We think all the plaintiffs in error are chargeable with actual notice of the writ and its contents, and are therefore liable for contempt if they violated it. Various petitions were filed in the superior court to the effect that the terms of the writ of injunction had been violated by parties therein named. Many affidavits were filed in support of these petitions, and the affidavits and petitions, together with the writ of injunction, notified these parties of the specific respects in which it was claimed the order of court had been violated, namely, by picketing, patrolling, persuading, threatening and assaulting. We are unable to see how it can be successfully maintained that defendants below did not have sufficient notice ³⁶⁸ of the charge made against them to intelligently prepare their defense, if they had any. They were not entitled to a specific bill of particulars, nor was it necessary to set out the charge with the same

particularity that would be required in an indictment: 1 Bishop on Criminal Procedure, sec. 643. It has often been held that in an attachment proceeding for contempt, alleged to have been committed out of the presence of the court, it should be brought to the attention of the court by an affidavit setting out the particular respects in which the injunction is alleged to have been violated, but that was sufficiently done in this case: 4 Ency. of Pl. & Pr. 776, 780; *People v. Diedrich*, 141 Ill. 665, 30 N. E. 1038; *Oster v. People*, 192 Ill. 473, 61 N. E. 469, 56 L. R. A. 462.

It is again insisted with much earnestness that this proceeding is criminal in its nature, and therefore the defendants below were entitled to be discharged upon their sworn answer, and if their answer was not sufficient they could only be punished after they had been tried and convicted by jury. Proceedings for contempt of court are of two classes: those which are criminal in their nature and those which are designated as purely civil remedies. When the contempt consists of something done or omitted in the presence of the court tending to impede or interrupt its proceedings or lessen its dignity, or out of its presence in disregard or abuse of its process, the proceeding is punitive or criminal, and the penalty is inflicted by way of punishment for the wrongful act and to vindicate the authority and dignity of the people, as represented by their judicial tribunals. In such cases the application for attachment may be made in the original cause, yet the contempt proceeding will be a distinct case criminal in its nature. Cases of this kind are clearly distinguished from cases where the parties to a civil suit, having the right to demand that the other party do some act for their benefit, obtain an order from a proper court commanding the act to be done, and upon refusal the court, by way of executing its orders, proceeds as for contempt, for the purpose of advancing the civil remedy of the other party to the suit. In this ³⁶⁹ class of cases, while the authority of the court will be incidentally vindicated, its power has been called into exercise for the benefit of a private litigant and not in the public interest merely. If imprisonment is ordered, it is not as a punishment, but to the end that the other party to the suit may obtain a remedy for the advancement of his own private interest and rights which he could not otherwise maintain: *Loven v. People*, 158 Ill. 159, 42 N. E. 82; *Crook v. People*, 16 Ill.

534; *People v. Diedrich*, 141 Ill. 665, 30 N. E. 1038; *Lester v. People*, 150 Ill. 408, 41 Am. St. Rep. 375, 37 N. E. 1004; *Leopold v. People*, 140 Ill. 552, 30 N. E. 348. The bill for the writ of injunction which the defendants are charged with having violated alleged that the complainant had vast interests at stake in the business enterprise in which it was engaged, and that the defendants had conspired together unlawfully to injure that business. Upon this bill being filed a writ of injunction was ordered for the purpose of protecting the company against the unlawful acts of certain persons, and when the injunction was issued and the plaintiffs in error were attached for contempt of court, it was primarily because they were injuring the business of the Kellogg company, and the punishment was inflicted to prevent such injury. While it is true that the dignity of the law and the order of the judicial tribunal have been violated, this was merely incidental to the rights of private individuals. The proceeding for the attachment was civil, and in no sense criminal. The rule is, that when the defendant is attached for contempt of court for a criminal offense and files a sworn answer, that answer, if sufficient to purge him of the alleged contempt, may be taken as true, and the defendant discharged. But this rule applies only where the proceeding is brought to vindicate the law or the dignity of the court, and does not apply to acts treated as contempts, for the enforcement of orders and decrees as a part of the remedy sought to be enforced: *Loven v. People*, 158 Ill. 159, 42 N. E. 82. In the case at bar plaintiffs in error filed their sworn answer to the petition for attachment for contempt, and as these proceedings were not purely criminal ³⁷⁰ in their nature, the answers filed did not entitle them to be discharged, and the chancellor did not err in so holding.

It is, however, contended that even though they were not entitled to be discharged upon their sworn answers, they still had the constitutional right to a trial by jury, and could not be legally deprived of their liberty or property without such a trial. Upon the filing of the petitions for contempt and the appearance of the defendants thereto, the court proceeded in the summary to hear the case upon the petitions, answers and affidavits filed by the respective parties. In 1893 the legislature of this state passed an act providing for a trial by jury in all cases where a judg-

ment was to be satisfied by imprisonment: *Laws* 1893, p. 96. In the case of *Barclay v. Barclay*, 184 Ill. 471, 56 N. E. 636, 51 L. R. A. 351, we decided that this act did not apply to the case of proceedings for contempt of court, where it was sought to coerce defendant into the performance of the duty which the court had ordered him to perform: See, also, *People v. Kipley*, 171 Ill. 44, 49 N. E. 229, 41 L. R. A. 775; *United States v. Debs*, 158 U. S. 564, 15 Sup. Ct. Rep. 900, 39 L. ed. 1092. These authorities are decisive of the question here raised, and hold that the defendants in such a proceeding as this are not entitled to a trial by jury.

It is insisted and argued at great length that the alleged acts of plaintiffs in error were not in violation of the injunction and that they were not shown to be guilty of those acts. The determination of these questions involves a consideration of the facts and circumstances under which the alleged strike was ordered and the purpose which was sought to be accomplished by it.

The Kellogg company employed from five to eight hundred men and women, some belonging to labor unions, while others did not. On May 7, 1903, several of the heads of labor unions called upon the company and submitted a certain agreement which they sought to have it sign. Among the conditions in that agreement are the following:

"Art. 2. Party of the first part hereby agrees to employ none but members of the aforesaid organizations or those ³⁷¹ who carry the regular working card of the said organization, provided the various crafts will furnish such competent help as may be required by the party of the first part within twenty-four hours after notification."

"Art. 7. There shall be a steward for each craft in each factory bound by the organization, whose duty it shall be to see that the men working in said factory belong to the organizations.

"Art. 8. It is hereby agreed by the party of the first part that the business agent of the party of the second part shall have the privilege of interviewing any members of the party of the second part in the offices of the party of the first part during business hours."

"Art. 10. A sympathetic strike to protect union principles shall not be considered a violation of this agreement.

"Art. 11. All the apprentices shall belong to the union and carry the working card of the organization.

"Art. 12. The number of apprentices shall not exceed one for every ten men or less of the different crafts."

The Kellogg company refused to sign the agreement, and was informed by the business agents of the unions that a strike would be called if the agreement was not signed. In other words, these business agents sought to obtain the signing of the contract by threats, or to induce the company to sign it in order to avoid a strike. A contract executed under duress is voidable, and duress is present where a party is constrained under circumstances which deprive him of the exercise of free will to agree to or to perform the act sought to be avoided: 10 Am. & Eng. Ency. of Law, 2d ed., p. 321. The law is well settled that every person shall be protected in the right to enter into contracts or in refusing to do so, as he shall deem best for the advancement of his own interests, without interference by others. No person or combination of persons can legally, by direct or indirect means, obstruct or interfere with another in the conduct of his lawful business, and any attempt to compel an individual, ³⁷² firm or corporation to execute an agreement to conduct his or its business through certain agencies or by a particular class of employes is not only unlawful and actionable, but is an interference with the exercise of the highest civil right. Thus we said in *Doremus v. Hennessey*, 176 Ill. 608, 614, 68 Am. St. Rep. 203, 52 N. E. 924, 925, 43 L. R. A. 797: "The common law seeks to protect every person against the wrongful acts of others, whether committed alone or by combination, and an action may be had for injuries done which cause another loss in the enjoyment of any right or privilege of property. No persons, individually or by combination, have the right to directly or indirectly interfere or disturb another in his lawful business or occupation, or to threaten to do so, for the sake of compelling him to do some act which, in his judgment, his own interest does not require. . . . It is clear that it is unlawful and actionable for one man from unlawful motives to interfere with another's trade by fraud, misrepresentation, or by molesting his customers, or those who would be customers, or by preventing others from working for him or causing them to leave his employ by fraud or misrepresentation, or physical or moral intimidation or persuasion, with an intent to inflict an injury which causes loss. . . . Every man has a right, under the law, as between himself and others, to full freedom in disposing of his own labor or capital according to his own will, and anyone who

invades that right without lawful cause or justification commits a legal wrong, and if followed by an injury caused in consequence thereof, the one whose right is thus invaded has a legal ground of action for such wrong. Damage inflicted by fraud or misrepresentation, or by the use of intimidation, obstruction or molestation, with malicious motives, is without excuse, and actionable. Competition in trade, business or occupation, though resulting in loss, will not be restricted or discouraged, whether concerning property or personal services. Lawful competition that may injure the business of another, even though successfully directed to driving that other out of business, ³⁷³ is not actionable. Nor would competition of one set of men against another set carried on for the purpose of gain, even to the extent of intending to drive from business that other set, and actually accomplishing that result, be actionable unless there was actual malice. Malice, as here used, does not merely mean intent to harm, but means an intent to do a wrongful harm and injury. An intent to do a wrongful harm and injury is unlawful, and if a wrongful act is done to the detriment of the right of another, it is malicious, and an act maliciously done with the intent and purpose of injuring another is not lawful competition. In this case it is clear the evidence sustained the allegations of the plaintiff's declaration, and there is here no contention on the facts. The principles herein announced are sustained by the weight of authority in England and in this country: *Lumley v. Gye*, 2 El. & B. 216; *Blake v. Lanyon*, 6 Term Rep. 22; *Sykes v. Dixon*, 9 Ad. & E. 693; *Pilkington v. Scott*, 15 Mees. & W. 657; *Hartley v. Cummings*, 5 Com. B. 247; *Bowen v. Hall*, L. R. 6 Q. B. D. 333; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Walker v. Crowen*, 107 Mass. 555; *Chipley v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367, 1 South. 934; *Delz v. Winfree*, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111; *Curran v. Galen*, 22 N. Y. Supp. 826; *Van Horn v. Van Horn*, 52 N. J. L. 284, 20 Atl. 485." See, also, *Aikens v. Wisconsin*, 195 U. S. 194, 25 Sup. Ct. Rep. 3, 49 L. ed. —.

Under the foregoing authorities there can be no doubt that any attempt to coerce the Kellogg Switchboard and Supply Company into signing said agreement by threats to order a strike was unlawful. It was violative of the clear legal right of the company, and was unjust and oppressive as to those who did not belong to the labor organizations. Nevertheless the strike was ordered, and thereafter plaintiffs in error sought by threats, intimidation and violence to prevent men and women from taking the places of the strikers.

In the case of *Mathews v. People*, 202 Ill. 389, 401, 95 Am. St. Rep. 241, 67 N. E. 28, 63 L. R. A. 73, in considering the free employment act, we said: "An employer whose workmen have left him and gone upon a strike, particularly when they have done so without any justifiable ³⁷⁴ cause, is entitled to contract with other laborers or workmen to fill the places of those who have left him. Any workman seeking work has a right to make a contract with such an employer to work for him in the place of any one of the men who have left him to go out upon a strike. Therefore, the prohibition contained in section 8 strikes at the right of contract, both on the part of the laborer and of the employer. It is now well settled that the privilege of contracting is both a liberty and a property right. Liberty includes the right to make and enforce contracts, because the right to make and enforce contracts is included in the right to acquire property. Labor is property. To deprive the laborer and the employer of this right to contract with one another is to violate section 2 of article 2 of the constitution of Illinois, which provides that 'no person shall be deprived of life, liberty or property without due process of law.' It is equally a violation of the fifth and fourteenth amendments of the constitution of the United States, which provide that no person shall be deprived of life, liberty or property without due process of law, and that no state shall deprive any person of life, liberty or property without due process of law, 'nor deny to any person within its jurisdiction the equal protection of the laws': *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 40 N. E. 454, 29 L. R. A. 79; *Adams v. Brennan*, 177 Ill. 194, 69 Am. St. Rep. 222, 52 N. E. 314, 42 L. R. A. 718; *Gillespie v. People*, 188 Ill. 176, 80 Am. St. Rep. 176, 58 N. E. 1007, 52 L. R. A. 283; *Fiske v. People*, 188 Ill. 206, 58 N. E. 985, 52 L. R. A. 291. The provision embodied in section 8 'is a discrimination between different classes of citizens founded on no justifiable ground, and an attempt to exercise legislative power in behalf of certain classes and against other classes, whether laborers seeking work or employers. It falls under the condemnation of the constitution.' "

Between the time the strike was called in this instance and the date of the application for an injunction, it appears from the evidence that acts of lawlessness were committed, and plaintiffs in error attempted to compel the Kellogg company to sign the foregoing labor contract and to prevent other laborers from taking the places of the strikers until it ³⁷⁵ did so. The injunction was issued by the court restraining these

various unlawful acts, but after the writ was issued and served as far as it could be there was no change in the conduct of plaintiffs in error, and the several petitions were filed in the superior court charging the violation of the writ. In support of such petitions more than one hundred affidavits were filed. A general review of the evidence disclosed by these affidavits is wholly impracticable. Some of plaintiffs in error are expressly mentioned in a part of the affidavits, to which reference should be made.

In support of the petition of June 22d it was alleged in one of the affidavits that Thomas Queenan, at the east door of the factory, spoke to one Hall, and tried to persuade him to quit working for complainant, and said to him, "Do you know that they have got to come to terms with us?" and Hall answered, "No; I don't know that," when Queenan replied, "Well, you should know."

An employé of complainant was stopped by plaintiff in error, John O'Brien, as the former was going to his lunch at the noon hour. O'Brien said to him, "You boys ought to stay out and join the union; you want to try and get the other fellows out and join the union also." When the employé said he was satisfied with his work and did not want to quit, O'Brien responded, "If you don't come out to-night I will lick you."

The affidavits in support of the petition of July 14th show that on divers days between June 22d and July 14th plaintiffs in error, Fisher, Christensen, Evans, Mashek and Brent picketed and patrolled around and about complainant's place of business, watching the streets, alleys and approaches thereto, daily shifting their positions; that they stationed themselves where the laborers employed in the factory were obliged to pass through the picket lines, and their attitude was ugly and menacing and such as to cause fear in the mind of an ordinary person, and that John O'Brien picketed and patrolled in a similar way. O'Brien, in his answer, states that ³⁷⁶ he was fined July 2, 1903, which was under the rule to show cause entered on the petition filed June 22d. He said in his answer that since July 2d he had not in any way participated in the strike, thereby admitting, by inference, that prior to that time he had taken part in the same.

In addition to the specific instances mentioned, the evidence abundantly shows that employés of the Kellogg company, and persons seeking employment there, were waylaid on their way to and from the factory, insulted, threatened, and in many instances assaulted and beaten by strikers, pickets and patrol-

lers, and that on June 30, 1903, when a number of men and girls were being escorted from the factory to their homes they were met by a crowd of men and boys, bringing on a serious riot. The employes were hissed, called "scabs," bricks and stones were thrown at some of them, and more or less shooting occurred. Large numbers of the strikers surrounded the plant, in company with at least a part of plaintiffs in error, and sought by every means in their power to embarrass and hinder the company in the peaceable pursuit of its business. The evidence, considered as a whole, is convincing that each of the plaintiffs in error was actively engaged in one or more of these unlawful acts, or aided, abetted, advised, assisted or encouraged others to commit them. That the acts were unlawful and in disregard of the expressed commands of the injunction cannot be denied.

The importance and far-reaching consequences of the cases are fully appreciated. We have endeavored to give the material questions raised and discussed in the argument due consideration, and have reached the conclusion that the judgments of the superior court were properly affirmed by the appellate court. The judgment of the latter court will accordingly be affirmed.

Mr. Justice Scott dissenting.

The Legal Aspects of Boycotting are discussed in the recent monographic note to *Gray v. Building Trades Council*, 103 Am. St. Rep. 488-503; and the subsequent cases of *State v. Stockford*, 77 Conn. 227, 107 Am. St. Rep. 28; *Patch Mfg. Co. v. Protection Lodge*, 77 Vt. 294, 107 Am. St. Rep. 668.

CALKINS v. CALKINS.

[216 Ill. 458, 75 N. E. 182.]

WILLS.—What will constitute a valid will or a valid attestation of a will is a legislative question, and the only legitimate function of a court is to declare and enforce the law as enacted by the legislature. (p. 234.)

WILLS.—Attestation of a will is the act of witnessing the actual execution of the instrument, and subscribing the name of the witness in the testimony of that fact. (p. 235.)

WILLS.—Proof of.—Attesting Witness to a will must be a subscribing witness, and it is not competent to prove a will by a person who was present and witnessed its execution but did not sign as an attesting witness. (p. 235.)

WILLS.—Subscribing Witness.—A valid will must be signed by the subscribing witness in the presence of the testator, and it is not sufficient that they merely acknowledge their signatures in the presence of the testator. (p. 236.)

WILLS—Execution—Presence of Testator.—"In the presence of the testator," as applied to subscribing witnesses to his will, means contiguity with an uninterrupted view between the testator and such witnesses, so that he can, if he wants to, see the act of attestation, whether in the same room or not. (pp. 236, 237.)

WILLS.—Attestation of a will is not in the presence of the testator, although the witnesses are in the same room and close to him if some material obstacle prevents him from knowing of his own knowledge, or perceiving by his senses, the act of attestation. (p. 237.)

WILLS—Attestation.—A will is not legally attested nor sufficiently executed, if the subscribing witnesses sign their names to the will where it is impossible for the testator to have conscious personal knowledge of their act, and is merely told that it has been done in another room, although he has requested them to sign, saw them take the will into the adjoining room, and saw their signatures on the will afterward. (pp. 237, 238.)

Aldrich & Worcester and L. Mighell, for the appellants.

Raymond & Newhall and R. Egan, for the appellees.

⁴⁶⁰ CARTWRIGHT, C. J. Appellants filed their bill in the circuit court of Kane county to contest the will of Cyrus Calkins, deceased, alleging, among other things, that the will was not executed in conformity with the requirements of the statute, for the reason that the persons signing the will as witnesses did not attest it in the presence of said Cyrus Calkins, but signed it in another room from the one in which he was lying and out of the range of his vision, where he did not and could not see the act of attestation. F. M. McNair, the executor, and Charles Calkins and Clara Calkins, three of the appellees, by their answer alleged that the will was signed within the range of vision of the testator, and that after it was signed by the witnesses it was immediately presented to the testator, and by him read over and acknowledged in the presence of said witnesses who had so signed the same. An issue was formed and submitted to a jury for trial, when the alleged will was presented, signed by Cyrus Calkins with his mark, and with the usual attestation clause signed by Phoebe Catlin and Edwin M. Harris. The subscribing witnesses testified that the will was prepared by the witness Harris, and was signed by the testator at 9 or 10 o'clock in the evening; that the ⁴⁶¹ testator was lying in bed with a broken hip; that after affixing his mark to it, he, in response to a question by Dr. McNair, the executor, requested said witnesses to witness it; that they took the will and went into an adjoining room out of the presence of the testator and outside of the range of his vision, where it was a physical impossibility for him to see them or the will, and sat down by a table and

wrote their signatures; that Mr. Harris then took the will and a lamp and they went back into the room where the testator was; that Mr. Harris then read the will to the testator, including the signatures, and showed them to him, and he said it was all right. The will being offered in evidence, was objected to by the appellants on the ground that it was not executed in accordance with the statute, and was not attested in the presence of the testator or within his sight or view or within the possible range of his vision. The court overruled the objection and admitted the will in evidence. The same question was afterward raised by instructions asked by the appellants and refused, and the court gave instructions at the instance of appellees stating, in effect, that there was a valid attestation of the will if the jury found the facts to be as testified to by said witnesses. The verdict was that the writing introduced in evidence was the last will and testament of Cyrus Calkins, deceased, and after overruling a motion for a new trial, the court entered a decree in accordance with the verdict. From that decree this appeal was prosecuted.

It must be borne in mind that the question what will constitute a valid will devising property or a valid attestation of such an instrument is legislative, and that the only legitimate function of the court is to declare and enforce the law as enacted by the legislature. The office of the court is to interpret the language used by the legislature where it requires interpretation, but not to annex new provisions or substitute different ones. The statute requires that all wills, testaments and codicils shall be attested in the presence of the testator or testatrix by two or more credible witnesses, and if we ^{we} should attempt to change that provision so as to authorize an attestation out of the presence of the testator or testatrix, either on account of a desire to sustain a particular will or because we regard a subsequent acknowledgment by the witnesses or ratification or approval by the testator just as good and effective as an attestation according to the statute, we should justly be charged with offensive judicial legislation. Our duty is merely to determine whether this will was attested in the presence of the testator, and the evidence was that it was not so attested, but was afterward read over to the testator and the signatures of the witnesses were shown to him. Attestation is the act of witnessing the actual execution of an instrument and subscribing the name of the witness in testimony of the fact: 4 Cyc. 888. In the case of *Drury v. Connell*, 177 Ill. 43, 42 N. E. 368, it was said that

the attestation of a will consists in the subscription of the names of the witnesses to the attestation clause as a declaration that the signature of the testator was affixed or the will acknowledged in their presence, and in the case of *Sloan v. Sloan*, 184 Ill. 579, 56 N. E. 952, the court considered the question whether there is a distinction between the attestation of a will and the subscription of the names of the witnesses. In that case the proponent offered to prove by one who was present that the will was signed by both the witnesses in his presence, and that it was executed and published by the deceased as and for his last will in his presence, but it was said that a different rule had been too long acquiesced in and understood in this state, and that to render a will valid it must be subscribed by the attesting witnesses. The supposed distinction, as applied to our statute, was rejected, and it was held that an attesting witness must be a subscribing witness, and that it is not competent to prove a will by a person who was present and witnessed its execution, but did not sign as an attesting witness.

That the attestation mentioned in the statute consists in the witnesses subscribing their names is shown by other provisions of our statute. In case of a deceased, insane or ⁴⁶³ absent witness, the court may admit proof of the handwriting of such witness and admit the instrument to probate as though it had been proved by such subscribing witness in his or her proper person. Proof of the handwriting of the subscribing witness in such a case raises the presumption that the witness duly attested the will in the presence of the testator and believed him to possess testamentary capacity: *More v. More*, 211 Ill. 268, 71 N. E. 988. It is not indispensable that the witnesses shall sign a formal clause of attestation. The attestation clause may consist of a simple word, such as "witness," "attest" or "test," or there may be no words of attestation at all, and yet the signature of the witness alone constitute an attestation of every fact necessary to make the will valid.

The provisions of the statute as to the signing by the testator and the witnesses are different. He may either sign the will in the presence of the witnesses or acknowledge that the will is his act and deed, but as to the witnesses, the only provision is that they shall attest the will in his presence. All the authorities declare that the object of the law is to prevent fraud and imposition upon the testator or the substitution of a surreptitious will, and to effect that object it is necessary that the testator shall be able to see and know that the wit-

nesses have affixed their names to the paper which he has signed and acknowledged as his will. The legislature have determined that such object shall be attained by requiring the attestation of the subscribing witnesses to be in the presence of the testator, and if that is not done, it is no answer to say that some other method would effect the same object. Numerous methods may be devised by which the testator can be made acquainted with the fact that the witnesses have signed the identical will which he executed, and that there is no fraud or imposition upon him, but where the legislature have determined in what manner the object in view shall be accomplished, no other method can be adopted, although in the opinion of the court it would be just as effective. ⁴⁰⁴ To adopt any other rule would open a limitless field as to what would be equivalent to a compliance with the provision of the statute.

The authorities have always given to the word "presence" the meaning of conscious presence, so that the act of attestation may be within the actual personal knowledge of the testator, and in *Witt v. Gardiner*, 158 Ill. 176, 49 Am. St. Rep. 150, 41 N. E. 781, it was stated that the test of presence of the testator is contiguity, with an uninterrupted view between the testator and the subscribing witnesses, as the indispensable element to the physical signing in the testator's presence. It is not necessary that the act of attestation be performed in the same room, if it takes place within the testator's range of vision where he can see the signing, considering his position and the state of his health at the time. It is still in his presence, although he may turn and look away or choose not to look at the act. On the other hand, no mere contiguity of the witnesses will constitute presence if the position of the testator is such that he cannot possibly see them sign. An attestation is not in the presence of the testator, although the witnesses are in the same room and close to him, if some material obstacle prevents him from knowing of his own knowledge or perceiving by his senses the act of attestation. The rule so stated was reaffirmed in *Drury v. Connell*, 177 Ill. 43, 42 N. E. 368.

But counsel say that according to the rule so stated a blind person would not be able to execute a will. The rule was naturally stated with reference to sight, because nearly all persons can see, and the rule would apply almost universally. In the case of a blind person, his will would be attested in his presence if the act was brought within his personal knowledge through the medium of other senses. But whether a

person is blind or can see, an attestation is certainly not in his presence if he has no conscious personal knowledge of the act and is merely told that it has been performed in another room. Neither is there anything in the suggestion that if a testator were lying on his bed and could ⁴⁶⁵ only look upward, the witnesses would have to be suspended in the air over his head. Means could be adopted to comply with the law, and the plain meaning of the authorities is that an attestation is in the presence of the testator only when he has personal knowledge that the witnesses are signing their names to his will in accordance with his request.

Counsel say that in this case the attestation was within the knowledge and understanding of the testator, meaning by that statement that from the question asked by the doctor concerning witnessing the will and the testator's answer and the taking of the will into the other room, he would naturally conclude that they went there to attest the will and were attesting it. It is perfectly clear that he could not have been a witness to the attestation, but that his knowledge, as it is called, was merely an inference or conclusion as to what was going on, based on other facts.

The question here involved was decided in *Mendell v. Dunbar*, 169 Mass. 74, 61 Am. St. Rep. 277, 47 N. E. 402, where the testator signed the will in the presence of the subscribing witnesses, and they withdrew to another room in the house and there subscribed it as witnesses. There was a question whether the fact that the witnesses afterward returned to the testator, and one of them, with the assent of the others, said that they had signed the will and showed him the signatures, and he assented thereto, was a sufficient compliance with the statute. The question was answered in the negative. The same view of the law was taken in the case of *In re Downie*, 42 Wis. 66. We have been referred to two cases adopting a contrary view: *Cook v. Winchester*, 81 Mich. 581, 46 N. W. 106, 8 L. R. A. 22, and *Cunningham v. Cunningham*, 80 Minn. 180, 81 Am. St. Rep. 256, 83 N. W. 58, 51 L. R. A. 642. In each of those cases there was a conscious effort on the part of the court to sustain the will on account of the equity and justice of the case. The subsequent acknowledgment was considered as effective as the actual attestation in the presence of the testator, and was held to be a substantial compliance with the statute. But we do not regard the reasons given as sufficient ⁴⁶⁶ to justify a departure from the plain language of our statute. If some other method than the attestation in the presence of the testator would be just as

effective to prevent fraud, imposition or the substitution of a surreptitious will, we deem it sufficient to say that the legislature has prescribed a particular method which must be followed in order to make a will legal and valid.

The court erred in overruling the objection to the will and in giving the instructions.

The decree is reversed and the cause remanded.

The Principal Case is supported by *Mendell v. Dunbar*, 169 Mass. 74, 61 Am. St. Rep. 277; *Burney v. Allen*, 125 N. C. 314, 74 Am. St. Rep. 637; *Witt v. Gardiner*, 158 Ill. 176, 49 Am. St. Rep. 150. A more liberal and reasonable view of the law, however, is taken in *Cunningham v. Cunningham*, 80 Minn. 180, 81 Am. St. Rep. 256. Consult, also, *In re Clafin's Will*, 73 Vt. 129, 87 Am. St. Rep. 693.

NATIONAL FIRE INSURANCE COMPANY v. THREE STATES LUMBER COMPANY.

[217 Ill. 115, 75 N. E. 450.]

INSURANCE—Sole Ownership—Contract to Convey.—Ownership of property is sole and unconditional, within the meaning of a fire insurance contract, even though the owner has made a contract for the sale of the land, which has not been performed. Under a written contract for the sale of land, the vendor retains the legal title as trustee for the benefit of the vendee. (p. 243.)

INSURANCE—Sole Ownership—Contract to Convey.—A mere contract to convey land at a future time upon the performance of certain acts by the purchaser does not create an equitable title in him and render the title of the proposed vendor less than a sole and unconditional ownership within the meaning of a fire insurance policy. (p. 244.)

VENDOR AND PURCHASER—Contract to Sell.—Possession of land under a contract for personal services in cutting timber and making lumber for the owner in possession as his agent merely, and not as vendee, although the contract provides that when all of the timber is made into lumber, the person thus in possession will be entitled to a conveyance of the land remaining unsold, provided certain conditions have been fulfilled. (pp. 246, 247.)

INSURANCE—Insurable Interest—Waiver of Condition of Title.—If the insured has an insurable interest in the property, and in good faith applies for insurance thereon, and makes no actual misrepresentation or concealment of his interest therein, and the insurance company refrains from making inquiry concerning his interest and issues a policy to him, accepts and retains his premium, it must be presumed to have knowledge of the condition of his title, and to insure the property with such knowledge. (pp. 247, 248.)

The contract mentioned in the opinion recites that the appellee, the Three States Lumber Company, "is now the owner and is in possession of the hereinafter described land and timber situated in Mississippi county, state of Arkansas"; by the terms thereof, "the said A. B. Wolverton agrees that he

will manufacture into lumber for the said Three States Lumber Company, its successors or assigns, all of the merchantable timber now lying, standing or being on the following described lands, and will deliver the same to said . . . company . . . as directed, F. O. B. barge Mississippi river" (here follows a description of the lands); it is therein agreed "that the said A. B. Wolverton will at all times follow the instructions and directions of said Three States Lumber Company, its successors or assigns, or their authorized agents, both in the cutting of said timber and in the manufacture of all lumber to be delivered under the terms of this contract, and said A. B. Wolverton will continue to follow such instructions and directions so long as this contract shall remain in full force and effect; it is particularly understood and agreed that the title to all land and timber heretofore described is and shall remain in said . . . company . . . and the title and possession of all lumber manufactured under this agreement remains in said . . . company . . . free from all liens, claims, demands and encumbrances of any nature whatsoever"; said company, its successors or assigns, therein "agree to purchase a suitable sawmill and other equipment, including steel tram and logging road, rolling stock for use on said tram and logging road, log wagons, teams, etc., all of said property to be purchased for the account of said Three States Lumber Company, its successors or assigns, and to be used by said A. B. Wolverton in the manufacture and delivery of all merchantable timber heretofore described"; it is further agreed that "the title and possession to all such property and material is and shall remain in the said Three States Lumber Company, its successors or assigns, and by it entered upon its books for record under name of 'Wolverton Lumber Account'"; it is further agreed "that the said . . . company . . . may sell any parcel or parcels of land, on which all merchantable timber shall have been removed under the terms of this contract, and the proceeds of such sale or sales will be entered upon its books and placed to the credit of 'Wolverton Lumber Account'"; the said company "agrees to make to said A. B. Wolverton a monthly advance for the payment of all labor and operating expenses, not to exceed five dollars per thousand feet; said advance to be made on estimate on all lumber manufactured and in pile on millyard, according to the terms of contract, which shall have been manufactured during the preceding months, and said estimate to be made by said Three States Lumber Company . . . or its authorized agents and entered upon its

books in 'Wolverton Lumber Account'"; it is further agreed that, should the said Wolverton, "in case of death, disability or otherwise fail or neglect to comply with the terms of this agreement, or refuse or delay the cutting of said timber heretofore described, or the manufacture of the same into lumber, then the said A. B. Wolverton agrees that the said Three States Lumber Company, its successors or assigns, may, upon written or verbal notice to him or his legal representatives, enter upon and take possession of all improvements of any and all nature whatsoever, and that they may make such arrangements as they may consider necessary to continue the cutting and manufacture of said timber, and said A. B. Wolverton or legal representatives do relinquish any and all claims they may have had under this agreement to the cutting and manufacture of said timber, and this agreement is canceled, except as to any manufactured lumber then on millyard, which shall be settled for according to the terms of this contract, and any balance which may be found due A. B. Wolverton or his legal representatives shall be placed to the credit of 'Wolverton Lumber Account' on books of said Three States Lumber Company, its successors or assigns," it is further agreed that the said Wolverton "will not manufacture any lumber for any other persons or person during the continuance of this contract, except by written consent of said Three States Lumber Company, its successors or assigns"; it is therein further agreed, that Wolverton "will cut or cause to be cut ten million feet of lumber each year during the continuance of this contract, until all of said merchantable timber heretofore described shall have been manufactured and delivered to said Three States Lumber Company, its successors or assigns, unless he shall be prevented by fires, floods or other causes over which he has no control"; it is therein further agreed that the appellee, its successors or assigns, "will buy from time to time, as they may elect, additional timber, bought with knowledge and consent of said A. B. Wolverton, and all such timber so bought is to be manufactured for and delivered to said Three States Lumber Company, its successors or assigns, according to and under the terms of this contract"; it is furthermore therein agreed that "when all of the terms of this contract shall have been fully complied with, and all of the merchantable timber heretofore described shall have been manufactured into lumber for and delivered to said . . . company . . . as agreed herein, together

with any additional timber that may have been purchased under the terms of this contract when the said company agrees to quitclaim to said A. B. Wolverton all land remaining unsold under this contract, and will further give to said A. B. Wolverton title to all improvements and personal property that have been purchased by it and remain upon said land, provided there is on its books to the credit of 'Wolverton Lumber Account' a sufficient sum to pay for all land, timber, personal property, and improvements at cost of the same, together with all expenses, interest, taxes and assessments thereon; and further provided that such credit shall first be applied on all indebtedness now owing the said company from said A. B. Wolverton, now amounting to twenty-eight thousand three hundred and thirty-nine dollars and twenty-nine cents, resulting from his marked tree blank, and balance of credit to be applied under this contract, if sufficient remains to balance account, otherwise to be held by said Three States Lumber Company, its successors or assigns, and applied by them pro rata as they may elect, under the terms of this agreement." Judgment for the plaintiff, and the defendant appealed.

W. F. Gilbert and M. M. Crane, for the appellant.

Lansden & Leek and D. S. Landsen, for the appellee.

120 MAGRUDER, J. In this case three defenses were set up in the trial court and argued and discussed in that court and in the appellate court. One of these defenses was, that there was a cancellation of the policy by the company before the fire under the following provision in the policy, to wit: "This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation." Whether the company gave such notice, and whether it was received by the appellee, were questions of fact, which are settled by the judgments of the circuit and appellate courts. The defense, based upon an alleged cancellation of the policy, has been abandoned by the appellant company in this court, and no considerations in support of it are presented in the argument of counsel for the appellant.

The second defense made upon the trial below was, that the interest of the insured at the date of the policy was other than an unconditional and sole ownership. The policy contains ¹²¹ the following provision, to wit: "This entire policy, unless otherwise provided by agreement in-

dorsed hereon or added hereto, shall be void, . . . if the interest of the insured be other than unconditional and sole ownership; . . . or if any change other than by the death of the insured takes place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process, or judgment, or by voluntary act of the insured, or otherwise." It was contended by the appellant in the lower courts that the interest of the appellee, as the insured party, in the property insured was other than unconditional and sole ownership, by reason of the contract made by appellee with A. B. Wolverton on December 17, 1898, as such contract is set forth in the statement preceding this opinion. The appellant, upon the trial below, submitted to the trial court, to be held as law in the decision of the case, certain propositions to the effect that the interest of the appellee was not, at the time of the destruction of the property by fire, that of sole and unconditional ownership; and that the execution of the agreement of December 17, 1898, between appellee and Wolverton, together with the alleged placing of Wolverton in possession of the insured premises, was an act, which so changed the status of ownership as to be in violation of the clause of the policy as to unconditional and sole ownership. These propositions were marked refused by the trial court, and their refusal presents the only question which is now urged upon our attention. That question is, whether or not the interest of the insured in the premises was other than an unconditional and sole ownership thereof by virtue of the provisions of such contract.

1. It is insisted by the appellant that the contract of December 17, 1898, is a conditional sale of the property mentioned, and possesses all the characteristics of a bond for a deed, and all the objectionable features of an encumbrance; and that it made the ownership conditional, inasmuch ¹²² as when the condition therein specified should be performed, appellee agreed to "quitclaim" to Wolverton "all lands" remaining.

If it be assumed, as is contended by the appellant, that the agreement in question is a contract by the appellee for the sale of land to Wolverton, it does not follow for that reason that the interest of the appellee in the property insured is other than unconditional and sole ownership. This precise question was decided by this court in *Phenix Ins. Co. v. Caldwell*, 187 Ill. 73, 58 N. E. 314, where it was held

that the execution and delivery of a bond for a deed, even though accompanied by a part payment of the purchase money, was not a sale within the meaning of an insurance policy, requiring the consent of the company to any sale of the property, since the maker of a bond for a deed retains both the legal and equitable title, until the obligee has performed the conditions, which entitle him to demand a conveyance. Where there is a written contract for the sale of land, the vendor retains the legal title: *Langlois v. Stewart*, 156 Ill. 609, 47 N. E. 177. As was said in *Langlois v. Stewart*: "A bond for a deed is only an agreement to make title in the future, and so long as it remains executory the title is vested in the original owner." The rule in this state is, that the vendor is trustee of the title for the benefit of the vendee: *Sutherland v. Goodnow*, 108 Ill. 528, 48 Am. Rep. 560; *Fuller v. Bradley*, 160 Ill. 51, 53 N. E. 732; *Phenix Ins. Co. v. Caldwell*, 187 Ill. 73, 58 N. E. 314. If, therefore, the agreement here under consideration is a contract for the sale of land by the appellee to Wolverton, the legal title to the property remained in appellee as vendor, and was held by appellee as trustee for the benefit of Wolverton.

In addition to this, the contract of December 17, 1898, expressly provides that "the title to all land and timber heretofore described is and shall remain, in said Three States Lumber Company, its successors or assigns, and the title and possession of all lumber manufactured under this agreement remains in said Three States Lumber Company, its ¹²³ successors or assigns, free from all liens, claims, demands and encumbrances of any nature whatsoever." The agreement also provides, as to the property to be purchased in the future by the Company, that "the title and possession to all such property and material is and shall remain in the said Three States Lumber Company, its successors or assigns." The agreement also provides that said company, its successors or assigns, "may sell any parcel or parcels of land, on which all merchantable timber shall have been removed under the terms of this contract"; and the company only agrees to quitclaim to Wolverton "all lands remaining unsold under this contract," when its terms have been fully complied with, and all of the merchantable timber therein described shall have been manufactured into lumber, and delivered to the company as agreed therein, together with any additional timber that may be purchased under the terms of the contract. The provisions that the

title and possession were to remain in the company, and that the company was to have the right to sell any portion of the land from which the timber should be cut off, indicate that the unconditional and sole ownership of the property remained in the company, so far as the legal title was concerned.

2. It cannot be said that, under the terms of this contract, the equitable title was thereby invested in Wolverton. A mere contract to convey at a future time upon the performance of certain acts by the purchaser does not create an equitable title. "It is but an agreement that may ripen into an equitable title. When the purchaser performs all acts necessary to entitle him to a deed, then, and not till then, he has an equitable title, and may compel a conveyance": *Chappell v. McKnight*, 108 Ill. 570; *Walters v. Walters*, 132 Ill. 467, 23 N. E. 1120. This question has arisen in connection with the subject of a widow's dower. It is held that a widow may have dower in the equitable estate of her husband in real property; but it has also been held that, where there is a contract for the sale of land, a husband, who is the vendee ¹²⁴ in such contract, has no such equitable interest in the property as will entitle his wife to an inchoate right of dower therein, until he has made all the payments for purchase money, as required by the contract, so that nothing remains to be done except the execution of a deed to him: *Greenbaum v. Austrian*, 70 Ill. 591; *Walters v. Walters*, 132 Ill. 467, 23 N. E. 1020. Before the purchaser under a contract of sale has performed all the conditions required of him by the contract, he does not really have an equitable title to the property described in the contract. In the case at bar, the proof shows that, in view of the quantity of land from which timber was to be cut by the terms of the contract, and in view of the amount of timber which it was possible to cut therefrom per day, it would take some twelve years or more before Wolverton could comply with all the terms of the contract. He was not entitled to a quitclaim deed of the part of the property remaining unsold, until all the terms of the contract had been fully complied with, and all of the merchantable timber described thereon had been manufactured into lumber and delivered to the appellee. As this period had not arrived at the time the property was destroyed by fire on September 6, 1902, he had no equitable title to the property.

3. In addition to this, the contract shows that the interest of Wolverton to be acquired by the terms of the con-

tract in the property was remote and contingent. Not only was the timber to be cut from the land and manufactured into lumber and delivered to the appellee, but certain advances, that had been made or were to be made, and certain indebtedness, due from Wolverton to the appellee, were to be paid off. All this work had to be done, and these advances and indebtedness had to be paid, before the appellee would be obliged to convey to Wolverton the land remaining unsold and the improvements remaining on the unsold land. This feature of the contract brings the case within the doctrine announced in *Security Ins. Co. v. Kuhn*, 207 Ill. 166, 69 N. E. 822, which was an action in assumpsit on an insurance policy, ¹²⁵ containing a provision that it should be void "if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple"; and where the defense was that the interest in the plaintiff in the property insured was not that of unconditional and sole ownership, and the ground on which the building was situated was not owned by him in fee simple; and it was there held that the widow, suing upon the policy, who took an equitable life estate as devisee, and the legal title as executrix and trustee, had a fee simple title within the meaning of the policy; and it was there further held that—as to the interest of the plaintiff which was limited upon her death, or the uncertain event of her remarriage, and to dubious and uncertain persons, who should be living and able to take the property at her death so that it could not be known who, if any, would be the surviving child or children, or the issue or descendant of any such child, to receive the future contingent interest, no one having a present vested estate or insurable interest except the plaintiff—"in the action at law she must be regarded as the sole and unconditional owner in fee simple, although the property in her hands or the proceeds of the insurance are impressed with a trust, which a court of equity will compel her to execute."

4. It is said however, by the appellant that Wolverton was put into possession of the property and that the possession did not remain with appellee as vendor. It is sought to distinguish the case of *Phenix Ins. Co. v. Caldwell*, 187 Ill. 73, 58 N. E. 314, from the case at bar, upon the alleged ground that, in the former case, the vendee under the contract of sale was not put into possession of the property, whereas here it is said that the vendee had the possession.

A careful examination of the contract will show that really the possession remained with appellee, the owner of the property. Wolverton's possession was not that of owner or purchaser. Appellee put him in possession of the mill, in order that he might ¹²⁶ manufacture into lumber the timber furnished to him by the appellee. He was merely the agent or representative of the appellee in the management of the property for the purpose of manufacturing the timber into lumber. The contract not only provides in express terms that the title of the property then on hand, and to be subsequently purchased, should remain in appellee, but also that the possession of the same should remain in appellee. The latter also was given the right to sell any and all of the land, whenever the timber should be removed from it. As to Wolverton, the contract was a personal one; that is to say, a contract for his personal services. He was to perform the duty of manufacturing the timber into lumber. That duty he was obliged to perform, not as the owner or purchaser of the property, but as the representative of the appellee.

5. It cannot be said that there was any change of the interest of the appellee in the property after the issuance of the policy of insurance. The policy bears date July 5, 1902. When it was issued the contract with Wolverton already existed, it having been executed on December 17, 1898. Therefore, the interest both of the appellee and of Wolverton under the contract existed when the policy was issued. It is not shown by any testimony in the record, to which our attention has been called, that any written application was made by appellee for the policy of insurance, upon which this suit is brought. Consequently, appellee made no representations as to the nature or character of its interest in the property when the policy was issued to it; nor does it appear that any inquiry was made by the appellant or its agents of appellee as to the nature of the latter's interest in the property. Consequently, there could have been no misrepresentation on the part of appellee as to the extent or character of its interest.

The third defense made below, that appellee concealed the existence of the contract with Wolverton at the time of the issuance of the policy, becomes immaterial, because, in ¹²⁷ the view here taken, appellee's interest under the contract was not less than unconditional and sole ownership of the property.

In *Manchester Fire Assur. Co. v. Abrams*, 89 Fed. 932, 32 C. C. A. 426, it was said by the United States circuit court of

appeals of the ninth circuit: "Sound reason as well as the weight of authority inclines us to the view that, where the assured has an insurable interest in the property, and in good faith applies for insurance upon the same, and makes no actual misrepresentation or concealment of his interest therein, and the insurance company refrains from making inquiry concerning his interest, and issues a policy to him, and accepts and retains his premium, the company must be presumed to have knowledge of the condition of his title, and to assure the property with such knowledge. . . . In the case at bar there can be no question that the defendant in error insured the property in good faith as his own. He was asked no questions concerning his title. The condition in the policy, which it is claimed renders it void, was one of the numerous printed conditions which the policy contained when it was delivered to him. The law does not favor forfeiture. The contract issued and prepared by the insurance company is made for its own protection, and must be construed most strongly against it": See, also, *Philadelphia Tool Co. v. British American Assur. Co.*, 132 Pa. St. 236, 19 Am. St. Rep. 596, 19 Atl. 77; *Western Assur. Co. v. Mason*, 5 Ill. App. 141; *Miotke v. Milwaukee Mut. Ins. Co.*, 113 Mich. 166, 71 N. W. 463; *Traders' Ins. Co. v. Pacaud*, 150 Ill. 245, 41 Am. St. Rep. 355, 37 N. E. 460; *German Ins. Co. v. Gibe*, 162 Ill. 251, 44 N. E. 490; *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302, 25 Am. Rep. 386. As, therefore, appellee, under the contract with Wolverton, retained the legal and equitable title, and the possession of the property, its interest was not thereunder less than a sole and unconditional ownership.

Counsel for appellant substantially admit that, if the case of *Phenix Ins. Co. v. Caldwell*, 187 Ill. 73, 58 N. E. 314, is to stand as the law of this court, the decision there made disposes of the defense ¹²⁸ here set up; but counsel strenuously urge that the decision in the *Caldwell* case is not in harmony with many decisions in other states upon this point, and that it ought to be overruled. After a careful consideration of the able argument of counsel, we see no reason for changing or retreating from the views expressed in the *Caldwell* case.

For the reasons above stated, the judgment of the appellate court, affirming the judgment of the circuit court, is affirmed.

A Policy of Fire Insurance is not avoided by a sale of the property not fully consummated: *Magoon v. Firemen's Fund Ins. Co.*, 86 Minn. 486, 91 Am. St. Rep. 370; *Hanover etc. Ins. Co. v. Brown*, 77 Md. 64, 39 Am. St. Rep. 386; *International Wood Co. v. National Assur.*

Co., 99 Me. 415, 105 Am. St. Rep. 288; Wood v. American Ins. Co., 149 N. Y. 382, 52 Am. St. Rep. 733.

Although a Policy of Insurance declares that it shall be void if the interest of the insured is other than the unconditional or sole ownership, such condition is waived if there is no written application made for a policy and no questions concerning the title are asked: Dooly v. Hanover Fire Ins. Co., 16 Wash. 155, 58 Am. St. Rep. 26. See, too, Union Assur. Co. v. Nalls, 101 Va. 613, 99 Am. St. Rep. 923; Virginia Fire Ins. Co. v. Richmond Mica Co., 102 Va. 429, 102 Am. St. Rep. 846.

IN RE PETITION OF MULFORD.

[217 Ill. 242, 75 N. E. 345.]

EXECUTORS AND ADMINISTRATORS—Constitutional Law.

The right of a person to be appointed and to act as an executor is not a privilege or immunity, the denial whereof is prohibited by constitutional guaranty. (p. 250.)

CONSTITUTIONAL LAW.—"Privileges and Immunities" which are protected by constitutional inhibition concern the personal and private rights of citizens, but do not include within their meaning the right to hold office. (p. 251.)

EXECUTORS AND ADMINISTRATORS—Nonresidents—Constitutional Law.—The state may decline to confer official power on residents of other states without depriving them of any "privilege" or "immunity," "liberty" or "property," within the meaning of constitutional provisions. And an executor is a public officer within this rule. (p. 252.)

EXECUTORS AND ADMINISTRATORS—Nonresidents—Constitutional Law.—A statute providing that no nonresident shall be appointed or act as an executor is not within constitutional guaranty that no person shall be deprived of life, liberty or property without due process of law. (p. 252.)

DOMICILE—Nonresidents.—One who has a permanent abode in one state and comes into another state for a temporary purpose, intending to return to such permanent abode, is a nonresident of the state in which he is temporarily staying. (pp. 252, 253.)

J. T. White and M. Sprague, for the appellant.

Knox & Akin, for the appellee.

²⁴⁵ **BOGGS, J.** Harriet M. Richards, a resident of the county of Will, in this state, while temporarily absent from her home, departed this life on the twenty-sixth day of April, 1904, at Palacias, Matagorda county, Texas. She left a will bearing date March 15, 1890, in which she nominated as executor Marion Mulford, the appellant. The will was presented to the probate court of Will county and duly admitted to probate. It was made known to the probate court that said Marion Mulford was a resident of the state of Ohio, and the court, on motion of certain legatees and distributees under the will, refused to grant letters testamentary to him, for the

reason he was a nonresident of this state. This record presents for decision ²⁴⁶ the correctness of the action of the court in refusing to authorize the appellant Mulford to act as executor of said will.

The final proviso of section 18 of chapter 3, entitled "Administration" (4 Starr & Curtis' Statutes, p. 32), as amended by the act of 1897, provides that "no nonresident shall be appointed or act as executor." But it is urged that this statutory provision is in conflict with section 2 of article 4 of the constitution of the United States, which provides that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," and is also in conflict with section 2 of article 2 of the constitution of the state of Illinois, which provides that "no person shall be deprived of life, liberty or property without due process of law."

The right to be appointed and act as an executor is not a "privilege" or "immunity," the denial whereof is prohibited by the federal constitution. The disposition which shall be made of property after the death of the former owner is to be determined by the law-making body of the state. No one has a natural right to take as heir of another, nor has any person the natural right to direct the devolution of his property after he shall have died. The right to devise or bequeath property by will or to take by inheritance exists only because conferred by law: *Evans v. Price*, 118 Ill. 593, 8 N. E. 854; *Wunderle v. Wunderle*, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84; *Kochersperger v. Drake*, 167 Ill. 122, 47 N. E. 321, 41 L. R. A. 446. The legislature may change the course of descent or of the devolution of property by will, and the enactment will operate at once as to all estates not already passed by the death of the owner: *Kochersperger v. Drake*, 167 Ill. 122, 47 N. E. 321, 41 L. R. A. 446. The state, acting in its sovereign capacity, by appropriate legislation regulates and controls the devolution of property after the death of an owner. Our statute in respect of these matters authorizes the owners of property to provide by will for the ownership thereof after they shall have died, and regulates and controls the manner in which ²⁴⁷ such will shall be executed and authenticated, and provides that they be duly proven in the court given jurisdiction of such matters and admitted to probate, and that the same, when so duly admitted to probate, shall be carried into execution by the person named therein as executor or executrix, provided such person shall possess the qualifications which the same statute has fixed and de-

clared to be essential to the legal right to discharge such duty. The judicial procedure thus established to regulate and control the devolution of property by will is the exercise of governmental power and duty by the state, and executors acting by force of such procedure exercise functions that are official in character. The position is denominated an "office" in sections 31 and 36 of the administration act: 1 Starr & Curtis' Statutes, 283, 284.

The nomination of an executor by the testator in his will does not confer power and authority on the person so nominated to act as executor until he has been found "legally competent" so to act by the branch of the judicial department of the state in which has been vested jurisdiction and power to so determine, save that the statute has granted temporary authority to the person so named as executor to act, to a circumscribed and limited extent, before the probate of the will. But this limited power is possessed in virtue of the statute conferring the same on the person named as executor. An executor receives formal letters testamentary, which constitute his commission as an officer. Before such letters may issue he must take the oath of office prescribed by the statute, and must execute a bond to the people of the state of Illinois conditioned for the faithful performance of the duties of his office, unless the will shall direct that no bond be required, and even in the event of such direction in the will the court may, for certain specified reasons, require the bond to be given. The estate is committed to the executor to be administered under the direction and supervision of the court, acting in pursuance of the general statutory ²⁴⁵ enactments relating to the administration of estates. Power resides at all times in the court to control and direct the executor and to revoke his authority to act for any statutory disqualification. His compensation is fixed by public law. He is required to report to the court at stated intervals, and it is essential to the preservation of the rights of widows and children, creditors, legatees and devisees, and to the proper administration of the estate in compliance with the law, that the court shall have power at all times to compel his personal attendance before the court. An executor is a public officer: Wharton on Conflict of Laws, sec. 552; Woerner on Law of Administration, sec. 172.

The "privileges and immunities" which are protected by the constitutional inhibition concern the personal and private rights of the citizen, such as his right to acquire and possess property, to pursue ordinary callings, and secure happiness

and safety, etc., and do not include within their meaning the right to hold office: *People v. Loeffler*, 175 Ill. 585, 51 N. E. 785. The state may decline to confer official power on residents of other states without depriving such nonresidents of any "privilege" or "immunity" protected by the constitution of the general government, or of "liberty" or "property" within the meaning of those words as used in our state constitution. A nonresident can have no property right in the fees provided by law to be paid as compensation for the performance of the duties of an office created by or existing in virtue of the statutes of this state. "Liberty," as the term is used in the constitutional provision, includes freedom from servitude and unlawful restraint; the right to pursue any ordinary calling, trade or employment, and acquire property, etc., thereby, but does not include any supposed right of a nonresident to receive an appointment to a position created by the general laws of the state for the purpose of carrying into effect legislation affecting the state and its people.

The power to control property of a deceased person to the end that it shall be applied to the payment of the just ²⁴⁹ debts of the decedent, for the protection of those who were peculiarly dependent upon him, and who may otherwise become burdens on the public, and the remainder be transmitted to the persons or to the purposes the testator desired it to go or be applied to, rests in the state in its sovereign capacity. In exercising this governmental function the state has the clear right to call to its aid and to invest with official power only such persons as are residents within its territorial limits. No nonresident enjoys the "privilege or immunity" to participate, as an officer, in the administration of the affairs of the state, nor has he any right of "liberty or property" in the fees or emoluments of any such office or public position. The petitioner, Marion Mulford, testified that he was seventy-one years old and had a wife and two daughters, with whom he resided in Dayton, Ohio, when the said Harriet M. Richards died; that he lived with his family on homestead property owned by himself and which he had not abandoned; that he had come to Illinois with the fixed purpose and intention of accepting the executorship of this estate and of remaining within the jurisdiction of the court until the estate could be administered upon in accordance with the will, and that he still retained that fixed purpose, whatever time might be required therefor. Nevertheless, the appellant is a resident of the state of Ohio. Residence is lost by leaving the place where one has acquired a permanent

home and removing to another place without a present intention of returning: 24 Am. & Eng. Ency. of Law, 2d ed., 697. "A temporary sojourn within a state for pleasure or business, accompanied by an intention to return to the state of one's former inhabitance, does not constitute residence": *Pells v. Snell*, 130 Ill. 379, 23 N. E. 117.

The court did not err in refusing to issue letters testamentary to the appellant.

Judgment affirmed.

At the Common Law all persons except idiots and lunatics were competent to act as executors; neither infancy, coverture, nonresidence, improvidence, ignorance, nor moral delinquency disqualified one for the office. But by the statutory law certain disqualifications for the office are enumerated, among which is sometimes found nonresidence: See the monographic note to *Berry v. Hamilton*, 54 Am. Dec. 518, 522; *Kidd v. Bates*, 120 Ala. 79, 74 Am. St. Rep. 17; *Clark v. Patterson*, 214 Ill. 533, 105 Am. St. Rep. 127.

BOYD v. CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

[217 Ill. 332, 75 N. E. 496.]

RAILROADS—Independent Contractor.—A railway corporation is liable for the wrongful act of a contractor while exercising, with the assent of the corporation, some chartered power or privilege of the corporation which he could not have exercised independently of its charter, but it is not liable for the wrongful act of an independent contractor not exercising any special power derived from the charter. (pp. 254, 255.)

RAILROADS—Construction of Road—Independent Contractor. The construction of a railroad by an independent contractor upon the right of way and property of the railway corporation is not the exercise of any chartered power or privilege by the contractor on behalf of the company, and it is not liable for his negligence. (p. 255.)

CORPORATIONS—Rule of Liability.—Every act of a corporation is done under its charter, in the sense that if there were no corporation it could not perform the act, but if the act is one which might have been done by an individual, no different rule obtains as to liability merely because there is a corporation. (p. 255.)

RAILROADS—Construction Work—Independent Contractor.—A contractor who has control and direction of the method and means for the performance of the work of constructing a railroad, the railroad company retaining only the right of general supervision and inspection to see that the contract is properly performed, is an independent contractor, and not a servant of the railroad company. (p. 257.)

H. Blaisdell and O. R. Barrett, for the plaintiff in error.

Stevens & Horton, for the defendant in error.

³³⁵ CARTWRIGHT, C. J. B. W. Goens was a subcontractor under George C. Smith for grading and preparing a part of the roadbed for a railroad track. Goens hired John Lyons as a laborer, and Lyons was injured by the falling of clay from the face of a bank in widening a cut, and died from his injuries. Plaintiff in error, as administrator of the estate of Lyons, sued Goens and Smith and the defendants in error, the Chicago and Northwestern Railway Company and the Peoria and Northwestern Railway Company, to recover damages, alleging that the death of Lyons was caused by negligence in respect to the bank and in the management and control of the work. At the close of the evidence for the plaintiff the court directed a verdict of not guilty as to the two railway companies and Smith, but denied a motion of Goens to direct a verdict of not guilty as to him. Goens then introduced evidence, after which, on motion of plaintiff, the court set aside the order directing a verdict as to Smith, and the plaintiff thereupon dismissed his suit as to Smith and Goens. A verdict was returned as to the railway companies in accordance with ³³⁶ the direction of the court, and the plaintiff moved for a new trial as to said companies. The court overruled the motion for a new trial and rendered judgment on the verdict. Upon a writ of error from the appellate court for the second district the judgment was affirmed and a certificate of importance was granted, under which a writ of error was sued out of this court to review the judgment of the appellate court.

The Peoria and Northwestern Railway Company procured the right of way from Peoria to Nelson on the Chicago and Northwestern railway, and transferred the right of way to the Chicago and Northwestern Railway Company. The grading of the roadbed was done under a contract between the Chicago and Northwestern Railway Company and Winston Brothers, of Minneapolis. Winston Brothers sublet a part of the grading to Smith, and Smith again sublet a part of what had been sublet to him to Goens. Lyons was hired by Goens, and was shoveling gravel into a car when the overhanging clay fell and struck him.

Counsel are agreed as to the rules of law governing the liability of railway corporations in such cases, and the controversy relates only to the application of such rules to this case. A railway corporation will be held liable for the wrongful act of a contractor while exercising, with the assent of the corporation, some chartered power or privilege of the corpora-

tion which he could not have exercised independently of its charter, but it will not be liable for the wrongful act of an independent contractor not exercising any special power derived from the charter: 1 Thompson on Negligence, sec. 671; 3 Elliott on Railroads, sec. 1063. In the brief and argument for plaintiff in error it is stated that in order to establish the liability of defendants in error, the fact must appear "that the contractor was exercising, with the assent of the railroad companies, some power which he could not have exercised independently of their charter." A railway corporation takes the responsibility of seeing that no wrong is done through the exercise of its chartered powers ³³⁷ by persons whom it permits to exercise them, and if the corporation has a public or statutory duty to perform, the employment of an independent contractor with control of the work will not relieve it from liability. It must perform such duties or be liable for any neglect thereof. The question in this case is whether the construction of a railway by a contractor upon the right of way and property of the railway corporation is the exercise of chartered powers or privileges by the contractor, and it is answered in the negative by the decision in the case of *West v. St. Louis etc. R. R. Co.*, 63 Ill. 545. In that case the railway company contracted with a firm of contractors to construct its railroad and appurtenances. A servant of the contractors was injured by the use of a poisonous mixture upon the timbers of a freight-house. It was decided that the railway company in letting the contract did not commit the execution of any of its franchises to the contractors, and that the contractors, in hiring the plaintiff, were only exercising their private and natural right, and not any special power derived from the charter of the corporation. The settled rule was recognized and stated, and the court pointed out that there was a radical difference between that case and previous ones in which a liability was imposed.

Every act of a corporation is done under its charter, in the sense that if there were no corporation it could not perform the act; but if the act is one which might have been done by an individual, no different rule obtains as to liability merely because there is a corporation. Where a corporation was authorized by its charter to enter upon the premises of individuals and take therefrom materials for the construction of its works, and provision was made for assessing the value of the materials taken and damages occasioned by reason of the taking, and judgment was to be rendered against the corporation

for such value and damages, it was held liable for the act of a contractor in taking such materials: *Leshner v. Wabash Nav. Co.*, 14 Ill. 85, 56 Am. Dec. 494; *Hinde* ³³⁸ *v. Wabash Nav. Co.*, 15 Ill. 72. Such an entry could only be made by virtue of the charter, and the privileges and liabilities of the charter attached to the corporation. Again, where acts of incorporation conferred the right to enter upon premises and construct a railroad track over them, and the work was let to contractors, who entered upon land and took down the fences and left them down, resulting in the killing of stock or other damages, the corporations were liable: *Chicago etc. R. R. Co. v. McCarthy*, 20 Ill. 385, 71 Am. Dec. 285; *Illinois Cent. R. R. Co. v. Finnigan*, 21 Ill. 645; *Chicago etc. R. R. Co. v. Whipple*, 22 Ill. 105. In such cases the contractors were exercising chartered powers in entering upon the lands, and without the charters would have had no right to do so. A railroad corporation is liable for the performance of its duty to keep its road fenced, and can never relieve itself of the duty by committing the work to a contractor. So, also, a railroad company is liable for the trespasses of contractors engaged in constructing its road, in entering upon land without right and digging a ditch and making embankments: *Rockford etc. R. R. Co. v. Wells*, 66 Ill. 321; *Cairo etc. R. R. Co. v. Woolsey*, 85 Ill. 370.

Plaintiff in error relies upon the decisions in *Chicago Economic Fuel Gas. Co. v. Myers*, 168 Ill. 139, 48 N. E. 66, and *North Chicago Street R. R. Co. v. Dudgeon*, 184 Ill. 477, 56 N. E. 796. Those cases were entirely different from this, and they also came within another principle which established the liability of the corporations. In both cases work was being done in the public streets of the city of Chicago, and in such a case there is an implied condition that the grantee of the license or permission will see to it that those using the streets are protected from unnecessary danger on account of the work. In such a case a duty is assumed by the corporation, and it can never relieve itself from the performance of the duty by committing the work to a contractor. The work in such a case is inherently dangerous to those using the streets unless performed ³³⁹ with proper care and properly guarded. Where work to be done in a street necessarily obstructs and renders it dangerous, the one for whom the work is done cannot avert liability for negligence in doing it by proving that he let the work to a contractor: 1 Thompson on Negligence, sec. 653. In

the case of *Chicago etc. Ry. Co. v. Hart*, 209 Ill. 414, 70 N. E. 654, 66 L. R. A. 75, the controversy was whether the liability of the lessor extended to injuries suffered by servants of the lessee in the exercise of chartered powers in running trains over the road. Neither of those cases is applicable here, and the general doctrine is not accurately stated in *Toledo etc. R. R. Co. v. Conroy*, 39 Ill. App. 351.

Plaintiff in error insists the railway companies are liable under the decision in *City of Chicago v. Murdock*, 212 Ill. 9, 103 Am. St. Rep. 221, 72 N. E. 46, on the ground that the Chicago and Northwestern Railway Company retained control and direction of the work. In that case the work was intrinsically and inherently dangerous, and in such a case the rule of respondeat superior applies, although the work is done by an independent contractor. The commissioner of public works also had control of the manner and method of doing the work, with power to inspect, approve or reject all material and labor and to make alterations in the work. In this case the railway company had no control of the means by which the work was to be accomplished, and there was only a right of general supervision and inspection to see that the contract was properly performed. The contractor had control and direction of the methods and means for the performance of the work, and was an independent contractor, and not a servant of the railroad companies: *Elliott on Railroads*, sec. 1063.

The judgment of the appellate court is affirmed.

A Railway Company which employs an independent contractor to do construction or improvement work, the probable effect of which will not be injurious to others, is usually not answerable for the negligence of the contractor or of his employes resulting in injury to third persons: See the monographic note to *Covington etc. Bridge Co. v. Steinbrick*, 76 Am. St. Rep. 411, on the liability for negligence of independent contractors.

WIGHTMAN v. EVANSTON YARYAN COMPANY.

[217 Ill. 371, 75 N. E. 502.]

INTERVENTION IN EQUITY.—The right of intervention, in the absence of statute, is controlled by the general rules in equity as to the answer of the proper parties. (p. 259.)

INTERVENTION IN EQUITY.—Parties having an interest in the subject matter of a suit in equity, and who are either necessary or proper parties to such suit, if not made parties by the plaintiff, may come in by way of application to intervene and be made parties complainant or defendant, to the end that their interests may be adjudicated and protected. (p. 260.)

INTERVENTION—Foreclosure—Simple Contract Creditors.—Persons holding unexpired contracts with a corporation have no such direct interest as entitles them to intervene in a suit in equity to foreclose a trust deed given to secure bonds issued by such corporation. (p. 260.)

INTERVENTION IN EQUITY—Interest Required.—The interest which enables a person to intervene in a suit in equity must be one created by a claim or lien upon the property in suit, or some part thereof, of such direct and immediate character that the intervener will gain or lose by the direct legal operation of the judgment therein. (p. 261.)

L. Evans, for the appellant.

Isham, Lincoln & Beale, for the appellees.

375 WILKIN, J. The only question presented for our decision by the assignment of errors is the ruling of the superior court in dismissing the petition and refusing to order the appellees to answer the same. No question is raised as to the decree of foreclosure and sale entered on March 21, 1903. If appellants had the claimed right of intervention, then the order of the superior court should be reversed; otherwise it must be affirmed. The controlling question in the case is, Have the appellants shown, by their petition, such an interest in the foreclosure proceedings as will entitle them to become parties thereto? If no such right is shown, then all the questions **376** raised and discussed by counsel on their behalf become unimportant.

The right of intervention has been defined to be: "The admission, by leave of the court, of a person not an original party to pending legal proceedings, by which such person becomes a party thereto for the protection of some right or interest alleged by him to be affected by such proceedings": 17 Am. & Eng. Ency. of Law, 2d ed., 180. Some of the states have adopted statutes authorizing intervention under certain facts and circumstances, under which persons having an interest in the matters in litigation in the succe

of either party, or an interest against both, are allowed to intervene. Mere interest in the matter in litigation under such statutes warrants intervention in actions at law. We do not understand that those statutes affect the rights of parties in suits in equity, where the distinction between law and equity is maintained. We have no statute extending the rights of parties to intervene except in attachment cases where a stranger to the proceeding claims property attached. In this state, therefore, the right of intervention must be controlled by the general rules in equity as to the answer of the proper parties. "In equity no one is entitled to be made or become a party to the suit unless he has an interest in its object. But it is the usual practice to permit strangers to the litigation claiming an interest in the subject matter to intervene on their own behalf to assert the titles": 17 Am. & Eng. Ency. of Law, 2d ed., 183. The rule in the United States courts is, that "persons who are not parties to a suit have no standing in court to enable them to file a petition in said suit. If they have any occasion to ask any relief in relation to the matters involved in said suit or to the proceedings therein they must file an original bill. . . . Strangers to a cause cannot be heard therein, either by petition or motion, except in certain cases arising from necessity, as where the pleadings contained scandal against a stranger, or where the strangers purchase the subject of litigation pending the ³⁷⁷ suit, and the like. . . . Creditors who are allowed to prove debts and persons belonging to the class on whose behalf a suit is brought are regarded quasi parties, and, of course, may have a standing in court": *Anderson v. Jacksonville etc. R. R. Co.*, 2 Woods, 628, Fed. Cas. No. 358; *Drake v. Goodridge*, 6 Blatchf. 151, Fed. Cas. No. 4062; *Shields v. Barrow*, 17 How. 130, 15 L. ed. 158; *Page v. Holmes Burglar Alarm Tel. Pole*, 18 Blatchf. 618, 2 Fed. 330. This court said in *Marsh v. Green*, 79 Ill. 385, speaking by the late Justice Walker: "As we understand the modern practice, any person feeling that he has an interest in the litigation may apply to the court and be permitted to intervene and become a party and have his rights passed upon on the hearing, and the court will permit him to become such party on a proper showing. He would, of course, not be permitted to intermeddle when he had no substantial interest in the subject matter of the suit." And in *Shannahan v. Stevens*, 139 Ill. 428, 28 N. E. 804, Justice Scholfeld,

rendering the opinion, said: "Patrick Shannahan, having the right to be made a party to the bill, necessarily retained the right to move the court to become such upon the record at any time while the record was within the control of the court"; citing *Marsh v. Green*, 79 Ill. 385.

From the foregoing text and decisions we understand the rule to be no more nor less than that parties having an interest in the subject matter of the suit in equity, and who are either necessary or proper parties to such suit, if not made so by the plaintiff, may come in by way of application to intervene and be made parties complainant or defendant, to the end that their interests may be adjudicated and protected.

It is difficult to see upon what principle it can be seriously contended that the appellants were either necessary or proper parties to the bill to foreclose. They do not pretend that they had any right, title or lien upon the mortgaged property. The sole ground of their claim of right to appear in that proceeding and prevent a decree of foreclosure is, that they ³⁷⁸ had certain contracts with the defendant company to furnish them heat and light, which contracts would be impaired by a decree of foreclosure. In other words, they were mere contract creditors of the corporation, and if they had the right to interfere in the foreclosure proceedings, then any other creditor of the corporation would have the same right, although his claim had not been reduced to judgment or otherwise made a lien upon the mortgaged property. Counsel says they were not mere contract creditors because their agreement with the company was to furnish heat and light—that is, their contracts were with a service company. But how that fact can be given the effect of changing their relation to the company from that of mere contract creditors to parties having a lien or right to the subject matter of the foreclosure proceedings is not shown, nor are we able to discover any substantial reason or authority for the position. As said in *Marsh v. Green*, 79 Ill. 385, they will not be permitted to intermeddle when they have no substantial interest in the subject matter of the suit; and as said in *Anderson v. Jacksonville etc. R. R. Co.*, 2 Woods, 628, Fed. Cas. No. 358: "If they have any occasion to ask any relief in relation to matters involved in said suit, or to the proceedings therein, they must file an original bill."

We entertain no doubt that under the general rule applicable to parties in chancery proceedings the court below ruled properly in dismissing the intervening petition. If we turn to the decisions rendered by the various courts in those jurisdictions in which statutes are in force authorizing intervention, we find that they hold, without exception, that the interest which will entitle a party to intervene must be an interest in the matter about which the litigation is to be, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment—that is, the interest must be one created by a claim to the demand of property in suit, or some part thereof, or a lien upon the property, or some part thereof, which is the subject matter of litigation: 17 Am. & Eng. ³⁷⁹ Ency. of Law, 2d ed., 181. Thus, in *Hahn v. Volcano Water Co.*, 13 Cal. 70, 73 Am. Dec. 569, which was an action on a note and mortgage against the water company to which the defendant filed an answer of general denial, creditors of the company were admitted to intervene, alleging that the note and mortgage were executed in fraud of their rights, and were therefore void. On the right of intervention the court, by Field, J., said: "Petition of the creditor Rawle does not disclose any right on his part to intervene. It shows that he was a simple contract creditor holding obligations against the company, but it does not show that any portion of them was secured by any lien upon the mortgaged premises. The interest mentioned in the statute which entitles a person to intervene in a suit between other parties must be in the matter in litigation, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment." In *Cassady v. Morgan*, 5 Mart., N. S., 500, *Pierre v. Masse*, 7 Mart., N. S., 196, and *Gastnet v. Johnson*, 1 La. Ann. 425, under a similar provision in the Louisiana code, the same doctrine is announced, and in the last case cited the court said: "This, we suppose, must be a direct interest, by which the intervening party is to obtain immediate gain or suffer loss by the judgment which may be rendered between the original parties, otherwise the strange anomaly would be introduced into our jurisprudence of suffering an accumulation of suits in all instances where doubts might be entertained or enter into the imagination of subsequent plaintiffs that the defendant against whom a previous action

was under prosecution might not have property sufficient to discharge all his debts, for as the first judgment obtained might give a preference to the person who should obtain it, all subsequent suitors, down to the last, would have the indirect interest in defeating the action of the first." In *Brown & Son v. Saul*, 4 Mart., N. S., 434, 16 Am. Dec. 175, the court, construing the same statute, said: "But the interest here intended we ³⁸⁰ are of the opinion must be direct and closely connected with the object in dispute, founded on some right, claim or lien, either conventional or legal. It surely will not be contended that under this law, in every case where a creditor sues his debtors all separately, or any one of the creditors of the same debtor, may intervene on a bare suggestion of insolvency." In *Dennis v. Spencer*, 51 Minn. 259, 38 Am. St. Rep. 499, 53 N. W. 631, the question before the court being whether the appellant had the right to intervene and participate in the trial of an action, it was held: "The interest which entitles a party to intervene in an action between other parties must be in the matter in litigation in a suit as originally brought, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal effect of the judgment therein": See, also, *McClury v. State Bindery Co.*, 3 S. Dak. 362, 44 Am. St. Rep. 799, 53 N. W. 428. The same doctrine has been held in Colorado, Iowa, Nebraska, New Mexico, Texas, and other states.

While, of course, these decisions are not directly in point, yet by analogy they sustain the rule announced in equity proceedings, and a summary of the limitations upon the rights of persons to intervene in actions to which they have been made parties is found in the *American and English Encyclopedia of Law*, volume 17, second edition, page 185, as follows: "The intervenor must take the suit as he finds it. He is bound by the record of the case at the time of his intervention. If he claims property in controversy, he can interfere only so far as is necessary to prove his right to it. He cannot, under such circumstances, contest the plaintiff's claim against the defendant, or raise an issue as to the formality of the pleadings or the regularity of the procedure in the principal cause, nor can he plead exceptions having for their object the dismissal of the action. He cannot change the issue between the parties nor raise a new one. He cannot insist upon a change in the form of procedure nor delay the trial of the action"—and each of

these several limitations is well supported by the authorities cited in the note. The ³⁸¹ reason for thus qualifying the right to intervene rests upon the principle that parties to a suit have the right to proceed with it to final judgment or decree free from interference by others, and if parties desire to obstruct the litigation, except as qualified in the foregoing, they must do so by an original action.

We do not deem it important, in the foregoing view, to consider the question as to the right of the court to direct the receiver to carry out the contracts of the company with the appellants, but, as we understand, the court had no power to make such an order: *Central Trust Co. v. Marietta N. G. Ry. Co.*, 51 Fed. 15, 15 L. R. A. 90, citing *Express Co. v. Railway Co.*, 99 U. S. 191, 25 L. ed. 319. See, also, *Ellis v. Boston etc. R. R. Co.*, 107 Mass. 1.

The judgment of the appellate court will be affirmed.

The Interest Which Entitles Persons to Intervene in a suit between other parties must be in the matter in litigation, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation of the judgment: *Wood v. Denver City Waterworks Co.*, 20 Colo. 253, 46 Am. St. Rep. 288; *Dennis v. Spencer*, 51 Minn. 259, 38 Am. St. Rep. 499. Or, as stated in *McClurg v. State Bindery Co.*, 3 S. Dak. 362, 44 Am. St. Rep. 799, the interest in the matter of litigation which will entitle a person to intervene in an action must be that created by a claim to the demand, or some part thereof, or a claim to a lien on the property, or some part thereof, which is the subject of the litigation. See, further, the note to *Brown v. Saul*, 16 Am. Dec. 177-184.

HOME BUILDING AND LOAN ASSOCIATION v. MCKAY.

[217 Ill. 551, 75 N. E. 569.]

HOMESTEADS—Mortgages.—A mortgage to a loan association to secure a loan of the entire purchase price of property not then in possession of the purchaser covers his entire interest therein, and the fact that he carries out a secret intention to make the property his homestead by moving thereon shortly after his purchase does not create a homestead against such mortgagee. (pp. 266, 267.)

HOMESTEADS—Mortgages.—Evidence of a conversation between a purchaser and his vendor that the former stated that he intended to occupy the house when purchased as his home is not admissible to establish a homestead therein as against a loan association advancing the purchase price and taking mortgage therefor, when such statement was not made in the presence or hearing of any agent or officer of such association. (p. 268.)

LOAN ASSOCIATIONS—Usury.—A loan association by complying with the statute controlling the making of loans by such associations may lawfully contract for a greater compensation, by way of interest and premium, for the use of money than the legal rate fixed by the general interest laws of the state, without committing usury. (p. 268.)

LOAN ASSOCIATIONS—Bidders—Usury.—If but one bidder for a loan appears before a loan association at any stated meeting, the association may lawfully accept his bid, and the contract will not be usurious, though the interest and premiums exceed the highest rate fixed by the general laws of the state. (pp. 269, 270.)

LOAN ASSOCIATIONS—Usury—Estoppel Against Mortgagee. Although a loan made to one not a stockholder in the loan association is in contravention of the statute and the transaction not exempt from the implication of usury, yet one who bids for a loan from such association, not then being a stockholder, cannot after receiving the loan and becoming a stockholder maintain as a defense to foreclosure of his mortgage that he was not competent to bid for a loan at the time he did so, and that this irregularity taints the loan with usury. (p. 270.)

USURY must be Specially Pleaded as a defense, and the fact wherein it is alleged the usury charged consists must be specifically alleged, and the proof must be confined to the allegations. (p. 270.)

C. I. McNett, L. E. Emmons and E. L. Chapin, for the appellant.

Sears & Smith, T. Worcester and T. G. Plain, for the appellees.

552 **BOGGS, J.** This was a bill in chancery filed by the appellant association to foreclose a mortgage given to it by the appellees George D. McKay and Anna McKay, his wife. The German-American Bank held a mortgage which was subsequent in point of time of execution and recording to that of the appellant association, and was made a party defendant. The McKays answered, alleging that the appellant association contracted for and exacted usurious interest in the execution of the mortgage, and that the mortgaged premises were their homestead, and that the acknowledgment of the mortgage was taken by a notary public who was the owner of shares of the capital stock of the association, and that under the holding of this court in *Ogden Bldg. Assn. v. Mensch*, 196 Ill. 554, 89 Am. St. Rep. 330, 63 N. E. 1049, the mortgage did not become a lien on the homestead estate. The answer of the appellee bank contained like allegations as that of the McKays with reference to the homestead interest; averred that the mortgage to the appellant association was not a lien on that estate, and set up an indebtedness of the McKays to the

bank and the execution by them of a mortgage on the premises to secure the indebtedness to the bank, and that such mortgage waived and relinquished the homestead estate of the debtors in due form of law, and was lawfully acknowledged, and became and was ⁵⁵³ the only lien on the homestead estate. The bank also filed a cross-bill asking for the foreclosure of its mortgage as against the homestead estate. On the hearing the defenses presented by the McKays and the contention of the bank were both sustained, and decree entered accordingly. On appeal the decree was affirmed by the appellate court for the second district, and the further appeal perfected by the association has brought the record into this court.

The appellant is a homestead loan association organized under an act of the General Assembly of this state approved June 10, 1879: 1 Starr & Curtis' Statutes, p. 1045. The appellees McKay are husband and wife. The mortgaged property originally belonged to Ellen M. Danahy. It consisted of a lot and a part of another lot in the city of West Aurora, upon which was a dwelling-house. The McKays contracted to buy the property from Mrs. Danahy at and for the sum of six thousand dollars, and procured the appellant association to loan them that sum of money to be secured by a mortgage on the premises, the McKays to become stockholders in the association in the same amount, and to repay the sum borrowed, together with interest and premiums thereon, in accordance with the by-laws of the association. Mrs. Danahy and the McKays appeared at the office of the appellant association. The former had in her possession a deed duly executed and ~~ready~~ to be delivered, conveying the property to George D. McKay. The bond or note to be given to the appellant association by the McKays for the sum of six thousand dollars was executed by the makers, and a mortgage to secure the same was drawn up and signed and acknowledged by the McKays, who applied for and had issued to each of them thirty shares of the capital stock of the association. When the papers were completed, the secretary of the association, to whom the mortgage was delivered, drew the check of the association for the said sum of six thousand dollars, payable to the McKays. They indorsed the check and delivered it to the secretary, together with the assignment of their shares of stock. The secretary delivered ⁵⁵⁴ the check to Mrs. Danahy and received from her the deed for the premises to

George D. McKay. The secretary delivered both the deed and the mortgage to the recorder, and caused the same to be recorded, and when recorded the instruments were returned to the secretary and by him placed in the vaults of the association, where they have since remained. Four days after the delivery of the deed by Mrs. Danahy and the execution and delivery of the mortgage to the appellant association, and after these instruments had been filed for record, the McKays removed from another dwelling-house which they occupied as tenants into the dwelling-house on the mortgaged property, where they have since resided.

The McKays, before the enactment of the act of May 15, 1903 (Laws 1903, p. 120), validating mortgages so defectively acknowledged as was the mortgage of the McKays to the association, executed the mortgage to the appellee bank, and legally therein waived and relinquished the homestead estate so far as the indebtedness to the bank was concerned. The contention of the bank is, that this validating act was inoperative as against the lien of the mortgage given to it, and that its mortgage constituted the first lien on the homestead estate of the McKays in the premises.

When the mortgage was executed and delivered to the association and filed for record, the premises were not in the possession of the McKays, nor had they ever been in the possession thereof. They testified that they bought the property with the intention of removing to it and making it their homestead, and within four days thereafter they did remove to and occupy the mortgaged premises as a residence. It is insisted that this intention and their subsequent act of moving into the dwelling-house on the mortgaged premises and occupying the same as a homestead created in the McKays a homestead estate therein at the time of the execution of the mortgage to the association, and that the mortgage to the association not having been so acknowledged as to legally ⁵⁵⁵ waive and relinquish their homestead estate did not constitute a lien thereon in favor of the association.

We find no proof in the record even tending to show that the appellant association, or any of its officers or agents, were advised or had knowledge that it was the intention of the McKays to occupy the premises as their homestead. They had never been in possession of the property, nor had they done any physical act in and about the property denoting an intention to subsequently occupy the same.

When the mortgage to the association was executed there existed only an undisclosed and unexecuted intention on the part of the McKays to subsequently occupy the premises which they were about to purchase. This secret and uncommunicated purpose was not, of itself, sufficient to impress the property with the character of a homestead estate as against the appellant association. The McKays executed the mortgage to induce the association to advance to them the money wherewith to enable them to buy the property, and it would be highly inequitable and unjust to hold that a secret and unknown intention as to the use they subsequently intended to make of the property could operate to defeat the lien of the mortgage by them voluntarily executed for the purpose, so far as the association knew, of creating a lien against the entire estate and interest which they were to receive by the deed from Mrs. Danahy.

Our statute creates the estate of homestead in the householder to the extent of one thousand dollars in premises "owned or rightly possessed, by lease or otherwise, and occupied by him or her as a residence," and while, under some circumstances, the purchase of property with the intention of occupying it as a homestead, followed within a reasonable time by the actual occupancy thereof as a residence, has been held to create the estate of homestead even before there be an actual occupancy thereof, yet we are cited to no authority holding that such mere intention, not manifested or evidenced by some overt act and not disclosed, can impress the property so intended to ⁵⁵⁶ be purchased for a homestead as against one whom such purchaser has induced to loan the money wherewith to buy the property, the repayment thereof to be secured by a lien of a mortgage which such proposed purchaser voluntarily executes, without communicating the bare secret intent on his part to subsequently occupy the property so to be purchased as a homestead. The property was not occupied by the McKays when the mortgage was executed, nor had they done any act affecting the physical character of the property whereby any intention to occupy the same was manifested, nor had they communicated to the appellant association their purpose and intent as to the subsequent use to be made of the property, and no release of any such proposed or intended homestead rights or interest was necessary to be inserted in the mortgage in order that the lien

thereof might have full operation and effect against the entire estate of the mortgagors in the property. The true rule applicable in the state of case disclosed by this record is thus expressed in 15 American and English Encyclopedia of Law, second edition, page 579: "The intention must not be a secret and uncommunicated purpose, but must be shown by acts of preparation of a physical character, or by something equivalent. Mere intention of a man and wife to occupy premises purchased by the husband as their home, without any preparation to put such intent into execution, does not render the premises exempt as a homestead."

The court did not error in excluding the proffered proof that George D. McKay told Mrs. Danahy that if he purchased the property he desired to move there at once in order to save paying another month's rent in the home he then occupied. This conversation was not in the hearing of any agent or officer of the appellant association, and as to it the conversation was mere hearsay and incompetent to be produced in evidence against it.

We are therefore of the opinion that the chancellor erred in holding that the mortgage to the appellant association was ⁵⁵⁷ not a lien against the entire estate of the mortgagors in the mortgaged premises.

We think the defense of usury was not sustained. The interest provided in the note secured by the mortgage given by the McKays to the appellant association was at the rate of seven per cent per annum, but a premium of seven twenty-fourths of one per cent was contracted to be paid monthly, and the premium and interest exceeded the legal rate. But the association, if it complied with the provisions of the statute controlling the making of loans by such associations, could lawfully contract for a greater compensation, by way of interest and premium, for the use of its money than the legal rate fixed by the general interest laws of the state without being exposed to the consequences attaching under such general interest laws to contracts for the payment of a rate of interest in excess of the legal rate: 1 Starr & Curtis' Statutes, 32, p. 1050, sec. 11; Borrowers' Bldg. Assn. v. Eklund, 190 Ill. 257, 60 N. E. 521, 52 L. R. A. 637. The association had not adopted a by-law fixing a rate of interest and premium at which its funds should be loaned and dispensing with the provisions of the body of section 8 of said chapter 32, requiring such association to loan its funds to the highest bidder at stated meetings of its board of directors, as it was

empowered to do by the proviso to section 8. In the absence of such by-law it became incumbent upon the appellant association to make loans of its funds, at stated meetings of its board of directors, to the stockholders who should bid the highest premium for the preference or priority of a loan, as is required by the provisions of the body of said section 8. If the loan to the McKays was made in pursuance of these provisions of section 8 it is not to be deemed usurious, though the interest and premium contracted to be paid therefor exceeded the maximum rate of interest specified to be exacted by the general interest laws of the state.

On November 30, 1896, a stated meeting of the board of directors of the appellant association was convened, and ⁵⁵⁸ the following appears as a part of the record of the proceedings of that meeting, viz.: "Mr. George D. McKay appeared before the board and made a request for a loan; offered interest seven per cent and premium seven twenty-fourths of one per cent per month." This statement appears to have been interlined on the record of the proceeding of the board of directors, and such is conceded to be the fact. The secretary of the board testified that he wrote the record of the proceedings of the board, including the interlineation; that he interlined the statement in the record on the same evening or night of the meeting. He testified the interlined matter was correct and a truthful statement of what occurred; that the loan desired was for the full amount that the McKays were to pay for the property, and that the board considered seriously the question of requiring some additional security for the reason the amount desired to be borrowed was the full amount of the purchase price of the property to be mortgaged, and that McKay made a strong personal plea to the board to accept his bid for the loan. James Walker and Eb Denney, members of the board of directors, testified that they were present at the meeting of the board; that McKay appeared before the board with reference to the loan. Mr. McKay, when first produced, denied that he was present at that meeting, but when subsequently testifying, stated: "I testified before positively that I did not appear before the board of directors; now I want to modify by saying that I do not recollect it. I am not positive about it. I have no recollection." There was no evidence tending to impeach the truthfulness of the record as interlined, and the oral testimony tended, by the clear weight thereof, to establish the truthfulness of the statement that Mr. McKay appeared be-

fore the board at a stated meeting and offered to pay the interest and premium as set forth in the note for the loan he desired. It does not appear that there were others who were present and bid, or desired to bid, for loans of the funds of the association, but we do not construe the statute to require ⁵⁵⁹ that there shall be more than one bidder present at a meeting at which a loan is made, but only that opportunity shall be given for competitive bidding, and that the priority or preference of a loan shall be awarded to the highest bidder. If but one bidder for a loan appears before the board at any stated meeting, the board may lawfully accept his bid, and the contract will not be usurious though the interest and premiums exceed the highest rate fixed by the general interest laws of the state.

Neither of the McKays was the owner of stock in the association at the time of the meeting of the board of directors when George D. McKay made his application and bid for a loan. A loan made to one not a holder of stock in the association would be in contravention of the statute, and such a transaction would not be exempt from the implication of usury. But we think it is fairly to be assumed that one who appears at a meeting of the board of directors of an association and bids for a loan does so with full knowledge that he must become a stockholder before he can lawfully receive the funds of the association by way of a loan or advance, and that his bid is on that basis. If the loan is awarded to him and he subsequently becomes a stockholder and receives the funds of the association as a loan to him in that capacity, he cannot be permitted to urge that he was not competent to bid for a loan at the time that he did so, and that this irregularity taints the loan with usury. The defense of usury is presented by the appellees McKay, and not by the bank. But we think it cannot be well advanced by either the McKays or the bank. The mortgage to the bank given by the McKays contains a clause declaring the loan in favor of the bank to be subject to a prior mortgage executed by the McKays to the appellant association. If the mortgage given to the appellant was legal and valid as between the McKays and the association, it would be equally legal and valid as against the bank.

⁵⁶⁰ Whether a stockholder, when bidding for a loan, could object that a competing bidder was not a stockholder, and therefore incompetent to bid against him, is not here presented for decision.

The appellees McKay executed the note and mortgage on the eighteenth day of December, and at the same time the association paid the money out of its treasury. The note and mortgage given by the McKays were antedated to the twenty-third day of November, and the note bore interest from that last-mentioned date. The suggestion the excess of interest thus received would constitute usury cannot avail. The statute provides that usury must be specially pleaded, and the fact wherein it is alleged the usury charged consists must be specifically alleged in the answer setting up that defense: *Goodwin v. Bishop*, 145 Ill. 421, 34 N. E. 47; *Borrowers' Bldg. Assn. v. Eklund*, 190 Ill. 257, 60 N. E. 521, 52 L. R. A. 637. That the notes given by the McKays were antedated is stated in the answer of the appellees McKay, but merely as a part of the history of the transaction. The facts specified as ground for the defense of usury are, that the appellees McKay were required, "by the terms of said note, to pay seven per cent per annum as interest, seven twenty-fourths of one per cent per month premiums, and said fines, dues, penalties and forfeitures," and in that the association has been guilty of contracting for and exacting usury. The appellees McKay must be restricted to the charge of usury specified in the bill.

The decree of the city court of Aurora and the judgment of the appellate court affirming the same are each reversed, and the cause will be remanded to the city court of the city of Aurora, with directions to enter a decree in accordance with this opinion.

Money Borrowed of a Third Person with which to purchase a homestead, when it is understood between the parties that it is to be used for that purpose, and it is so used, is purchase money for which the homestead is liable: *Acrumen v. Barnes*, 66 Ark. 442, 74 Am. St. Rep. 104. See, further, the note to *Magee v. Magee*, 99 Am. Dec. 575; and the subsequent cases of *Berger v. Berger*, 104 Wis. 282, 76 Am. St. Rep. 877; *North American Trust Co. v. Lanier*, 78 Miss. 418, 84 Am. St. Rep. 635; *Brown v. Ennis*, 60 Ark. 123, 86 Am. St. Rep. 171, and monographic note; extended note to *Jerde v. Furbush*, 95 Am. St. Rep. 931. But, according to *Dreese v. Myers*, 52 Kan. 126, 39 Am. St. Rep. 336, a debt created by borrowing money from a third person, without any specific agreement that it is to be used in the purchase of a homestead is not a lien against the homestead.

Whether It is Usury for a building and loan association to exact premiums in excess of the lawful rate of interest will be found discussed in the notes to *Robertson v. American Homestead Assn.*, 69 Am. Dec. 160-162; *Bank of Newport v. Cook*, 46 Am. St. Rep. 200, 201; and the subsequent cases of *Meroney v. Atlanta Bldg. etc. Assn.*, 116 N. C. 882, 47 Am. St. Rep. 841; *Washington Investment Assn. v. Stanley*, 38 Or. 319, 84 Am. St. Rep. 793; *McDonnell v. De Soto Sav. etc. Assn.*, 175 Mo. 250, 97 Am. St. Rep. 592.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

BUCK v. BEACH.

[164 Ind. 37, 71 N. E. 963.]

TAXATION—Situs of Notes.—The state has power to treat promissory notes of a nonresident, which are permanently kept in the hands of an agent within the state, as personal property within the state for the purpose of taxation. (p. 280.)

TAXATION—Situs of Personal Property—Power of State.—It does not militate against the power of the state to tax personal property which has a definite and permanent situs therein, that another state, by reason of its jurisdiction over the owner or otherwise, is also exercising a like power. (p. 283.)

TAXATION—Situs of Personalty of Nonresident.—Where a resident of one state owning a single business has for the purpose of transacting it, split it up between two other states, the state which not only furnishes protection, but which has within it practically at all times the concrete evidences of the indebtedness created in such business that alone, so far as the credit is concerned, is subject to taxation, may be treated as the proper situs for the assessment and taxation of such evidences of indebtedness. (p. 285.)

TAXATION—Situs of Personalty—Avoidance of Taxation.—If the tangible evidences of a nonresident's investments are kept within one state permanently in the hands of an agent for the purpose of escaping taxation elsewhere, their situs, for the purpose of taxation, is in the state where they are thus kept. (pp. 286, 287.)

TAXATION—Situs of Personalty—Avoidance of Taxation.—If promissory notes of a nonresident are permanently kept within one state, their situs, for the purpose of taxation, is in that state, and their liability to taxation therein cannot be avoided by temporarily removing them from such state each year prior to assessment day. (p. 288.)

TAXATION—Situs of Personalty—Burden of Proof.—As to any personal property having a definite and established situs within the state, the burden of proof is on the person objecting to its assessment to point out some reason compelling the conclusion that it is not subject to taxation in such state. (p. 288.)

TAXATION—Constitutional Law.—A statute which exempts from taxation property of residents of the state, "actually and permanently invested in business in another state," does not affect the

taxation by the state of the personal property of a nonresident permanently kept within the state, and is not unconstitutional as creating a discrimination in favor of the residents of the state. (p. 289.)

B. W. Langdon, A. C. Harris and F. C. Cutter, for the appellant.

J. F. Hanly and W. R. Wood, for the appellee.

³⁷ GILLETT, J. James Buck and William A. Goodman, as trustees under the will of Job M. Nash, deceased, commenced an action in the court below against appellee's predecessor in office to cancel an assessment for taxes made against their decedent's estate, and to restrain that officer ³⁸ from enforcing said assessment against them and against the property held by them. A demurrer for want of facts was sustained to the complaint, and final judgment rendered against the plaintiffs in said action. They prosecuted an appeal to this court, where the judgment was affirmed: *Buck v. Miller* (1897), 147 Ind. 586, 62 Am. St. Rep. 436, 47 N. E. 8, 37 L. R. A. 384. Appellee afterward commenced this action to enjoin appellant from removing certain of said trust property from the county of Tippecanoe until the taxes which had been assessed against the estate of said Nash upon the duplicate of said county had been paid, and to procure an order against him to discover and turn over, for the purpose of sale, so much of said property as it was necessary to sell to pay said taxes. There was a trial by the court, and, before the finding, the parties entered into the following stipulation, which was made a matter of record: "It is agreed in open court by and between the parties to this cause that the court, in the judgment and decree to be rendered herein, may find, fix and adjudge what, if any, of the property, on which the tax in controversy herein was levied, was subject to taxation for each of the years in controversy and what, if any, portion of the said assessment is a valid assessment; also the amount, if any, of said taxes due the plaintiff herein; also what, if any, portion of said assessment is invalid and void, and that the court in such decree may adjudge the payment of any portion of said assessment so found and adjudged to be due, and may cancel and enjoin the collection of any portion of said assessment so found and adjudged to be invalid, and said action of the court shall be taken and held to be within the issues in said cause, and this agreement shall not be controlling on the parties for any other purpose." There was a

finding in favor of appellee. Although special in form, yet, for want of a prior request, the finding must be treated as general in effect. Over appellant's motion for a new trial, there was a decree in accordance with the finding, and the ³⁹ record presents the question whether the finding was contrary to law.

The underlying controversy in this case relates to the taxation of certain notes secured by mortgage, styled in the record "the Ohio notes." In 1895 the auditor of Tippecanoe county, after giving notice to the executors of said estate and to appellant, entered upon the duplicate of said county as omitted property, assessments against said estate, based on said notes, for the years and in the amounts following: 1884, \$32,329.08; 1885, \$98,131; 1886, \$129,885; 1887, \$198,612; 1888, \$241,457; 1889, \$221,599; 1890, \$282,524; 1891, \$311,944; 1892, \$369,636; 1893, \$309,858. The auditor also extended taxes upon said assessments aggregating, aside from penalties, \$36,357.71. During the years above mentioned, and for a considerable time prior thereto, the decedent was in life, and was domiciled in, and a resident of, the state of New York. During the period covered by said assessment he had a sum approximating \$750,000 invested in Ohio and Indiana, much of which was loaned upon notes secured by mortgage upon real estate. For the purpose of collecting the principal and interest on his outstanding investments, and to reinvest the moneys so received, he had an agent in Cincinnati and another in La Fayette. The Cincinnati agent commenced loaning decedent's money about 1860, and upon the removal of decedent to New York, about 1870, until his death, in 1893, said agent made investments on decedent's behalf in Ohio, collected principal and interest upon his mortgage loans, and had general charge of his financial interests in that state. The notes on which said assessment was based were made payable to decedent in Ohio, in from three to five years after their execution, and were secured by mortgage on real estate situate in said state. James Buck was the agent of decedent at La Fayette during the years from 1884 to 1893. Aside from his duties in respect to Indiana business, Buck kept the Ohio notes involved in ⁴⁰ said assessment, together with the mortgages securing said notes, in his possession at La Fayette, Indiana, from the time the mortgages were recorded until the notes were due, except that the notes were sent to the Ohio agency to have interest payments indorsed upon them, and except that the notes and mortgages were sent to Ohio just

before the first day of April in each year, the Ohio agent returning them a few days afterward. It was the business of Buck, aside from keeping said notes and mortgages safe, to keep memoranda of the loans represented by them, and of the transactions concerning them, in a register, and to forward said instruments as above indicated.

It is the theory of appellant that the Cincinnati agent had the legal control of the Ohio notes and mortgages at all times, and that they were sent to La Fayette merely for safekeeping and for clerical convenience. If we were required to accept the conclusions of the two agents, as set out in the transcript of the evidence, as to who had the control of said paper, appellant's theory would be maintained by the record; but the court below was authorized to make the opposite deduction from the uniform course of the business in respect to the keeping of said notes and mortgages, and from the evidence that decedent gave the direction which established the practice that was pursued in that particular. More than that, the evidence clearly warranted the conclusion that Buck was vested with a control of said notes and securities for the purpose of enabling decedent to escape taxation in Ohio. We must therefore conclude, in support of the general finding, that the court below found that, in conducting the business of the Ohio agency, the decedent separated from said business the possession of said notes and mortgages, and vested the right to such possession in said Buck. There was no return for taxation of said notes, or of the investment represented by them, either in Ohio or in New York during the lifetime of the decedent. There was much evidence introduced by appellee as to the nature ⁴¹ and extent of the business conducted by Buck at the La Fayette office, and as to the powers possessed by him, but in the view we take of the case it is not necessary to go into these matters. We may, however, state, as a circumstance not wholly immaterial, that the office wherein said notes and mortgages were kept belonged to the decedent.

It is contended by appellant's counsel that the Ohio notes were not taxable in Indiana, because the owner of them was a nonresident of this state, and the notes themselves had at no time been used or invested in any Indiana business, and had not arisen out of any business or investment in this state.

It was said by Chief Justice Marshall, in pronouncing the opinion of the court in *McCulloch v. State of Maryland*

(1819), 4 Wheat. 316, 429, 4 L. ed. 579: "All subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may also be pronounced self-evident. The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission."

In *State Tax on Foreign-Held Bonds* (1872), 15 Wall. 300, 21 L. ed. 179, it was, in effect, said that the subjects of taxation within the jurisdiction of a state are necessarily limited to persons, property and business. Without pausing to determine how far *Buck v. Miller* (1897), 147 Ind. 586, 62 Am. St. Rep. 436, 47 N. E. 8, 37 L. R. A. 384, declares the law of the case upon this appeal with reference to the question as to whether said notes were taxable in this state, we may say that we agree with counsel for appellant that the mere fact that a business was carried on in Indiana which was collateral to the business of Buck in connection with the notes in question was not enough to give said notes a business situs here.

In the orderly disposal of this case it is necessary to consider, first, as to the existence of the power to tax paper evidences ⁴² of credit, and, next, if that question is solved in the affirmative, whether the power has been exercised.

In *Pullman's Palace Car Co. v. Pennsylvania* (1891), 141 U. S. 18, 22, 11 Sup. Ct. Rep. 876, 35 L. ed. 613, the court said: "No general principles of law are better settled or more fundamental than that the legislative power of every state extends to all property within its borders, and that only so far as the comity of that state allows can such property be affected by the law of any other state. The old rule expressed in the maxim '*mobilia sequuntur personam*,' by which personal property was regarded as subject to the law of the owner's domicile, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*, the law of the place where the property is kept and used."

In *New Orleans v. Stempel* (1899), 175 U. S. 309, 320, 20 Sup. Ct. Rep. 110, 44 L. ed. 174, it was said of the observation of the court in the case of *State Tax on Foreign-Held*

Bonds, 15 Wall. 300, 21 L. ed. 179, that personal property consisting of bonds and mortgages generally has no situs independent of the owner: "The last sentence, properly construed, is not to be taken as a denial of the power of the legislature to establish an independent situs for bonds and mortgages when those properties are not in the possession of the owner, but simply that the fiction of law, so often referred to, declares their situs to be that of the domicile of the owner, a declaration which the legislature has no power to disturb when in fact they are in his possession." The case from which we have just quoted is an instructive one on the question as to the power of the legislature to localize notes and mortgages for the purposes of taxation. In that case the plaintiff, as ⁴³ guardian of certain minors, residents of New York, appointed by a court in that state, having been put in possession of certain notes belonging to her wards, secured by mortgage on real estate in Louisiana, left the notes and mortgages in the possession of an agent in that state, to collect the interest and principal, and deposit the money in a bank in New Orleans to the credit of the plaintiff. It will be observed that the case did not involve the element of reinvestment. It was held that the notes were subject to taxation in the hands of the agent. In concluding the opinion the court said: "It is well settled that bank bills and municipal bonds are in such a concrete, tangible form that they are subject to taxation where found, irrespective of the domicile of the owner, are subject to levy and sale on execution, and to seizure and delivery under replevin; and yet they are but promises to pay—evidences of existing indebtedness. Notes and mortgages are of the same nature; and while they may not have become so generally recognized as tangible personal property, yet they have such a concrete form that we see no reason why a state may not declare that if found within its limits they shall be subject to taxation."

In *People v. Board etc.* (1827), 48 N. Y. 390, the question was as to whether a real estate contract, relating to lands in New York, belonging to a nonresident vendor, and held in the hands of an agent in said state, was taxable therein. In the course of the court's opinion it was said: "Notes, bonds and other contracts for the payment of money have always been regarded and treated in the law as personal property. They represent the debts secured by them. They are the subject of larceny, and a transfer of them transfers the debt. If this

kind of property does not exist where the obligation is held, where does it exist? It certainly does not exist where the debtor may be, and follow his person. And while, for some purposes in the law, by legal fiction, it follows the person of the creditor and exists ⁴⁴ where he may be, yet it has been settled that for the purpose of taxation, this legal fiction does not, to the full extent, apply, and that such property belonging to a nonresident creditor may be taxed in the place where the obligations are held by his agent."

Attention may be called to the case of *People v. Smith* (1882), 88 N. Y. 576, in which it was held that property belonging to a person domiciled in the state of New York, consisting of notes and mortgages, which had obtained a business situs in another state, was not to be treated as taxable under the New York statute. That case possesses two special elements of interest: 1. That it is a case where a court of the state in which the owner of the property was domiciled gave recognition to the fact that notes and mortgages may obtain a situs for taxation elsewhere; and 2. That the decision at least suggests that the decedent Nash was probably not liable to pay taxes on said Ohio notes in New York, the state of his domicile.

In the case of *In re Romaine's Estate* (1891), 127 N. Y. 80, 27 N. E. 759, 12 L. R. A. 401, the question arose as to the liability of the estate of a person who died while domiciled in the state of Virginia to pay a tax, under the collateral inheritance tax law of the state of New York, on the value of certain paper evidences of investments, kept in a safety deposit vault in New York City, and also on his deposits in savings banks in that city. The statute in terms applied to nonresidents as well as to residents; but aside from the matter of power, there was a question whether the property was within the state, as a matter of law, in view of its character and the domicile of its owner. "The fiction of law," said the court, in considering the statute, "that personal estate has no situs away from the person or residence of its owner is done away with to a limited extent, and for a specified purpose, and the truth is substituted in its stead as a rule of action. That the legislature had the power to do this can hardly be questioned: *Matter of McPherson* ⁴⁵ (1887), 104 N. Y. 306, 58 Am. Rep. 502, 10 N. E. 685. As said by Judge Story, when writing upon this subject: 'A nation within whose territory any personal property is actually situated has as entire dominion

over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situated there': Story on Conflict of Laws, sec. 550. In *People v. Commissioners* (1861), 23 N. Y. 224, 228, Judge Comstock quotes with approval the foregoing extract, and adds: 'I can think of no more just and appropriate exercise of the sovereignty of a state or nation over property situated within it and protected by its law than to compel it to contribute toward the maintenance of government and law. Accordingly, there seems to be no place for the fiction of which we are speaking (*mobilia sequuntur personam*) in a well-adjusted system of taxation.' The appellant further contends that the property in question was not 'within the state,' according to the true meaning of the statute, and the contention is supported by the argument that it would be unreasonable to tax money found upon the person of a nonresident who died while traveling in this state. We should hesitate before applying the statute to any property casually brought into the state for a temporary purpose, as by a visitor or traveler, but the record before us does not present such a case. It might well be held that such property, although literally 'within this state,' was not here in the sense meant by the statute, on account of the transitory and accidental character of its presence and the immediate custody of the owner: *Herron v. Keeran* (1877), 59 Ind. 472, 476, 26 Am. Rep. 87. Where, however, the money of a nonresident is invested in this state, as it was by Mr. Romaine in the bond and mortgage in question, and in the deposits made by him in the savings banks, or where the property of a nonresident is habitually kept, even for safety, in this state, we think that the statute applies both in the letter and spirit. Such property is within this state ⁴⁶ in every reasonable sense, receives the protection of its laws, and has every advantage from government, for the support of which taxes are laid, that it would have if it belonged to a resident': See, also, *In re Whiting's Estate* (1896), 150 N. Y. 27, 55 Am. St. Rep. 640, 44 N. E. 715, 34 L. R. A. 232; *In re Houdayer's Estate* (1896), 150 N. Y. 37, 55 Am. St. Rep. 642, 44 N. E. 718, 34 L. R. A. 235.

A case involving the power to tax the notes of a nonresident company, although it only made use of its credit in purchasing such notes, and had no local capital, is *Comptoir etc. v. Board* (1900), 52 La. Ann. 1319, 27 South. 801. In that case a French company was engaged at New Orleans in the

business of loaning money on bills of lading covering cotton and grain shipped to Europe. It raised the money to make such advances by selling its bills of exchange upon London, Paris, Berlin and New York. In deciding the case the court said: "A non-negotiable note is certainly sufficiently concrete in form to be made an object of taxation. The fact that it may be less valuable in fact than it appears on its face may affect the estimate to be placed upon it for assessment purposes, but that question is something other than the question of its being a proper object of taxation. If a person domiciled abroad were to die leaving non-negotiable notes in this state in the hands of an agent, the presence of these notes in Louisiana would authorize the opening of the succession in Louisiana for the protection of Louisiana creditors. We think the state has as much legal right to subject them, being here, to the payment of the contribution which it justly claims from all parties receiving the protection and benefit of its law, who operate their property here for their individual gain and benefit, as any creditor would have."

A late text-writer on the law of taxation says: "Where personal property is located within the state, whatever its form, whether evidences of debt or otherwise, it may be subjected to the state's taxing power, irrespective of the ⁴⁷ residence of the owner. Thus the state may establish an independent situs for taxation of bonds, mortgages and other securities of nonresident owners, located in its jurisdiction": Judson on Taxation, sec. 394. And see section 397 of same work. In the light of the above authorities there certainly can be no question as to the power of the legislature to treat the promissory notes of nonresidents which are permanently kept in the hands of an agent within the state as personal property for the purposes of taxation.

The only open question in this connection is as to whether the power has been exercised. Preliminary to a consideration of the taxation acts of 1881 and 1891 (Acts 1881, p. 611, sec. 6269 et seq., Rev. Stats. 1881; Acts 1891, p. 199, sec. 8408 et seq., Burns' Rev. Stats. 1901), respecting the question suggested, it will be profitable to consider such of the decisions of this court as are relevant to the question last suggested, and also to consider which state, according to general principles of law, may be said to have been the proper or more appropriate jurisdiction to tax the property mentioned. We pass over without citation a number of early cases in Indiana wherein

it was held that, in the absence of any direction to the contrary, the domicile of the owner of intangible personal property is the controlling factor as between different taxing corporations within the state. We do not regard such authorities as at all in point as applied to cases like the one in hand.

In *Herron v. Keeran* (1877), 59 Ind. 472, 26 Am. Rep. 87, it was held that promissory notes and accounts placed in the hands of an attorney in Indiana for collection, and municipal bonds left temporarily with a bank in this state for safekeeping, belonging to a nonresident, were not liable to taxation here. This court there said that the choses in action involved were property within the state, and as such were within the letter of the taxation act; but as a matter of interpretation it should be held that the property was not within the state according to the sense in which the ⁴⁶ legislature had used those words. The court in that case distinguished between the case before it and the class of cases recognizing the possibility of notes obtaining a business situs where they are in the hands of an agent for collection, with a purpose to have him rel oan the money, the business being permanent in his hands.

Foresman v. Byrns (1879), 68 Ind. 247, is not remotely in point upon the question here involved, so far as the matter before the court was concerned; but that case is relied on by counsel for appellant, since language was used in the opinion from which it is to be inferred that credits due to a nonresident are only to be taxed where a business situs has been established as the same was defined in the case of *Herron v. Keeran*, 59 Ind. 472, 26 Am. Rep. 87. There was a mere statement of the proposition, and as the question of business situs was not involved, it cannot be presumed to have received the careful attention of the court. This mere inconsiderate obiter cannot be held to have established a rule of construction that should be influential in the construction of the taxation acts which were subsequently passed: See *National Supply Co. v. Stranahan* (1904), 161 Ind. 602, 69 N. E. 447; *Sulzer-Vogt Mach. Co. v. Rushville Water Co.* (1903), 160 Ind. 202, 65 N. E. 583.

Schmidt v. Failey (1897), 148 Ind. 150, 37 L. R. A. 442, is a case which involved the liability of a receiver of a corporation to assessment for the purposes of taxation on moneys in bank in this state, it appearing that a considerable part of the fund deposited, belonging to creditors over the country,

had been brought into the state by reason of the fact that courts in other states had appointed receivers over the same corporation, and had caused the funds sequestered by such orders to be turned over to the receiver in this state, for the purpose of having one administration. In deciding that the deposit was subject to taxation, this court indicated that since the funds were protected by this state, and one of its courts was administering the trust, it inclined ⁴⁹ to a construction of the act of 1891 which would render the property liable to contribute to the maintenance of government in this state. In *Gallup v. Schmidt* (1900), 154 Ind. 196, 56 N. E. 443, it was said: "The right to tax property is a sovereign right reserved to the jurisdiction charged with the duty of its protection; and the authority of a taxing district to require all classes of property sheltered by it to pay their ratable proportion of the expenses of maintaining the government is unaffected by the residence of the owner."

We come now to the case of *Buck v. Miller* (1897), 147 Ind. 586, 62 Am. St. Rep. 436, 37 L. R. A. 384, 45 N. E. 647, 47 N. E. 8, which we mentioned in an earlier portion of this opinion. As indicated, the questions in that case were presented on demurrer to the complaint. There was so much of what was material left indefinite in that pleading that we hesitate to hold that the opinion is the law of the case in respect to the question as to whether said notes were taxable in this state. That opinion, however, is very much in point. Thus it was there said: "For purposes of taxation, the term 'personal property' includes bonds, notes, choses in action and other evidences of credits. . . . The test as to where the right to tax property exists is its place of location and use; the place where, if a security or obligation, it is a credit, not where it is a debit. It is quite immaterial whether the notes or other obligations were executed or were due by residents or nonresidents of the state. If they were owned, held or used in Indiana, they were taxable here; and this, too, whether the business here in which they were used was conducted by Mr. Nash in person, or by some one else for him. . . . The property is taxable where it is owned, held and used in business, and where it is protected by the laws of the community in which it is so held and used; and the circumstance that the owner, whether for honest or other motives, claims a residence elsewhere, is not controlling. It is, of course, quite different, as already many times said, where the property is temporarily

in the state; as, for instance, ⁵⁰ where securities are sent into the state for collection, inspection, safekeeping, or the like."

It does not militate against the power of the state to tax personal property which has a definite and permanent situs therein that another state, by reason of its jurisdiction over the owner or otherwise, is also exercising a like power: *Coe v. Errol* (1886), 116 U. S. 517, 6 Sup. Ct. Rep. 475, 29 L. ed. 715; *Boyer v. Jones* (1860), 14 Ind. 354; *Judson on Taxation*, sec. 426. And see *Davidson v. New Orleans* (1877), 96 U. S. 97, 106, 24 L. ed. 616. As a matter of justice, however, the courts incline to a presumption that the taxing acts they are called on to construe were not intended to reach property which has its proper situs elsewhere, provided that the language of the statute does not lead to the opposite conclusion. But as applied to this state it may be said that where it appears that the proper situs of property is here, the effect of our constitutional provision relative to taxation (Const., art. 10, sec. 1), is to create a presumption of a legislative purpose to tax. As an aid, therefore, to the construction of the acts of 1881 and 1891, we look to the question as to whether the appropriate state for the taxing of said notes was New York, Ohio or Indiana.

As to the first-named state, it would appear that, if the notes and the agency had been united in another state, the doctrine laid down by the New York court of appeals would have relieved the owner of liability to pay a tax on the notes in New York, provided, of course, that the statute remained as it was. In view of the abiding character of the Ohio agency, and of its nature and extent, and of the fact that the notes were kept in this state in the hands of an agent, as a part of said business, and in the office of the decedent, it cannot be held that the owner did not separate the notes from his domicile. So far as concerns protection of the property, the most potent element in natural justice on which taxation can be based, it appears that New York cannot assert that reason for exacting a tax. Indeed, it could ⁵¹ not reach the property, but only its owner—a power that ought to be the first to yield.

As to the state of Ohio, it is first to be considered that the mere fact that it was the state where the debts existed did not authorize it to tax the investments: *State Tax on Foreign-Held Bonds* (1872), 15 Wall. 300, 21 L. ed. 179; *Senour v.*

Ruth (1894), 140 Ind. 318, 39 N. E. 946. In the federal case above cited it was said: "Corporations may be taxed, like natural persons, upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditor. With them they are property, and in their hands they may be taxed. To call debts the property of debtors is simply to misuse terms." Since the above case was decided, the same court held in *Savings & Loan Soc. v. Multnomah County* (1898), 169 U. S. 421, 18 Sup. Ct. Rep. 392, 42 L. ed. 803, that for the purposes of taxation it is competent for the state to tax the interest of a mortgagee of real property at the place where the land is situated, relieving the owner of the land pro tanto; but that case proceeded on the theory that, as a mortgage is a defeasible conveyance of the fee, it is therefore competent to tax such interest. Doubtless it would have been within the authority of the state of Ohio to have established an excise tax upon the permanent business of loaning money in the state. It may be possible that, as to moneys which had been made permanently a part of the capital of the state it would have been competent to have enacted a law requiring agents in such circumstances to return such capital, on behalf of the owner, as moneys loaned, although we have not found any case which goes that far. Whether any such exceptional enactment exists in the state of Ohio we are not informed, and it is really immaterial as to what the fact is in such particular, for it will be perceived that neither of such forms of taxation would tax either the note or the ⁵² credit. In the enforcement of its revenue system this state cannot defer to any possible law which might be upon the statute books of another state indirectly subjecting the same property to taxation. Our chief concern in entering on the inquiry as to whether the decedent was subject to taxation on his property in Ohio was to guard against a holding that the notes were taxable here (assuming that such construction were admissible), if, upon well-established principles concerning notes obtaining a business situs, it was evident that holding such property liable here would result in double taxation. All of the cases involving business situs that we have examined are cases where the notes were in the hands of the agent. Indeed, under any ordinary statute, merely authorizing the taxation of property in the possession

of an agent, we do not perceive how he could be assessed except upon the notes. If the latter had a situs elsewhere, it would result that in such circumstances the investment would escape taxation: See *People v. Davis* (1884), 112 Ill. 272. We shall therefore look to the question as to the situs of the notes.

The evidence in this case warranted the conclusion that the agent in Ohio had no general right of possession which would have enabled him to recall the notes at any time; that his right of possession was limited to the times when the principal or interest was due, and to assessment days in Indiana. It is to be recollected that whatever measure of possessory right the Indiana agent had over the notes was in necessary diminution of the possession which might be lawfully had of them by the agent in Ohio. It appears that the possession of the notes in Indiana was the substantial one, while that in Ohio was never more than ephemeral, and in some instances merely fugitive. Such possession as the Ohio agent had, assuming that he had no general right of control, was not sufficient to establish the situs of the notes there, as between that state and the one where they may be practically said to have been kept, and where an ⁵³ essential part of the business of the agency, as it was actually constituted, was carried on.

If it satisfactorily appears that neither New York nor Ohio was the proper place for the assessment of said notes, then it must needs be that the appropriate situs for their taxation was in this state. Indiana has just grounds on which to claim the situs of said notes. It was the only state in which they were generally kept; they were kept in the hands of an agent here, in the office of decedent, in connection with a business that, however limited as applied to this state, was of a permanent character, and a component part of an entire business sufficiently broad to give such notes a situs other than the domicile of the owner. The additional elements of a power over the paper to surrender it upon payment and to reinvest the proceeds serve to mark more plainly a business situs; but in this case, where a single business had, for the purpose of transacting it, been split up between two states, we think that the state which not only furnished protection, but which had within it, practically at all times, the concrete evidences of the indebtedness that alone, so far as the credit was concerned, was subject to taxation, may be

treated as the proper situs for the assessment of such paper. This is not a case of notes sent into the state by their owner for safekeeping and clerical convenience merely. The business done by Buck concerning said notes would have clearly been a part of the Ohio business, had it been done in Ohio, but as Buck's duties relative to said notes were transacted in Indiana, as they were required to be, such duties, while attached to the same business, were really a part of an interstate business. That business, as before stated, was of such a character as to localize said notes for the purposes of taxation, and the court is therefore called upon to determine the situs of the notes pertaining to the business, as between the states in which the business was transacted.

We regard the proper situs of the paper as the place ⁵⁴ where it was located in fact. The theory of appellant's counsel that notes of a nonresident are only taxable in the event that they represent business done in the state is fallacious. The assessment is in this instance based on the paper representatives of credits, on the theory that the concrete evidence of a credit, which may be seen, handled and replevied, which is protected by the law, and which so far represents the demand that a mere delivery of it may carry an equitable right to receive the benefit of the promise, may appropriately be subjected to assessment in the state where it is kept, provided that the circumstances of the keeping are such as to separate it from the domicile of its owner. If this be the correct theory, the state in which the note is not kept, and not protected, where it cannot be seen, handled or replevied, or subjected to manual delivery, is not the state which may most appropriately tax the note.

There can be nothing in the theory that the state where the note is payable continues to protect it, though absent, by holding out a remedy for its ultimate enforcement, for constitutional provision has placed it beyond the power of the state to impair the contract. Neither can it be held that the state where the note is given may tax it on the theory that it is the place of its business nativity, for this would enable the state to tax notes executed in the state, not connected with any business agency and in the hands of nonresident principals—a proposition which all of the authorities deny.

Furthermore, as it was decedent's purpose to avoid localizing said notes in Ohio by keeping them in this state, the intent must be imputed to him to establish a situs for that

portion of his wealth here; and in a case where the tangible evidences of a man's investments are kept here permanently, in the hands of an agent, to escape taxation elsewhere, we perceive no reason why it would be unjust to him to hold that his paper was within the state.

In view of all the circumstances surrounding the keeping⁵⁵ of said notes in Indiana, and of the purpose in so doing, it is not only our opinion that the situs of said notes was within the governmental subdivision on behalf of which appellee acted, but also that, so far from straining against a construction of the enactments from which the authority to assess must be derived, if it exists we ought rather to give weight to the presumption that the general assembly has done its plain duty in the premises by providing for the assessment of the property.

Section 6271 of the Revised Statutes of 1881 provided: "All real property within this state, all personal property owned by persons residing in this state (whether it is in or out of this state), and all personal property within this state owned by persons not residing within this state, subject to the exceptions hereinafter stated, shall be subject to taxation." Section 6273 of the Revised Statutes of 1881 provided that "the terms 'personal estate' and 'personal property,' as used in this act, shall be construed to include . . . all rights, credits, and choses in action." Provision was made for agents listing property: Rev. Stats. 1881, secs. 6927, 6330. The schedule of said act was sufficiently broad to cover property which could not be listed as money loaned: See Rev. Stats. 1881, sec. 6336, items 81, 82.

Turning now to the act of 1891, we find that section 8410 of Burns' Revised Statutes of 1901 (Acts 1891, p. 199, sec. 3) provides that "all property within the jurisdiction of this state, not expressly exempted, shall be subject to taxation." Provision is made in said act for agents listing property: Burns' Rev. Stats. 1901, secs. 8429, 8458 (Acts 1891, p. 199, secs. 19, 48). It is also provided that "personal property of nonresidents of the state shall be assessed to the owner or to the person having control thereof in the township, town or city where the same may be, except that where such property is in transit to some place within the state, it shall be assessed in such place": Burns' Rev. Stats. 1901, sec. 8421 (Acts 1891, p. 199, sec. 11). All notes are required to be valued in the schedule (Burns' Rev. Stats. 1901, sec. 8460; ⁵⁶ Acts

1891, p. 199, sec. 50), and that instrument must be attested by an oath that it "contains a true, full, and complete list of all property, held or belonging to" the person making the same: Burns' Rev. Stats. 1901, sec. 8463 (Acts 1891, p. 199, sec. 53). Section 8676 of Burns' Revised Statutes of 1901 (Acts 1891, p. 199, sec. 258) provides as follows: "The state board of tax commissioners is hereby authorized to prepare for the use of assessors a more complete and perfect form of 'schedule of property' than that set out in section 53 of this act, with a view of securing a full assessment of all of the property of the state." Counsel for appellant contend that section 8410, *supra*, is limited in its operation by the section which follows it. Segregating these two sections from the remainder of the act, the contention mentioned might seem plausible, but the whole act must be considered, and, especially in view of the section last quoted, we are constrained to the conclusion that it was not the purpose in the enactment of section 8411 of Burns' Revised Statutes of 1894 (Acts 1891, p. 199, sec. 4), to give a particular enumeration of all of the kinds of property which the act subjects to taxation.

Referring now to both acts, we are of opinion that each is broad enough, the situs of the notes being within the state, to warrant the holding that said notes were subject to taxation here, and reading said acts in the light of the constitutional requirement above referred to we deem it clear that the construction indicated is proper. Indeed, it is our opinion that, as to any property having a definite and established situs within the state, the onus is on the person objecting to its assessment to point out some reason compelling the conclusion that the legislature has not subjected the property to taxation.

Having held that the situs of the Ohio notes was in Indiana, rather than Ohio, it must needs follow that the mere fact that they were sent out of the state each year to avoid having them here on assessment day can make no difference. The statute cannot be thus avoided: *Dundee Mortgage* ⁵⁷ etc. Co. v. School District (1884), 19 Fed. 359; *Savings & Loan Soc. v. Multnomah County* (1898), 169 U. S. 421, 18 Sup. Ct. Rep. 392, 42 L. ed. 803; *Connecticut Valley Lumber Co. v. Monroe* (1902), 71 N. H. 473, 52 Atl. 942; *Webb v. John Hancock etc. Ins. Co.* (1904), 162 Ind. 616, 62 N. E. 1006, 66 L. R. A. 632; *Voss v. Waterloo Water Co.* (1904), 163 Ind.

69, 106 Am. St. Rep. 201, 71 N. E. 208, 66 L. R. A. 95. It is the substantial possession to which the law looks, and that possession is not impaired by a mere temporary transfer: *Powell v. City of Madison* (1863), 21 Ind. 335.

Appellant's counsel further contend that the act of 1891 would be invalid, as discriminating against nonresidents, if it were held that provision had been made by said act for the assessment of notes held as these notes were, since section 4 of said act (*Burns' Rev. Stats. 1894, sec. 8411*) contains an exemption in favor of residents by the provision that, for the purposes of taxation, personal property shall be held to include "all goods, chattels and effects belonging to inhabitants of this state situate without this state, except the property actually and permanently invested in business in another state shall not be included." This provision was not designed to give an advantage to residents of this state by way of avoiding taxation, but it merely represents an act of comity, by which this state yields in a measure its taxing power over the owner, to avoid double taxation, in a class of cases where in all probability the other state is taxing the business or the property invested therein. To give appellant a standing to complain, assuming that said section could in any circumstances offend against the provisions on which his counsel rely, it occurs to us that he ought to show that his decedent's property was liable to taxation elsewhere. But it is not because the owner of said notes was a nonresident that our minds incline to the conclusion that the notes were subject to assessment in Indiana, but because the notes had a situs here. How our statute, thus construed, could be held to be discriminative as ⁵⁸ against a nonresident, we are at a loss to understand. This state has merely created an exemption in favor of its own citizens from the burdens of taxation here on a class of property having its permanent situs elsewhere. Just such an exemption, we are led to infer, was created in favor of decedent and those in like situation by the laws of the state of New York. In other words, by said section this state has released its citizens from a burden at home based on the theory that they would be subjected to taxation elsewhere, and the same right which we recognize as existing in another state to tax the property of our citizens, if it is permanently located therein, is the right which this state asserts against nonresidents who establish the situs of

their property here. This is not discrimination, but perfect fairness.

Finally, counsel for appellant urge that as the property against which the assessment was sought to be levied had come to him as a legatee, in trust to carry out certain provisions of the decedent's will, there is no statutory authority for assessing him on account of property omitted by the decedent in his lifetime. The complaint by appellant and his cotrustee to enjoin the enforcement of said assessment, which was under review in *Buck v. Miller* (1897), 147 Ind. 586, 62 Am. St. Rep. 436, 45 N. E. 647, 47 N. E. 8, 37 L. R. A. 384, contained full averments as to the nature of the securities held by said trustees, and as to the manner in which they obtained title thereto. There was an unequivocal holding in that case that the auditor had authority to levy an assessment on omitted property in such circumstances, and that taxes so assessed were a lien upon all of the property of the estate within the county. We entertain no doubt, therefore, that said rulings, whether right or wrong, have become the law of the case, and they are therefore binding upon the parties during all subsequent stages of the controversy. We find no error.

Judgment affirmed.

The Situs of Personal Property for purposes of taxation is the subject of a monographic note to *Buck v. Miller*, 62 Am. St. Rep. 448-477. That personal property may, for the purpose of taxation, be separated from its owner, and taxed wherever found, though not situated at the place of his domicile, see *Hall v. American Refrigerator etc. Co.*, 24 Colo. 291, 65 Am. St. Rep. 223. Compare, however, *Balk v. Harris*, 124 N. C. 467, 70 Am. St. Rep. 606. On the taxation of credits due a foreign corporation, see *In re Appeal of Union Tank Line Co.*, 204 Ill. 347, 98 Am. St. Rep. 1108; *Armour Packing Co. v. City Council*, 118 Ga. 552, 98 Am. St. Rep. 128; *Matzenbaugh v. People*, 194 Ill. 108, 88 Am. St. Rep. 134. According to this last case, notes and securities of a principal remaining in the hands of his agent in one state, to enable the latter to carry on the business of the principal, are taxable in that state, although he may have established his domicile in another state. A state may tax all mortgages on land within the state in the county where the land is situated, no matter whether the mortgages are owned by residents or nonresidents: *Allen v. National State Bank*, 92 Md. 509, 84 Am. St. Rep. 517. But see *Adams v. Colonial etc. Mtg. Co.*, 82 Miss. 263, 100 Am. St. Rep. 633.

Property is not Exempt from Taxation because it may have been returned for taxation for the same year in another state: *Nathan v. Spokane County*, 35 Wash. 26, 102 Am. St. Rep. 888; *Kelley v. Rhoads*, 7 Wyo. 237, 75 Am. St. Rep. 905.

KNOX v. STATE.

[164 Ind. 226, 73 N. E. 255.]

EXTRADITION—Right of.—The right of one independent government to demand and receive from another the custody of an offender who has sought an asylum upon its soil, depends upon the existence of treaty stipulations between them, and is measured and restricted by the express provisions of the treaty, and those silent provisions which are necessarily implied. (p. 294.)

EXTRADITION—Right of Asylum.—The right of a person extradited to return to the country from which he was surrendered is not a natural and inherent right of his own, but is based upon the right of his adopted sovereign to afford asylum to the fugitive, and to refuse to give him up to another except upon such terms as it is pleased to impose. (p. 294.)

EXTRADITION Between States.—Principles governing international extradition have no application to interstate extradition. (pp. 295, 296.)

EXTRADITION—Interstate—Right to Try for Another Crime. A fugitive from justice when lawfully extradited from one state and returned to another to answer a specific crime may be required to answer another and different criminal charge under the law of that state, before being afforded an opportunity to return to the state from which he has been extradited. (p. 297.)

EXTRADITION—Interstate—Trial for Different Crime—Constitutional Law.—Upon a fugitive's surrender to the state demanding his return from another state, he may be tried in the former state for any other offense than that specified in the requisition for his rendition, and in so trying him against his objection no constitutional right, privilege or immunity is thereby denied him. (pp. 297, 298.)

INDICTMENT—Counts in Information.—An information for a crime may consist of different counts. (pp. 298, 299.)

INDICTMENT—Counts—Election.—A motion to require the prosecution to elect on which count in an information it intends to try is addressed to the sound discretion of the court, and unless there is an abuse of discretion, the ruling will not be reviewed. (p. 299.)

INDICTMENT—Counts—Election.—If the several counts in an information for crime are based upon the same essential facts, the doctrine of election upon which to try does not apply. (p. 299.)

CONSPIRACY—Declarations of Co-conspirator.—If the conspiracy is established by proof, declarations of a co-conspirator in furtherance of the common design are admissible against one of the conspirators, although made in his absence. (p. 300.)

CONSPIRACY—Evidence—Letter of Conspirator.—A letter found on the person of a co-conspirator and testified to by him as having been received from the accused, is admissible in evidence as a physical fact of an incriminating character. (p. 300.)

E. E. McGriff, for the appellant.

C. W. Miller, attorney general, C. C. Hadley, L. G. Rothschild and W. C. Geake, for the state.

227 MONTGOMERY, J. A criminal action was commenced against appellant and one H. B. Gordon, whose true name was alleged to be unknown, by filing an affidavit with a justice of the peace of Jay county, charging, in substance, that said defendants at said county on the second day of March, 1904, feloniously conspired and agreed feloniously to deface and alter a certain check for the payment of money, which check before such alteration was as follows: "Cashiers check. Lewisburg, W. Va., Jan. 27, 1904. 190—, No. 1079. The Bank of Greenbrier. Pay to the order of H. B. Gordon \$15.00, Fifteen 00/100 Dollars, H. F. Hunter, Ass't Cashier. For ———." And the affidavit charged the manner of the alteration and set out a copy of the check altered calling for fifteen hundred dollars, and the alteration was made to defraud the Citizens' Bank, etc. Upon this charge, on application **228** of the state, a requisition was issued by the governor of this state upon the governor of Ohio for the return of appellant to Jay county for trial. Appellant was arrested at Columbus, Ohio, and duly returned, and confined in the jail of the county to answer said charge. On March 22, 1904, while appellant was so confined in jail, this section was instituted by the filing of an affidavit and information in five counts in the office of the clerk of the Jay circuit court, and the issuance of a warrant thereon for the arrest of appellant and said Gordon.

The first count of the affidavit and information charged defendants with the forgery of the following check: "Cashiers check. Lewisburg, W. Va., Jan. 27, 1904. No. 1079. The Bank of Greenbrier. Pay to the order of H. B. Gordon \$1,500, Fifteen Hundred 00/00 Dollars. H. F. Hunter, Ass't Cashier. For ———," and that the forgery was committed to defraud the Bank of Greenbrier. The second count charged defendants with uttering and publishing as true the above false and forged check, with intent to defraud the Citizens' Bank of Portland. The third count charged defendants with conspiracy to make and forge said check, with intent to defraud the Bank of Greenbrier. The fourth count charged defendants with a conspiracy to utter and publish as true said false and forged check, with intent to defraud the Citizens' Bank of Portland. The fifth count charged the same offense as the

fourth, but set out in detail the alterations made in the check, and a copy of the check before as well as after such alterations were made.

Appellant, being rearrested on said warrant, appeared by counsel "specially" to said affidavit and information, and filed a plea in abatement thereto. This plea set forth with particularity the first charge preferred against him before the justice, his arrest, and extradition from the state of Ohio to answer said charge and no other; the filing of another affidavit and an information thereon charging him with a different offense from that for which he was extradited, ²²⁹ while the first was undisposed of and before he had been afforded an opportunity to return to Ohio, "his asylum state." A demurrer to this plea, for want of facts, was sustained, and appellant excepted. Appellant's motion to quash each count of the affidavit and information was overruled, and an exception saved. At his request, appellant was tried separately, and upon the conclusion of the state's evidence he moved the court to require the state to elect upon which count it relied for a conviction, and this motion was overruled, and an exception saved to the ruling. Upon the conclusion of the evidence the court withdrew from the consideration of the jury the first, third and fifth counts of the affidavit and information, and the jury, after deliberation, returned a verdict of guilty upon the fourth count. Appellant applied for a new trial, his motion was overruled, and an exception properly saved, and judgment pronounced upon the verdict.

The assignment of errors charges: 1. That the affidavit and information, and each count thereof, does not state facts sufficient to constitute a public offense; 2. Error in overruling appellant's motion to quash each count of the affidavit and information; 3. Error in sustaining appellee's demurrer to the plea in abatement; 4. Error in overruling the motion to require the state to elect upon which count it would rely for conviction; 5. Error in overruling the motion for a new trial; 6. That the judgment is not fairly supported by the evidence; and 7. That the decision of the court is not fairly supported by the evidence.

1. The first question for our consideration, in logical order, is raised by the demurrer to appellant's plea in abatement, and is this: Can a fugitive from justice fleeing

from this state into another state, when lawfully extradited and returned to this state to answer a specific crime, be required to answer another and different criminal charge under our laws, before being afforded an opportunity to return to the state from which he has been extradited? Appellant ²³⁰ contends that this question must be answered in the negative, and cites in support of his contention a number of authorities, among which are the following: *State v. McNaspy* (1897), 58 Kan. 691, 50 Pac. 895, 38 L. R. A. 756; *Ex parte McKnight* (1891), 48 Ohio St. 588, 28 N. E. 1034, 14 L. R. A. 128; *State v. Jackson* (1888), 36 Fed. 258, 1 L. R. A. 370; *State v. Hall* (1888), 40 Kan. 338, 10 Am. St. Rep. 200, 19 Pac. 918; *United States v. Watts* (1882), 8 Saw. 370, 14 Fed. 130; *Ex parte Hibbs* (1886), 26 Fed. 421; *Ex parte Coy* (1887), 32 Fed. 911; *Commonwealth v. Hawes* (1878), 13 Bush (Ky.), 697, 26 Am. Rep. 242; *Blandford v. State* (1881), 10 Tex. App. 627; *United States v. Rauscher* (1886), 119 U. S. 407, 7 Sup. Ct. Rep. 234, 30 L. ed. 425.

The cases cited above from the states of Kansas, Ohio and Tennessee support the doctrine contended for by appellant. The other cases cited involve only international and not interstate, extradition. Appellant contends, however, that the principles governing international extradition are equally controlling in cases of interstate extradition, and the courts of Kansas, Ohio and Tennessee declare that doctrine in the cases cited above.

2. The right of one independent government to demand and receive from another the custody of an offender who has sought an asylum upon its soil, depends upon the existence of treaty stipulations between them, and is measured and restricted by the express terms and provisions of the treaty, and those silent provisions which are necessarily implied.

In the case of *United States v. Rauscher*, 119 U. S. 407, 7 Sup. Ct. Rep. 234, 30 L. ed. 425, the court, by Mr. Justice Miller, said: "It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the states where their crimes were committed, for trial and punishment. This has been done generally by treaties made by one independent government with another. Prior to these treaties, and apart from them, it may be stated ²³¹ as

a general result of the writers upon international law, that there was no well-defined obligation on one country to deliver up such fugitives to another, and though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked; and it has never been recognized as among those obligations of one government toward another which rest upon established principles of international law."

The crimes usually enumerated in such treaties, and for which extradition between nations is provided, are confined to such offenses as all mankind regard as heinous, and destructive of security of life and property; and all offenses of a political or religious character, and those growing out of intestine strife, are excluded. Applying the general rules for the construction of contracts to the interpretation of these treaties, it is plain that a nation could not demand, as a matter of right, the surrender of a fugitive from another independent government to answer for an offense not enumerated in an existing treaty between them, no matter how wicked such crime might seem. The extradition papers, therefore, must show with certainty, the particular offense with which the fugitive is charged, and on his return he cannot be tried for any other offense until he has been afforded an opportunity to return to his asylum country. Any other rule would permit a prisoner to be extradited for an alleged crime of one class, and to be tried for another, which perhaps is not extraditable, and possibly merely political in character, and would result in a breach of that good faith and high honor which should characterize all dealings between nations.

3. The right of the person extradited to return to the country from which he has been surrendered is not a natural and inherent right of his own, but is based upon the right of his adopted sovereign to afford asylum to the fugitive, and to refuse to give him up to another except upon such terms as it is pleased to impose. The criminal himself never ²³² acquires a personal right of asylum or refuge anywhere, but all such rights as he may claim in this respect flow entirely out of the rights of the government to whose territory he has fled.

4. In our opinion the principles governing international extradition have no application to cases of extradition between states of the Union. This conclusion is in accord

with the great weight of judicial authority, and rests upon sound principles and a wise public policy.

The second clause of section 2 of article 4 of the constitution of the United States declares that: "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." To carry this constitutional provision into effect, Congress passed the act of February 12, 1793, which has been in part re-enacted and embodied in sections 5278, 5279 of the Revised Statutes of the United States, which provide with regard to demanding the surrender of fugitives, that "it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear," and further, that the agent "so appointed who receives the fugitive into his custody, shall be empowered to transport him to the state or territory from which he has fled."

5. A decision of the question under immediate discussion requires a construction of these provisions of the constitution and statutes of the United States. The supreme court of the United States has furnished a construction in the case of *Lascelles v. Georgia* (1893), 148 U. S. 537, 13 Sup. Ct. Rep. 687, 37 L. ed. 549, and that construction and decision is binding upon us, and conclusively settles the controversy in this case.

²³³ Mr. Justice Jackson, speaking of the contention made in that case, and made by appellant in this—that a fugitive from one state extradited from another has the same rights of exemption as a fugitive from justice extradited from a foreign nation, says: "This proposition assumes, as is broadly claimed, that the states of the Union are independent governments, having the full prerogatives and powers of nations, except what have been conferred upon the general government; and not only have the right to grant, but do in fact, afford to all persons within their boundaries an asylum as broad and secure as that which independent na-

tions extend over their citizens and inhabitants. . . . If the premises on which this argument is based were sound, the conclusion might be correct. But the fallacy of the argument lies in the assumption that the states of the Union occupy toward each other, in respect to fugitives from justice, the relation of foreign nations, in the same sense in which the general government stands toward independent sovereignties on that subject; and in the further assumption that a fugitive from justice acquires in the state to which he may flee some state or personal right of protection, improperly called a right of asylum, which secures to him exemption from trial and punishment for a crime committed in another state, unless such crime is made the special object or ground of his rendition. . . . The sole object of the provision of the constitution and the act of Congress to carry it into effect, is to secure the surrender of persons accused of crime who have fled from the justice of a state whose laws they are charged with violating. Neither the constitution, nor the act of Congress providing for the rendition of fugitives upon proper requisition being made, confers, either expressly or by implication, any right or privilege upon such fugitives under and by virtue of which they can assert, in the state to which they are returned, exemption from trial for any criminal act done therein. No purpose or intention is manifested to afford them any immunity or protection ²³⁴ from trial and punishment for any offenses committed in the state from which they flee. On the contrary, the provision of both the constitution and the statutes extends to all crimes and offenses punishable by the laws of the state where the act is done: *Commonwealth of Kentucky v. Dennison* (1860), 24 How. 66, 101, 102; *Ex parte Reggel* (1885), 114 U. S. 642, 5 Sup. Ct. Rep. 1148, 29 L. ed. 250." The opinion is concluded in the following language: "It would be a useless and idle procedure to require the state having custody of the alleged criminal to return him to the state by which he was rendered up in order to go through the formality of again demanding his extradition for the new or additional offenses on which it desired to prosecute him. The constitution and laws of the United States impose no such condition or requirement upon the state. Our conclusion is that, upon a fugitive's surrender to the state demanding his return in pursuance of national law, he may be tried in the state to which he is

returned for any other offense than that specified in the requisition for his rendition, and that in so trying him against his objection, no right, privilege, or immunity secured to him by the constitution and laws of the United States is thereby denied." A like conclusion was reached by the courts in the following cases: *Lascelles v. State* (1891), 90 Ga. 347, 35 Am. St. Rep. 216, 16 S. E. 945; *Carr v. State* (1893), 104 Ala. 43, 16 South. 155; *State v. Kealy* (1893), 89 Iowa, 94, 56 N. W. 283; *Commonwealth v. Wright* (1892), 158 Mass. 149, 35 Am. St. Rep. 475, 33 N. E. 82, 19 L. R. A. 206; *State v. Patterson* (1893), 116 Mo. 505, 22 S. W. 696; *State v. Leidigh* (1896), 47 Neb. 126, 66 N. W. 308; *People v. Cross* (1892), 135 N. Y. 536, 31 Am. St. Rep. 350, 32 N. E. 246; *State v. Glover* (1893), 112 N. C. 896, 17 S. E. 525; *Ham v. State* (1878), 4 Tex. App. 645; *State v. Stewart* (1884), 60 Wis. 587, 50 Am. Rep. 388, 19 N. W. 429; *Williams v. Weber* (1891), 1 Colo. App. 191, 28 Pac. 21; *In re Brophy* (1895), 4 Ohio Dec. 391.

²³³ Our conclusion is that, upon his return to this state, appellant could be lawfully held to answer for any crime committed by him against the laws of this state, without regard to the particular offense named in the papers for his extradition, and, therefore, that there was no error in sustaining the state's demurrer to his plea in abatement.

6. If the offense for which appellant was extradited was based upon the same facts, and in its essential features was the same as that for which he was tried, a question which we need not now determine, then appellant's contention could not be sustained, although the two offenses charged were technically different: *Musgrave v. State* (1893), 133 Ind. 297, 32 N. E. 885; *Waterman v. State* (1888), 116 Ind. 51, 18 N. E. 63; *Harland v. Territory of Washington* (1887), 3 Wash. Ter. 131, 13 Pac. 453; *Ex parte Foss* (1894), 102 Cal. 347, 41 Am. St. Rep. 182, 36 Pac. 669, 25 L. R. A. 593.

7. Appellant has made objection to the sufficiency of the first and second counts of the affidavit and information, but, as he was acquitted upon these counts, no harmful error can be predicated upon the court's ruling as to their sufficiency to charge a public offense.

8. Appellant insists that there is no statutory provision by which the state may prosecute a defendant upon more than one count by affidavit and information, and that the

statute only provides for a prosecution upon different counts in cases founded upon an indictment. This question has been decided against appellant's contention in the case of Diehl v. State (1901), 157 Ind. 549, 62 N. E. 51. The verdict of guilty in this case was based upon the fourth count alone, and no objection to the sufficiency of this count has been pointed out or discussed in appellant's brief, and the first and second errors assigned will therefore be deemed waived.

9. A request to require the prosecuting attorney to elect upon which count of an indictment, or of an affidavit and information, he will rely for a conviction, is addressed largely to the discretion of the trial court, and this court will not ²³⁸ review and reverse its ruling upon such request unless it affirmatively appears that there was an abuse of such discretion. In this case it was manifest both from the affidavit and information, and also from the evidence when the motion was made, that the several counts of the charge against appellant were founded upon the same essential facts, and all arose from one transaction; the doctrine of election did not apply, and there was clearly no error in denying appellant's motion to require an election by the prosecuting attorney: Reed v. State (1897), 147 Ind. 41, 46 N. E. 135; McCullough v. State (1892), 132 Ind. 427, 31 N. E. 1116; Glover v. State (1887), 109 Ind. 391, 10 N. E. 282; Short v. State (1878), 63 Ind. 376; Mershon v. State (1875), 51 Ind. 14.

10. Appellant finally insists that there was error on the part of the trial court in admitting in evidence conversations with H. B. Gordon in his absence, and after the consummation of the purpose of the conspiracy, and in admitting in evidence a letter purporting to have been written by appellant without specific proof, at the time, that it was written by him, and in giving to the jury instruction numbered fifteen; and that for these reasons his motion for a new trial should have been granted.

Some of these objections, stated as general propositions of law, are sound, but, when applied to the facts in this case, are untenable. The order in which evidence may be introduced upon a trial is governed by the discretion of the court, and, when from all the evidence it is manifest that the court's rulings were right, no prejudicial error can be asserted merely because, at some particular moment of time

in the progress of a trial, a ruling may not have seemed fully justified.

Appellant's co-conspirator waived his privilege and testified in this cause. His evidence sustained all the material elements of the charge against appellant, and was abundantly corroborated by other evidence. The conspiracy charged was thus fully established, and therefore the acts²³⁷ and declarations of Gordon, the co-conspirator, in furtherance of the common design, were admissible against appellant, although done and made in his absence: *McKee v. State* (1887), 111 Ind. 378, 12 N. E. 510; *Walton v. State* (1882), 88 Ind. 9.

Gordon was arrested in the act of attempting to pass the forged check, and what he said at that time and place and in that connection was not objectionable on the ground that the conspiracy had terminated, but was a part of the *res gestae*, within the rule just stated, and admissible. It is an erroneous assumption to say that the object of the conspiracy had been accomplished. The conspiracy was never terminated by agreement of the parties or by the consummation of its aims, but its purpose was thwarted by timely warning and prompt action on the part of the officers of the law.

11. The letter, to the admission of which objection was made, was found upon the person of Gordon at the time of his arrest. He testified, subsequent to its introduction in evidence, that he had received it from appellant. Its admission was, however, fully justified, as a physical fact of an incriminating character, under the rule declared in the case of *Musser v. State* (1901), 157 Ind. 423, 61 N. E. 1.

Instruction No. 15 is not subject to the criticisms made, but correctly and fairly states the law upon the topic covered by it. There was no error in overruling appellant's motion for a new trial.

12. The sixth and seventh assignments of error were doubtless suggested by the provisions of the act of March 9, 1903 (Acts 1903, p. 338, sec. 8), but that act has no application to cases of this class, and no question is presented by these assignments.

No error appearing in the record, the judgment is affirmed.

A Fugitive from Justice Extradited from a foreign country cannot be tried, it seems, for an offense other than the one for which he was

extradited: See the note to *State v. Hall*, 10 Am. St. Rep. 210. This rule is extended to extradition as between the states of the Union, in *State v. Hall*, 40 Kan. 338, 10 Am. St. Rep. 200. The weight of authority, however, appears to be opposed to such an extension of the doctrine: *Lascelles v. State*, 90 Ga. 347, 35 Am. St. Rep. 216; *Commonwealth v. Wright*, 158 Mass. 149, 35 Am. St. Rep. 475; *People v. Cross*, 135 N. Y. 536, 31 Am. St. Rep. 850.

FIELD v. CAMPBELL.

[164 Ind. 389, 72 N. E. 260.]

MARRIED WOMEN—Suretyship.—Whether or not a married woman is surety or principal on a note or other obligation is to be determined, not from the form of the contract, nor from the basis upon which the transaction is had, but from the inquiry as to whether she received in person, or in benefit to her estate, the consideration upon which the contract depends. (p. 304.)

MARRIED WOMEN—Suretyship.—A married woman may borrow money for herself, and her subsequent disposition of it will not invalidate her contract to repay, but she cannot in such transaction by indirection evade the statute prohibiting suretyship by her, and in such manner bind herself. (p. 305.)

MARRIED WOMEN—Suretyship.—As the statute puts a married woman under disability as a surety, there can be no recovery upon her suretyship undertaking, except when the facts are such that the person who accepted it is reasonably justified in supposing, and does suppose, that she is not only a principal in name, but also in fact. (p. 305.)

MARRIED WOMEN—Suretyship—Knowledge.—Anyone loaning money to a married woman is bound to know that she cannot become a surety, and he must satisfy himself by active diligence and inquiry that she is in fact a principal. (p. 306.)

PRINCIPAL AND AGENT.—Notice to or Knowledge of an agent within the scope of his authority is notice or knowledge of his principal. (p. 306.)

NOTICE—Recorded Instruments.—Any instrument affecting title, which is properly recorded, is absolute notice to everyone subsequently dealing with such title, irrespective of whether or not such person has examined the records, or even had an opportunity to make an examination. (pp. 307, 308.)

PRINCIPAL AND AGENT—Recorded Instruments as Notice.—Actual notice to an agent arising from the fact that a certain instrument is properly recorded, is actual notice to his principal. (p. 308.)

MARRIED WOMEN—Suretyship—Estoppel.—A mere statement by a married woman that money borrowed by her was for her own use does not estop her from showing that she became a surety therefor, when the lender knew of facts and circumstances calling on him to make more specific and diligent inquiry. (p. 309.)

MARRIED WOMEN—Suretyship.—A married woman has no authority to become a principal in a loan made to pay a former suretyship debt. (p. 311.)

MARRIED WOMEN—Suretyship—Estoppel.—A married woman, by deceit which actually misleads, may estop herself from deny-

ing that in obtaining a loan she became a surety for another. (p. 311.)

MARRIED WOMAN—Suretyship—Estoppel.—Unless an estoppel in pais exists a married woman is not bound to repay money obtained by her to pay the debts of another. (p. 313.)

Gavin & Davis, M. B. Hottell, J. J. Giles and McCart & Talbot, for the appellant.

Elliott, Elliott & Littleton and W. J. Buskirk, for the appellee.

³⁹⁰ GILLETT, J. This is a second appeal: See Field v. Noblett (1901), 154 Ind. 357, 56 N. E. 841. As the action now stands, John A. Campbell, as administrator of the estate of Van R. Noblett, deceased, is seeking to recover against appellant on a note and to foreclose a real estate mortgage which she and her husband executed to secure said note. Certain special paragraphs of answer sufficiently present the question of her suretyship. The general denial and special paragraphs of estoppel were pleaded by way of reply. The court found for ³⁹¹ appellee, and rendered a judgment and a decree in his favor. The question is duly presented whether the finding was contrary to law.

It appears from the evidence that in November, 1890, the term of Joseph J. Field as treasurer of Orange county expired. He was owing at the time, on account of his office, about \$12,000, but the deficit was not discovered until subsequently, when a report was made to the state. January 10, 1891, he and his wife, the appellant herein, executed to his bondsmen a mortgage covering all of the real estate of each of said mortgagors, conditioned to save the mortgagees harmless on account of their suretyship. The mortgage was recorded January 12, 1891. A few days subsequently, Joseph J. Field applied to Van R. Noblett for a loan of the above amount, and proposed to secure the same by a mortgage upon his own real estate. Noblett offered to loan \$9,000 on said real estate, but declined to loan more, for the reason that he regarded the security as insufficient. A few days later appellant applied in person to Noblett to borrow \$3,000 upon her real estate. He asked her if she wanted the money for her own use, and she answered that she did. Noblett stated that he was willing to make the loan, provided the title was good and unencumbered and the land worth \$6,000, she to pay the ex-

pense of the transaction. Appellant agreed to his proposition. He then directed one Hicks, who was at the time the cashier of a bank of Orleans, Indiana, to appraise the land, and, if it was worth \$6,000, he was authorized to procure an abstract, and determine whether the title was good and unencumbered, and, if so, he was to make the loan. As to the relation of Hicks to the transaction, Noblett testified in part as follows: "I authorized Hicks to go and get the abstract and find out if the—whether it was good and unencumbered, and if he thought it was then he might take the mortgage for this amount." On cross-examination Noblett was asked this question: "Didn't you learn, Mr. Noblett, that ³⁹² Mrs. Field and her husband had mortgaged all of his property, and also her property, for the purpose of saving harmless the bondsmen of Mr. Field, while he was treasurer?" The witness answered: "Well, I'd heard say. I knew that. They had some fear about that—that their property was all mortgaged." Hicks appraised the lands offered as security for each loan, and he also procured and passed on the abstracts. Noblett further testified on cross-examination that he received a report from Hicks that the title to the real estate of appellant was good; that there was no encumbrance, and that it would be a sufficient security for \$3,000. Afterward, on February 2, 1891, Noblett deposited \$12,000 in said bank, taking two certificates of deposit, one for \$9,000 and the other for \$3,000. The latter certificate was indorsed, "Pay to W. T. Hicks for benefit of Mrs. Matilda Field. Van R. Noblett," and the certificate was turned over to Hicks. The other certificate was apparently placed under the control of Hicks, since he closed up both loans. February 13, 1891, the bondsmen of Joseph J. Field executed to Hicks a power of attorney, authorizing him to release said indemnity mortgage upon the payment to the treasurer of Orange county of \$12,701.74 "on the amount of his [Field's] indebtedness to said county." Hicks drew the notes and mortgages, and consummated both loans on the same day, February 14, 1891. On the morning of that day appellant came to the town of Orleans. She had no knowledge that a mortgage was to be executed at that time. A person, who was a notary public, met her at a drug-store, and she there signed the note and mortgage in question, and also joined her husband in the \$9,000 mortgage on his lands. She then ac-

accompanied the person who had taken her acknowledgment to the bank. One Ellis, who was her husband's successor in office, was in the bank at the time. Hicks counted out \$3,000 to her, and she receipted the payment on the certificate. She took the money to the drug-store at once, where her husband was in waiting, and ³⁹³ handed the money to him. He immediately went with it to the bank. Ellis testified that on that day Field paid him \$3,000 in cash and \$8,334.74 in a check or checks on said bank, and that the aggregate of said amounts was the sum then due from Field according to the footings of the books. Hicks afterward entered of record a release of the indemnity mortgage. There is and can be no question made upon the evidence that the \$3,000 paid to Ellis was the money received by appellant. We are unable to find that Noblett testified that he believed the statement of appellant that "she desired the money for her own use" to be true.

1. Counsel for appellant contend that the note and the mortgage sued on are void under section 6964 of Burns' Revised Statutes of 1901 (Rev. Stats. 1881, sec. 5119). That section is as follows: "A married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract, as to her, shall be void." It is the contention of appellee's counsel that the loan was made to appellant upon the representation that she desired it for her own use, and that Noblett was not bound to see to the application of the money which he furnished her. It is settled law in this state that whether or not a married woman is surety or principal on a promissory note or other obligation is to be determined, not from the form of the contract, nor from the basis upon which the transaction was had, but from the inquiry as to whether she received in person or in benefit to her estate the consideration upon which the contract depends: *Field v. Noblett*, 154 Ind. 357, 56 N. E. 841; *Harbaugh v. Tanner* (1904), 163 Ind. 574, 71 N. E. 145, and cases cited.

2. It does not admit of question that a married woman may borrow money for herself, and that her subsequent disposition of it, whatever that may be, will not invalidate her promise to repay: *Bouvey v. McNeal* (1891), 126 Ind. 541, 26 N. E. 326; *Cummings v. Martin* (1891), 128 Ind. 20, 27 N. E. 173. If, however, it appears that an elaboration of outward details was, as both parties knew, but a cloak

to cover an attempt to ³⁹⁴ conclude a contract in violation of the statute, the indirection in method by which they have proceeded will not avail to save the transaction: *Webb v. John Hancock Mut. Life Ins. Co.* (1904), 162 Ind. 616, 69 N. E. 1006, 66 L. R. A. 632; *Long v. Crosson* (1889), 119 Ind. 3, 21 N. E. 450, 4 L. R. A. 783. As was said in the case last cited: "Whatever device may be resorted to for the purpose of evading the statute, if the person seeking to enforce the contract knew of, or participated in, the design, or purposely remained ignorant, courts will deal with the transaction according to its substance, regardless of the form in which it may have been disguised."

3. But it is not necessary that the party loaning the money should actually have been a party to the violation of the statute. Being advised of the fact that the woman is covert, he stands charged with a knowledge of her disability. A married woman has no power to deal as principal if she is in fact a surety: *Vogel v. Leichner* (1885), 102 Ind. 55, 1 N. E. 554; *Andrysiak v. Satkoski* (1902), 159 Ind. 428, 63 N. E. 854, 65 N. E. 286. There can be no evasion of the statute upon the part of the person who accepts an obligation that the woman is powerless to issue, and she could not escape the statutory prohibition except for the fact that she may be bound by an estoppel in pais. As the statute puts a married woman under disability, there can be no recovery upon her suretyship undertaking, except where the facts were such that the person who accepted it was reasonably justified in supposing, and did suppose, that she was not only a principal in name, but also in fact. In all ordinary circumstances, at least, there must be some degree of active diligence upon the part of a lender to ascertain the purpose for which a woman whom he knows to be married is borrowing money. It was said in *Cupp v. Campbell* (1885), 103 Ind. 213, 2 N. E. 565: "One contracting an encumbrance on the estate of a married woman, cannot, however, deal with her at arm's-length, knowing that she is married, and that by law she is prohibited from contracting for the benefit of another; and, knowing that she is about to ³⁹⁵ encumber her separate estate in his favor, he is bound to inquire concerning the consideration, and ascertain, if he may, by reasonable inquiry from her whether it is for her benefit or for the benefit of another, and unless misled by the conduct or representations of the wife,

he will be held to have acquired a knowledge of the facts which prudent inquiry would have disclosed." There may be a necessity of further inquiry, despite the general affirmation of the woman that she desires the money for her own use, in cases where the circumstances are such as to admonish the lender that probably she is seeking to evade the statute. This is the effect of the opinion in *Ward v. Berkshire Life Ins. Co.* (1886), 108 Ind. 301, 9 N. E. 361, where it was said: "It is not material that there was a secret agreement between the husband and wife, for the appellee could not be prejudiced by an agreement of which it had no notice. The question is, not what facts were known to the mortgagors, but what facts did the appellee have knowledge of, or ought it under the circumstances to be charged with having knowledge of. It is true that the appellee, having notice of Mrs. Ward's coverture, was bound to inquire whether she had capacity to make the contract; but when reasonable care and diligence are exercised, the party contracting with the married woman may rely upon her representations: *Cupp v. Campbell* (1885), 103 Ind. 213, 2 N. E. 565. Here reasonable care and diligence were exercised, for no other person than the married woman could so well inform the lender what she intended to do with the money obtained upon the mortgage, and there were no circumstances indicating that her representations were untrue, or even subjecting them to suspicion."

4. In determining the extent that Noblett had notice of what was to be done with the money received by appellant, it is important to consider what notice he himself had, and the notice, if not the actual knowledge, which his agent Hicks had, and the notice based on the record. Notwithstanding any conclusions indulged in by Hicks in his testimony, it is ³⁹⁶ plain that he was an agent of Noblett, not only to appraise the land, but to pass upon the title and conclude the loan. All this was within the scope of his agency, and to the extent that he had notice or knowledge must notice or knowledge be imputed to his principal. It is laid down in *Story on Agency*, ninth edition, section 140, that: "Notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from, or is at the time connected with, the subject matter of his agency; for, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal;

and if he has not, still the principal, having intrusted the agent with the particular business, the other party has a right to deem his acts and knowledge obligatory upon the principal." It was said by Lord Brougham in *Kennedy v. Green* (1834), 3 Mylne & K. 699: "The doctrine of constructive notice depends upon two considerations: 1. That certain things existing in the relation or the conduct of parties, or in the case between them, beget a presumption so strong of actual knowledge, that the law holds the knowledge to exist, because it is highly improbable it should not; and next, that policy, and the safety of the public, forbids a person to deny knowledge while he is so dealing as to keep himself ignorant, or so as that he may keep himself ignorant, and yet all the while let his agent know, and himself, perhaps, profit by that knowledge. In such a case it would be most iniquitous and most dangerous, and give shelter and encouragement to all kinds of fraud, were the law not to consider the knowledge of one as common to both, whether it be so in fact or not." A writer on the law of agency states the doctrine thus: "The principal is chargeable with notice of all the material facts that come to the knowledge of his agent in a transaction in which the agent is acting for the principal. If this were not so a purchaser could always free himself from the possible equities arising from the acquisition of knowledge of adverse rights in or to the property purchased, by purchasing through an ³⁹⁷ agent. It is against the policy of the law to place one who deals through an agent in a better position than one who deals in person": Huffcut on Agency, 2d ed., sec. 141. "My solicitor," as was said in an English case, "is alter ego; he is myself; I stand in precisely the same position as he does in the transaction, and therefore his knowledge is my knowledge; and it would be a monstrous injustice that I should have the advantage of what he knows without the disadvantage": *Boursot v. Savage* (1866), L. R. 2 Eq. 134.

5. The fact that the mortgage to the bondsmen of the husband was of record lifts the information which Noblett admits that he had concerning it above the plane of mere rumor, if his answer upon the stand is to be so construed. "Any instrument affecting the title, which is properly recorded is absolute notice to everyone subsequently dealing with the title, irrespective of whether such person has examined the records, or even had an opportunity to make an

examination": Wade on Notice, 2d ed., sec. 97. See, also, *Webb v. John Hancock Mut. Life Ins. Co.* (1904), 162 Ind. 616, 69 N. E. 1006, 66 L. R. A. 632; *McPherson v. Rollins* (1887), 107 N. Y. 316, 1 Am. St. Rep. 826, 14 N. E. 411.

6. Taken as a whole, the authorities warrant the assertion that the notice which the law imputes from notice to an agent, or from the fact that an instrument in the chain of title is properly of record, is the equivalent of actual notice. We are not unmindful that a false representation might sometimes lead a person who contemplated loaning money on real estate security to omit to examine the record, but we fail to perceive how the effect of such a representation would be to prevent an agent from informing his principal of facts which it was nevertheless the agent's duty to communicate, or why that should furnish any reason for not conclusively presuming, as in other cases, that the duty of the agent to communicate facts of importance to his principal was discharged. And the indulgence of this presumption in the case before us, thereby infecting Noblett with the ~~same~~ notice of Hicks, makes it just, as we think, to hold that the representation of appellant was not of such a character as to relieve Noblett of the imputation of record notice.

7. Focusing all elements of notice in Noblett, we find that before the loan was made he knew that Field and his wife had executed a mortgage of indemnity on all of the property belonging to each of them to the sureties on Field's official bond; that the bondsmen's liability was estimated by them at a sum approximating \$12,000; that Field had sought to borrow \$12,000 on his property, but not being able to borrow more than \$9,000 had arranged to obtain the latter sum; that his wife was seeking to borrow on her property a sum equal to the difference between \$9,000 and \$12,000; that after the full sum of \$12,000 had been promised, and the money deposited in the bank to make the loans, the bondsmen had placed in the hands of the agent a power of attorney to release the indemnity mortgage, in apparent anticipation that an amount approximating the aggregate of the proposed loans would be paid; and, in addition to all this, Noblett had notice that the treasurer was actually in the bank while Field and his wife were closing up their respective transactions with Hicks. The fact that the procuring of said loans and the paying off of Field's public indebtedness were transactions dependent on each other

could not have escaped the notice of Hicks, since an obedience to the injunction to see that the land was unencumbered made it his particular duty to ascertain whether the money borrowed was to be used in such a way that as attorney in fact he would be able to release the indemnity mortgage.

8. As to the answer which Noblett testified that he received from appellant in response to his mild and general question, it must be said, in view of the circumstances, that the meaning of her statement was at least problematical. It might have meant that the money was to be applied for the benefit of herself or of her separate estate, or there was ~~no~~ room for the construction that she answered that the money was "for her own use" in the sense of "Is it not lawful for me to do what I will with mine own?" Noblett's inquiry was a very scant one at the best, but in the light of the notice of facts with which he was charged before the loan was concluded it is clear that to have asked appellant the explicit question as to whether she intended to apply the money she was borrowing on her husband's shortage was the least that he could have done by way of inquiry to furnish a basis on which to charge appellant as a principal.

Had there been an effort to observe the statute upon the part of Noblett and his agent, we do not understand how they could have failed to perceive that every footprint having to do with the loan in question and its associated transactions indicated that the movement of events was toward the consummation of the encumbering of appellant's estate to raise money to apply on her husband's delinquency. It was said in *Webb v. John Hancock Mut. Life Ins. Co.*, 162 Ind. 616, 69 N. E. 1006, 66 L. R. A. 632, a case very much like this in principle: "It would appear, when all of the facts and circumstances of which appellee had knowledge are considered, that its neglect to make further inquiry can only be explained upon the theory that it desired to remain ignorant. It was not at liberty to close its eyes and make no further inquiry or investigation, and then, as it does in this action, attempt to shield itself upon the plea that it was ignorant of the purpose of appellants to evade the law by executing the conveyances in question."

9. The facts being without dispute, the question whether a lender made such inquiry as to warrant him in treating the woman as a principal is a question of law. While she

cannot use her disability as a means for the perpetration of fraud upon those who, after due inquiry, have treated her as engaged in the exercise of a power she undoubtedly possessed, yet such is her status that there must be circumstances of due inquiry to authorize her to be charged upon a contract which she has made in defiance of law. The statute ⁴⁰⁰ represents a legitimate exercise of the power of the legislature to determine what is expedient. As to such an enactment it may be said that when the legislative department speaks it conclusively determines what the public policy of the state is, and it becomes the business of the courts to enforce the statute in dealing with transactions entered into in violation of its evident spirit, whatever their form, to the end that the declared policy of the state may prevail. The question in this case is whether there was due inquiry. We hold that the meager and almost ambiguous statement which Noblett elicited from appellant, when considered in the light of the fact that the circumstances from the beginning to the end conspired to warn him that she was seeking to violate the statute, was not sufficient to warrant him in dealing with her upon the assumption that she was a principal in the transaction. It was his duty to observe, and follow up by special inquiry, the clear indices of a purpose on her part to evade the law. Bearing in mind the fact that Noblett was not authorized to deal with appellant on the basis of her being *sui juris*, and that the statute is to be enforced against all who cannot claim that after due care they were deceived into the belief that they were dealing with a principal, we deem it clear that there was in the transaction before us such a want of care to ascertain the purpose for which the loan was to be made that the transaction should be condemned as a violation of law.

10. The question is not presented to us as one involving the weight of the evidence. It is a case where the legal effect of the evidence was misapprehended by the trial court: *State v. Forsythe* (1897), 147 Ind. 466, 44 N. E. 593, 33 L. R. A. 221.

11. We have thus far dealt with the question in hand upon the assumption that the contract of appellant was in fact one of suretyship, and but for the argument of counsel for appellee, we might close this opinion without discus-

sion of this point. It was decided in *Andrysiak v. Satkoski* ⁴⁰¹ (1902), 159 Ind. 428, 63 N. E. 854, 65 N. E. 286, that the fact that the payment of a debt by a wife relieves land in which she has an inchoate interest of a mortgage does not authorize her to be charged as principal. But it is contended that the indemnity mortgage was only voidable, since the statute provides that the class of obligations therein mentioned are void "as to her," thereby making her coverture a personal defense, and that, as she did not elect to avoid the mortgage, but chose rather to pay it, the note and the mortgage in suit were executed by her as a principal. While it is true that in some of our cases it has been stated that the suretyship obligation of a married woman is only voidable, yet such language has been used in pointing out the fact that under the terms of the statute the defense is of a personal nature. If the undertaking was of a character which the statute prohibited, it would not have such a status that her mere subsequent election to waive the defense could operate as a confirmation: See *Voreis v. Nussbaum* (1892), 131 Ind. 267, 31 N. E. 70, 16 L. R. A. 45. It strikes us that to adopt the argument of counsel would be to attach importance to the shadow, rather than to the substance, which is the legislative enactment. Moreover, to hold that a married woman might execute a mortgage upon her property, purporting to render her liable as a guarantor to pay a debt previously incurred by another, and that she might then legally charge her estate by borrowing money to relieve her property of the mortgage, would be judicially to declare the open sesame which would swing wide the door to the nullification of the statute.

12. Whether the lender may be led in some instances to assume that the prior mortgage which his money is used to satisfy is a valid encumbrance is another question. As we have seen, she cannot, except by conduct which is tantamount to deceit, and which actually does mislead, charge herself with any debt except for the benefit of herself or of her estate. The case of *Cupp v. Campbell* (1885), 103 Ind. ⁴⁰² 213, 2 N. E. 565, fully discusses and disposes of the contention of counsel with which we are now dealing, particularly since the prior mortgage in the case at bar showed on its face that it was executed by way of indem-

nity. In the case referred to it was said: "The question which remains is, Can the wife be held on the notes, and the mortgage in suit be enforced against her separate property, to the extent that the money secured thereby was used in discharging the invalid prior mortgage? We think that this question must be answered in the negative. . . . Where her estate is encumbered in such manner as that she is exposed to the hazard of losing it, even though such encumbrance is for the debt of another, it is manifestly beneficial that she should have the power to relieve it from the peril of such encumbrance, and when she and her husband contract a loan for that purpose, it cannot be said that the consideration for such loan does not inure to her benefit. Where, however, an encumbrance is made on the wife's separate estate, to pay the husband's debt, or to remove an encumbrance which by the very terms of the statute she had no power to make, and which exposes her land to no peril whatever, we can discover no ground upon which it can be said that the consideration for an encumbrance so made inured to the benefit of the wife. One seeking to enforce a mortgage against the separate estate of a married woman must show by proof aliunde that the debt secured by the mortgage was either the debt of the wife, or that it inured to the benefit of her separate estate: *Bowman v. Kaufman* (1878), 30 La. Ann. 1021. And if nothing further can be shown than that it was to pay the husband's debt, to secure which a mortgage had previously been made, which was within an absolute statutory prohibition, we think there is a failure of proof. Unless there is at least a bona fide question as to the validity of the encumbrance, resting on some apparent foundation, the contract is one of suretyship": See, also, *Andrysiak v. Satkoski*, 159 Ind. 428, 63 N. E. 854, 65 N. E. 286. It can make no manner of difference that appellant was given a ⁴⁰³ temporary possession of the money. There being no element of estoppel present, her original purpose in borrowing the money, and her subsequent application of it, must be regarded as component parts of what was an entire transaction.

13. The fact that Field and his wife were in dire need of money at the time of the transaction gave her no en-

larged power to borrow money with a purpose to use it in paying the debt of her husband. We make no question about her right to apply her money to pay an indebtedness of his, but we hold that in the absence of an estoppel she cannot enter into a valid contract to repay money borrowed by her for that purpose. The stress of circumstances in which the two were involved cannot obscure the meaning of the statute. It was intended to prevent the making of contracts in the nature of suretyship, undertakings by married women in all cases. In *Harbaugh v. Tanner* (1904), 163 Ind. 574, 71 N. E. 145, it was said: "One of the principal reasons for enacting the statute forbidding married women to enter into contracts of suretyship, and providing that such contracts were void, was to prevent them from squandering or encumbering their property as sureties for improvident husbands"; citing *Cummings v. Martin* (1891), 128 Ind. 20, 27 N. E. 173; *Voreis v. Nussbaum*, 131 Ind. 267, 31 N. E. 70, 16 L. R. A. 45.

Judgment reversed and a new trial ordered.

For Authorities in General on the Liability of Married Women on their contracts of suretyship, see Rogers v. Shewmaker, 27 Ind. App. 631, 87 Am. St. Rep. 274; Garrigue v. Keller, 164 Ind. 679, post, p. 324; Tompkins v. Triplett, 110 Ky. 824, 96 Am. St. Rep. 472; Freeman's Appeal, 68 Conn. 533, 57 Am. St. Rep. 112. If a husband and wife execute their joint note apparently as makers and without disclosing any suretyship, she cannot assert the defense of suretyship as against a person acquiring the note before maturity without notice that she was not a principal: Strickland v. Vance, 99 Ga. 531, 59 Am. St. Rep. 241. See, too, the note to Trimble v. State, 57 Am. St. Rep. 178. And if a wife makes her husband agent to deliver a note signed by both, her signature appearing first, she is bound by his representation to the payee that she is principal: Tompkins v. Triplett, 110 Ky. 824, 96 Am. St. Rep. 472. According to Kitchen v. Chapin, 64 Neb. 144, 97 Am. St. Rep. 637, if a married woman assigns a note which is payable to her order, and guarantees its payment, she is liable on her guaranty, and the purchaser need not inquire as to her intended disposition of the proceeds of the sale. And according to Robertson v. Rowell, 158 Mass. 94, 35 Am. St. Rep. 466, a married woman and her separate estate are bound by her indorsement of a note to a third person, where the note purports to be payable to her order, though it was given for a pre-existing debt of her husband, if it was made pursuant to an agreement between the indorsee and the husband that if the note should be paid it should be in settlement of all claims between the parties.

BOONE v. VAN GORDER.

[164 Ind. 499, 74 N. E. 4.]

CORPORATIONS — Stock — Equitable Owner — Transfer.—A wife to whom her husband owes money and delivers corporate stock in payment, becomes thereby the equitable owner of the stock, and has the right as against him to have his legal title thereto transferred to her, subject to any existing paramount rights of the corporation and third persons. (p. 317.)

CORPORATIONS — Stock — Levy on.—A sheriff has the right to levy on and sell corporate stock, and for that purpose has a right of access to the corporation books to make the levy and transfer the stock. (p. 318.)

CORPORATIONS — Stock — Levy on, How Made.—A levy of execution on corporate stock is not made by seizing the stock certificate, but is made on the shares as registered on the corporation books, and the levy as made is subject to the paramount rights of the corporation and of third parties. (p. 319.)

CORPORATIONS — Sale of Stock on Execution — Rights of Purchaser.—The purchaser of corporate stock sold on execution takes the legal title of the judgment debtor subject to equities of which such purchaser has actual or constructive notice. (p. 319.)

CORPORATIONS — Stock — Sale on Execution — Injunction.—If the sheriff attempts to sell corporate stock on execution and the unregistered equitable owner thereof seeks to restrain the sale by an injunction, a failure to find that such stock has any value or use to such owner, or that the sale would cause him great or irreparable damage, or that he has no adequate legal remedy, deprives him of the remedy by injunction. (pp. 319, 320.)

E. Bundy and J. R. Hadley, for the appellants.

G. A. Henry and P. H. Elliott, for the appellee.

500 JORDAN, J. Action by appellee, Sophia C. Van Gorder, to enjoin the sheriff of Grant county, Indiana, a co-appellant herein, from selling at sheriff's sale on execution twelve shares of the capital stock of the Marion Ice and Cold Storage Company, an incorporated concern domiciled and doing business at the city of Marion, in said county. This corporation appears to have been organized under the statute of this state relating to the incorporation of manufacturing and mining companies. Appellants answered the complaint 501 (1) by a general denial; (2) by setting up affirmative matter. Under the issues the court, on request, made a special finding of facts, and stated conclusions of law thereon adversely to appellants. Over their motion for a new trial, judgment was rendered perpetually enjoining them, and each of them, from levying on and selling said shares of stock, or from in any manner disturbing the appellee in her owner-

ship and enjoyment thereof, and further adjudging that the appellants pay the costs of the action. Appellee alleges in her complaint that she is the owner, by purchase for value, of twelve shares of the capital stock of the aforesaid corporation. This stock, as alleged, is of the par value of one hundred dollars per share. Further facts are averred to disclose that on November 1, 1901, appellants other than the sheriff recovered a judgment for seventeen hundred and fifty dollars against Charles A. Van Gorder and others in the Grant superior court. Execution was duly issued on this judgment, and placed in the hands of the sheriff of said county, who on February 25, 1902, levied the same on the said twelve shares of stock, and will, as charged, unless enjoined, sell the same at sheriff's sale, and apply the proceeds upon the payment of the judgment. It is alleged that appellee was not a party to the action upon which judgment was rendered, and in no manner is she concerned therein. It is charged that she was the owner and in possession of said stock before the rendition of the judgment, and the issue of the execution thereon. The sheriff has levied upon and advertised the stock for sale as the property of said Charles A. Van Gorder, and, unless immediately restrained, will, "without right or authority," sell the same, to appellee's "irreparable damage." A restraining order is prayed for, and on final hearing a perpetual injunction is demanded, enjoining appellants, or any of them, from levying on or selling the stock in question, and it is further demanded that the appellee's title to said property be forever quieted in her.

The court, in its special finding, found substantially the ⁵⁰² following: Plaintiff [appellee herein], about twenty-two years ago, received from her father's estate two thousand three hundred dollars in money. She loaned this money to Charles A. Van Gorder, who was her husband. The loan was made with the understanding and agreement between her and him that the money should be paid whenever he obtained money or property which he could spare in applying to the payment of said loan. Her said husband, Charles A., at the organization of the Marion Ice and Cold Storage Company, subscribed and paid for forty shares of the capital stock of said concern. These shares of stock were his property, twenty of which on the tenth day of September, 1901, he sold to one Fred Eward, for which a certificate was issued by the company to Eward. On the same date a certificate

was issued to said Charles A. Van Gorder for the other twenty shares of stock. Sometime in September, 1901, after receiving the stock certificate for the twenty shares, he delivered it to appellee, his wife, to be applied by her as a payment upon the loan of two thousand three hundred dollars. She accepted it as a payment thereon. After the delivery of the certificate to appellee, her said husband at no time thereafter had possession or control thereof; but it has ever since been in her possession and under her control, and she has claimed to be the owner thereof. On the thirteenth day of November, 1901, she caused eight shares of stock so received by her to be turned over to Barley & Spencer as a payment upon a house and lot which she had purchased, and a stock certificate for these shares was made out and issued to said parties by the company. On the same day a certificate for the remaining twelve shares was also made out in the name of said Charles A. Van Gorder, and issued to him by the corporation. This certificate he delivered to the appellee, and it represents the twelve shares of stock in controversy in this action. The stock represented by this certificate was at no time transferred to appellee on the books of the corporation, but stands and remains registered therein in the name of Charles A. Van Gorder, as his ⁵⁰³ property. Since the delivery of this certificate by him to appellee, a dividend on the stock has been paid to him by the company. The money received was by him paid over to appellee. The par value of the stock in controversy at the time the certificate was delivered to appellee was one hundred dollars per share. In March, 1900, said Charles A. Van Gorder became a surety on the bond of one McCray, who had been granted a license under the statute of this state to sell intoxicating liquors. At the time he executed this bond as one of the sureties he was the owner of the forty shares of stock, as hereinbefore stated. On March 6, 1901, an action was commenced against him and others on said bond by appellant Rozella Boone and her co-appellants other than the sheriff to recover damages for the death of the husband of said Rozella Boone, his death being due to the unlawful sales of liquor to him by said McCray. On November 1, 1901, a judgment for seventeen hundred and fifty dollars was rendered in said action for the plaintiffs therein against the defendants. An execution was issued upon the judgment to the sheriff of Grant county, who on February 25, 1902, levied the writ on the twelve shares of

stock herein in controversy, taken as the property of Charles A. Van Gorder; and the sheriff is threatening to sell the same under the execution in question, and will do so unless enjoined by the court.

Upon these facts the court stated its conclusions of law to the effect that appellee on February 25, 1902, was the owner in her own right of the shares of stock in controversy, and that the levy thereon by the sheriff under the execution was wrongful, and that the appellants, and each of them, ought to be perpetually enjoined from selling said property.

Exceptions to the court's conclusions were duly reserved, and it is assigned in this appeal that the court erred in its conclusions of law. It is argued by appellants' counsel that under the facts set out in the special finding the conclusions of law cannot be justified. Section 5059 of Burns' Revised Statutes of ⁵⁰⁴ 1901, Acts 1891, page 344, pertaining to the organization of manufacturing and mining companies, provides that "the stock of such company shall be deemed personal estate, and when fully paid in shall be transferable in such manner as the by-laws may prescribe."

1. The special finding discloses that whatever rights appellee has acquired to the shares of stock in controversy are by virtue of the mere delivery to her of the stock certificate. The stock has never been transferred to her on the books of the company, but remains and stands registered therein in the name of and as the property of her husband Charles A. Van Gorder. The special finding does not show that the corporation had adopted any by-law prescribing the manner in which stockholders should transfer their stock. It appears, however, by the record, that appellants, on the trial, introduced in evidence a by-law of the company providing as follows: "A registered stock-book shall be kept by the secretary of the corporation, and no transfer of stock shall be valid except on such book by a stockholder in person or by power of attorney executed for that purpose."

It is insisted by counsel for appellants that the court in its special finding, under the evidence, should have found in respect to the existence of this by-law. As the finding, however, is silent in regard to the by-law in dispute, therefore, in reviewing the questions presented by the conclusions of law, we cannot consider the effect of this by-law upon the transfer of the stock in controversy. Under the facts alleged in the complaint, and as found by the court, the title which

appellee acquired to the stock in controversy, as between herself and her husband, the legal owner, was merely an equitable one, or, in other words, she had the right as against him to have his legal title or interest in the stock transferred to her, subject or subordinate, however, to any existing paramount rights of the corporation and third parties: *Bruce v. Smith* (1873), 44 Ind. 1; *Coleman* ⁵⁰⁵ v. *Spencer* (1839), 5 Blackf. 197; *Helm v. Swiggett* (1859), 12 Ind. 194, and cases cited; *State v. First Nat. Bank* (1883), 89 Ind. 302. In *Helm v. Swiggett* (1859), 12 Ind. 194, the court said: "Ownership simply of a certificate of stock in the bank did not constitute the owner a stockholder. It required a transfer of the stock to him upon the books of the bank." In addition to the above authorities in respect to the rights acquired by a transferee of stock of a corporation through the mere delivery by the legal owner of the certificate representing such stock, see 39 Alb. L. J. 164-166; 2 Beach on Private Corporations, secs. 634-637; 10 Cyc. of Law & Proc. 597-605.

2. Section 735 of Burns' Revised Statutes of 1901 (Rev. Stats. 1881, sec. 723), provides: "Shares of stock in any corporation or company may be levied upon and sold in the county where the office and books showing the shares of stock and stockholders of the corporation or company are kept; and the sheriff shall transfer the stock, subject to the rights of the corporation or company. The sheriff shall have access to the books of any corporation or company in his county, for the purpose of making the levy; and if refused access, the court shall enforce the right. The shares of stock subject to be levied upon shall be bound by the execution from the time of the levy; and when such levy is made, the sheriff shall leave the notice thereof with the officer of the company, and such levy shall constitute a lien upon the stock from the time of such levy."

It will be observed that section 5059, *supra*, declares that the stock of the company shall be deemed to be personal estate. The evident purpose of section 735, *supra*, is to place shares of stock of a corporation, owned by a judgment debtor so far, at least, as the right to levy thereon is concerned, on a parity with other personal property owned by him. It is "the shares of stock in any corporation or company" upon which this statute authorizes a levy, and the sheriff is empowered thereunder to transfer on the books of the corpora-

tion to ⁵⁰⁶ the purchaser at the execution sale the shares of stock sold to him: *State v. First Nat. Bank*, 89 Ind. 302.

3. The levy is not made by seizing the stock certificate issued by the corporation to the judgment debtor, but it is made upon his shares of stock as registered in the books of the company; access to these books is accorded by the statute to the sheriff for the purpose of making the levy. The statute in question evidently contemplates that the officer in making the levy shall be governed by the books of the corporation; and whatever stock they disclose as owned by or belonging to the judgment debtor may, as previously said, be levied upon, subject to any existing paramount rights of the corporation or third parties. In respect to the relative rights of an unregistered transferee of stock, and execution or attaching creditors of the transferrer, see *Helliwell on Stock and Stockholders*, sec. 361; 2 *Cook on Corporations*, 5th ed., secs. 486, 487.

4. As to whether appellants at the time of the levy in question had notice of the transfer of the stock certificate to appellee, the special finding is silent. In the event of the consummation of the threatened sale upon execution of the shares of stock in controversy, the purchaser thereof will acquire whatever legal title Charles A. Van Gorder, the judgment debtor, has therein, subject of course to any valid existing right or title of appellee or others thereto, of which right or title such purchaser at the time of the sale may have actual or constructive notice.

5. It follows that, under the facts exhibited by the special finding, the levy in question is not illegal or wrongful.

6. Again, upon another view of the question, there are no facts in the special finding going to show that the stock or property in question is of any peculiar value or use to appellee; neither does it appear that the threatened sale by the sheriff will cause her to suffer any great or irreparable damage. It may truly be said that there are no facts ⁵⁰⁷ to indicate that she has not an adequate legal remedy, and therefore is compelled to resort to the harsh and extraordinary remedy of injunction. In this respect the case falls clearly within the rule enforced in *Allen v. Winstandly* (1893), 135 Ind. 105; *Wabash R. Co. v. Engleman* (1903), 160 Ind. 329; *Shafar v. Fry* (1905), 164 Ind. 315.

We are constrained to hold that, upon either view under the facts, the court erred in its conclusions of law, for which

error the judgment is reversed and the cause remanded, with instructions to the lower court to restate its conclusions of law to the effect that the plaintiff (appellee herein) take nothing by this action.

On the Transfer of Corporate Stock in general, without an entry on the books of the company, see *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575, 102 Am. St. Rep. 115; *People's Bank v. Exchange Bank*, 116 Ga. 820, 94 Am. St. Rep. 144. In *First Nat. Bank v. Holland*, 99 Va. 495, 86 Am. St. Rep. 898, it is held that the delivery of a certificate of bank stock by a husband to his wife, with intent to transfer title thereto by way of gift is effectual as an equitable assignment, although no legal title passes for want of indorsement on the certificate or transfer on the books of the bank. In *Havens v. Bank of Tarboro*, 132 N. C. 214, 95 Am. St. Rep. 627, it is held that one is not deprived of his character of bona fide purchaser of stock by the fact that the certificate is not surrendered and the transfer noted on the books of the corporation, although the certificate declares that it is transferable only on the books of the corporation. And in *Lipscomb v. Condon*, 56 W. Va. 416, 107 Am. St. Rep. 938, it is held that an unregistered transfer of stock, for which no certificate has been issued, when bona fide made, vests in the transferee a title superior to the claim of a subsequent attaching creditor of the transferor.

ELSEA v. ADKINS.

[164 Ind. 580, 74 N. E. 242.]

DEEDS—Exceptions—Will.—A provision in the descriptive clause in a deed that "the grantor reserves the ownership of the well on or near the east line of the lot hereby conveyed," constitutes an exception from the premises conveyed. (p. 321.)

DEEDS.—Exception is a part excepted from the general terms of that which is granted, and the mere fact that that which is excepted is mentioned as being reserved will not defeat its operation as an exception. (pp. 321, 322.)

DEEDS—Exceptions—Repugnancy.—If the general words of a grant are limited by an exception, the exception is not void for repugnancy. (p. 322.)

DEEDS—Construction—Intent.—Courts will give effect to the intent in a deed when it can be discovered and is not in violation of law, and will construe the grant most strongly against the grantor, in case of doubt, only as a last resort. (p. 322.)

DEEDS—Exceptions—Parol Evidence to Locate.—Parol evidence is admissible to identify the subject matter of an exception in a deed. (p. 322.)

DEEDS—Exceptions—Parol Evidence to Locate.—Parol evidence is admissible to show that a well excepted from the operation of a deed is on the east line of the lot conveyed. (p. 322.)

DEEDS—Exceptions—Appurtenances.—An exception of a well from the operation of a deed, excepts all usual and necessary incidents and appurtenances of the well. (p. 322.)

DEEDS—Reservation—Exception.—Although a pleading uses the word "reservation" when referring to a deed, it will be construed as meaning an "exception" when the facts show it to be such. (p. 323.)

J. A. Kersey, for the appellants.

J. L. Custer and O. L. Cline, for the appellees.

⁵⁸¹ GILLETT, J. Appellants commenced this action to quiet title to a certain lot, alleging that the defendants were asserting a claim to a well situate near the east line of said lot. It appears from an answer that appellants deraign their interest in said lot from a deed executed by appellees Adkins, a copy of which is set out in said answer. The description of what is conveyed is found in the following language of said deed: "Lot number 546 in the Marion Real Estate Company's first addition to the city of Marion, Indiana, subject to the assessment against said lot for the improvement of Euclid avenue, and taxes that become due in November, 1897, and thereafter. The grantor hereby reserves the ownership of the well on or near the east line of the lot hereby conveyed." It further appears from said answer that at the time of said conveyance the grantor John C. Adkins was the owner of a lot immediately east of said lot number 546, and that he has since continued to be the owner of said east lot; that at the time of said conveyance there was, and still is, a well situate midway between said lots, having a curb about four and one-half feet wide, east and west, by five feet long, north and south; that the north end of said curb is about seventy feet south of Euclid avenue; that there then was, and still is, a pump in said well. It is further alleged or stated that by said deed appellee John C. Adkins reserved, and intended to reserve, the ownership of said well, including the curb and pump, and this is followed by a general averment of ownership of the same. The answer concluded by a disclaimer of any further interest in said lot. Appellees demurred to this pleading for want of facts, and, their demurrer being overruled, they excepted and elected to abide their exception.

1. Appellants' counsel discusses at length the difference between an exception and a reservation. An exception is a part excepted from the general terms of that which is granted. The words, however, are often used interchangeably, and the mere fact that what is excepted is mentioned ⁵⁸² as being

reserved will not defeat its operation as an exception: 3 Washburn on Real Property, *640; 13 Cyc. of Law & Proc. 674, 675; 1 Jones' Law of Real Property in Conveyancing, sec. 505.

2. The exception in the deed before us is not repugnant to the grant. The proper course was pursued of limiting the general words of the grant by the exception: 3 Washburn on Real Property, *640; 4 Kent's Commentaries, *468; 1 Jones' Law of Real Property in Conveyancing, sec. 518.

3. It is urged that the exception in question should be construed against the grantors. While it is true that courts are sometimes compelled to resolve doubts against the grantors in deeds, yet in doing so the courts but follow a rule of construction that is adopted as a dernier resort: *Falley v. Giles* (1867), 29 Ind. 114. It is our duty to effectuate the intention of the parties, if it can be discovered, and does not contravene any rule of law.

4. Counsel for appellants contends that it is not competent to resort to parol evidence to identify the subject matter of the exception, and that it is void for indefiniteness as to the extent of that which was excepted. It is not the office of the description to identify the land, but to furnish the means of identification: *Rucker v. Steelman* (1881), 73 Ind. 396; *Scheible v. Slagle* (1883), 89 Ind. 323; *Trentman v. Neff* (1890), 124 Ind. 503, 24 N. E. 895; *Collins v. Dresslar* (1892), 133 Ind. 290, 32 N. E. 883; *Edens v. Miller* (1897), 147 Ind. 208, 46 N. E. 526. It is thoroughly settled that extraneous and parol evidence is competent to apply the terms of a deed to the subject matter: *Colerick v. Hooper* (1852), 3 Ind. 316, 56 Am. Dec. 505; *Guy v. Barnes* (1867), 29 Ind. 103; *Indiana Central Canal Co. v. State* (1876), 53 Ind. 575; *Tewksbury v. Howard* (1894), 138 Ind. 103, 37 N. E. 355.

5. Assuming that parol evidence would reveal the existence of this well on the east line of said lot, we perceive no reason why it should not be identified, just as a monument referred to in the description of a deed might be located.

⁵⁸³ 6. Nor are we the more impressed with the argument that the extent of the intended exception cannot be determined. What was excepted was a well, constructed and equipped, as the answer shows the one in question to have been, and whatever was necessary to enable the grantor to use and maintain it for the purpose of drawing water from it was an incident. It was said by Judge Story, concerning

grants, that "The good sense of the doctrine on this subject is, that under the grant of a thing, whatever is parcel of it, or of the essence of it, or necessary to its beneficial use and enjoyment, or in common intendment is included in it, passes to the grantee": *Whitney v. Olney* (1823), 3 Mason, 280, 284. This rule also applies to exceptions to grants: *Allen v. Scott* (1838), 21 Pick. 25, 32 Am. Dec. 238; *Reidinger v. Cleveland Iron Min. Co.* (1878), 39 Mich. 30; *Waldorf v. Elkhart etc. R. Co.* (1895), 13 Ind. App. 134, 41 N. E. 396. In *Allen v. Scott*, 21 Pick. 25, 32 Am. Dec. 238, a deed conveyed a tract of land and the buildings thereon, "except the brick factory," and it was held that the exception included the right to occupy the land on which the building stood, and the water privilege necessary to the carrying on of the business, the court saying: "When property is granted, all that is necessary to the enjoyment of the grant is impliedly granted as incident to the express grant, and the same rule of construction applies to an exception to a grant." Whether there was any right to approach the well except from the adjoining lot is a question that we need not determine here. If the exception is valid, however narrowly it may be construed, the answer stated facts in bar of a suit to quiet title.

7. Appellants' counsel makes the point that the answer is drafted on the theory that the deed contained a reservation rather than an exception, and to that theory it is insisted that appellees shall be held in this court. The argument is too fine-spun. While it is true that the pleader used the term "reservation" in the description of the right asserted by way of defense, yet it is evident that the theory of the answer ⁵⁸⁴ was that an outstanding interest existed in appellee John C. Adkins by virtue of that part of the deed which is therein described as a reservation.

Judgment affirmed.

Reservations and Exceptions, as these terms are used in deeds and conveyances, are defined and distinguished in *Eisely v. Spooner*, 23 Neb. 470, 8 Am. St. Rep. 128; *Rich v. Zeilsdorff*, 22 Wis. 544, 99 Am. Dec. 81. These words are often used synonymously or interchangeably: *Roberts v. Robertson*, 53 Vt. 690, 38 Am. Rep. 710. It is said that an exception out of a grant includes all that is necessary to the enjoyment of the thing excepted: *Allen v. Scott*, 21 Pick. 25, 32 Am. Dec. 238. In this case it is held that a grant of land and all the buildings thereon, "except the brick factory," does not pass the land on which the factory stands nor the water privilege appurtenant thereto. That reservations are construed most strongly against the grantor, see *Grayton v. Moir*, 130 N. Y. 465, 27 Am. St. Rep. 533.

GARRIGUE v. KELLAR.

[164 Ind. 676, 74 N. E. 523.]

CONFLICT OF LAWS—Negotiable Instruments.—If a note is executed in one state and payable in another having conflicting laws, all matters bearing upon the execution, the interpretation and validity of the note including the capacity of the parties to contract, are to be determined by the law of the place where the contract is made, and all matters connected with the payment, including presentation, notice, demand, protest and damages for nonpayment, are regulated by the law of the place where, by its terms, the note is to be paid, and all matters respecting the remedy to be pursued, including the bringing of suit, service of process, and admissibility of evidence, depend upon the law of the place where the action is brought. (pp. 326, 327.)

CONFLICT OF LAWS—Lex Loci Contractus.—A contract must be construed and its validity determined under the laws of the state where it was executed, unless it can be fairly said that the parties at the time of its execution clearly manifested an intention that it should be governed by the laws of another state. (p. 327.)

CONFLICT OF LAWS.—Contracts Valid in the state where made are valid everywhere. (p. 327.)

CONFLICT OF LAWS—Lex Loci Contractus—Validity.—A note executed in one state by a husband as principal and his wife as surety, and payable at a bank in another state, is valid against her in the latter state, if the law of the state where the note is made permits a married woman to become a surety, although the law of the place of payment does not. (p. 327.)

CONFLICT OF LAW—Intention of Law to Govern Validity.—The fact that a note is made payable in another state is not conclusive evidence, nor does it clearly manifest an intention by the parties that its validity should be governed by the law of that state, when such interpretation would render it wholly void as to one of the makers. (p. 327.)

BILLS AND NOTE—Place of Payment—Tender.—The substantial contract evidenced by a note is the undertaking by the maker to pay the principal sum of money named. The place of payment is an incidental matter, and the maker is not discharged from his principal obligation by an unaccepted tender of the amount owing, at the time and place designated for payment, but by such tender is only released from liability for damages which would otherwise accrue from nonpayment. (p. 328.)

CONFLICT OF LAWS—Bills and Notes.—A note executed in one state, and made payable in another state, is, as to its validity, governed by the laws of the state where made. (p. 329.)

BILLS AND NOTES—Renewal—Consideration.—If a married woman becomes surety on her husband's note and when due they execute another note in renewal of the former, the surrender of the old note is sufficient consideration for the new one, and as to the payee, the married woman is a principal on the renewal note. (p. 330.)

APPELLATE PRACTICE—Waiver of Error.—If an alleged erroneous instruction is not set out in full or in substance in the appellant's brief, the error is waived. (p. 332.)

BILLS AND NOTES—Delivery by Mailing.—Notes properly signed, sealed, placed in an envelope properly addressed to the payee, and delivered to the United States mail at a certain place with the postage prepaid, are deemed delivered at such time and place. (p. 332.)

CONFLICT OF LAWS—Contract of Suretyship of Married Woman.—A note against a married woman executed by her as surety for her husband in one state where it is valid will be enforced in another state by principle of comity unless this is forbidden by positive law. Such contract is not opposed to good morals or public policy. (p. 333.)

L. W. Welker, for the appellants.

R. P. Barr and Chapin & Denny, for the appellee.

⁹⁷⁸ **MONTGOMERY, J.** This action was brought upon three promissory notes executed by appellants to the Noble County Bank, and payable at said bank, and by it assigned before maturity to appellee. Appellee filed with his complaint an affidavit and undertaking, and obtained a writ of attachment upon which certain real estate owned by appellant Lida M. Garrigue was attached.

Appellant Lida M. Garrigue answered the complaint (1) by general denial, and (2) by alleging her suretyship and coverture. Appellee replied in three paragraphs to the second paragraph of answer: 1. That at the time of the execution of said notes said appellant Lida M. Garrigue ⁹⁷⁹ was, and that she still is, a resident of the state of Illinois; that said notes were executed in said state; and that under the laws of said state, set out in full, she had the capacity to execute said notes as surety; 2. The same averments as in the first, and further, that said notes were given in renewal of a note for the principal sum of three thousand seven hundred and fifty dollars, executed by both of the appellants on the thirtieth day of July, 1900, in the city of Chicago, and payable in said city in one year after date, for money loaned and paid to R. H. Garrigue in the city of Chicago; 3. General denial.

The cause was tried by a jury, and a general verdict returned for appellee, with answers to interrogatories. Appellant Lida M. Garrigue unsuccessfully moved the court for judgment in her favor upon the answers to interrogatories, and for a new trial, and judgment was thereupon rendered in favor of appellee for four thousand three hundred dollars, and for the sale of the attached real estate.

The assignment of errors requires us to review the decision of the court in overruling the demurrer to the first and sec-

ond paragraphs of reply, and in overruling the motion for judgment on the special findings of the jury, and in overruling the motion for a new trial.

1. The first question for decision is presented by appellant Lida M. Garrigue's demurrer to the first paragraph of reply, and is this: Is a note executed in Illinois by a married woman as surety, while domiciled in that state, but made payable at a bank in this state, valid and enforceable in Indiana? The statute of Illinois in regard to contracts of married women, in force at the time of the execution of the notes in suit, and at all other times covered by this controversy, is as follows: "Contracts may be made and liabilities incurred by a wife, and the same enforced against her, to the same extent and in the same manner as if she were unmarried; but, except with the consent of her husband, she may not enter into or carry on any partnership business, unless her husband has abandoned or deserted her, or is idiotic ⁶⁸⁰ or insane, or confined in the penitentiary": Ill. Rev. Stats. 1899, p. 959, sec. 6. The Indiana statute applicable to the matter under consideration is as follows: "A married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract, as to her, shall be void": Burns' Rev. Stats. 1901, sec. 6964; Rev. Stats. 1881, sec. 5119.

The decisions of the courts of different states upon the question before us are in irreconcilable conflict and in hopeless confusion. It has been held by some courts that when conflicting laws affect the enforcement of a contract like the one in suit, the law of the domicile of the maker governs; by others, the law of the place of execution; by others, the law of the place of performance, and by others, the law of the place of enforcement. We cannot reconcile the cases, or harmonize the divergent views contained in the books, but must be content to extract therefrom such principles as we believe to be sound, and declare the law as it is and ought to be in this state. The law applicable to promissory notes executed in one state and payable in another, having conflicting laws, may be summed up as follows: 1. All matters bearing upon the execution, the interpretation and validity of the note, including the capacity of the parties to contract, are to be determined by the law of the place where the contract is made. 2. All matters connected with the payment, including presentation, notice, demand, protest and damages

for nonpayment, are to be regulated by the law of the place where, by its terms, the note is to be paid. 3. All matters respecting the remedy to be pursued, including the bringing of suits, service of process, and admissibility of evidence, depend upon the law of the place where the action is brought: *Scudder v. Union Nat. Bank* (1875), 91 U. S. 406, 23 L. ed. 245; *Bowles v. Field* (1897), 78 Fed. 742; *Union Nat. Bank v. Chapman* (1902), 169 N. Y. 538, 88 Am. St. Rep. 614, 62 N. E. 672, 57 L. R. A. 513; *Ruhe v. Buck* (1894), 124 Mo. 178, 46 Am. St. Rep. 439, 27 S. W. 412, 25 L. R. A. 178; ⁶⁸¹ *Mendenhall v. Gately* (1862), 18 Ind. 149.

2. A contract must be construed and its validity determined under the laws of the state where it is executed, unless it can be fairly said that the parties at the time of its execution clearly manifested an intention that it should be governed by the laws of another state: *Grand v. Livingston* (1896), 4 App. Div. 589, 38 N. Y. Supp. 490; *Hauck Clothing Co. v. Sharpe* (1900), 83 Mo. App. 385; *Wharton on Conflict of Laws*, 3d ed., sec. 401.

3. If a contract is valid in the state where it is executed, it is valid everywhere: *Milliken v. Pratt* (1878), 125 Mass. 374, 28 Am. Rep. 241; *Wright v. Remington* (1879), 41 N. J. L. 48, 32 Am. Rep. 180; *Taylor v. Sharp* (1891), 108 N. C. 377, 13 S. E. 138; *Holmes v. Reynolds* (1883), 55 Vt. 39; *Miller v. Wilson* (1893), 146 Ill. 523, 37 Am. St. Rep. 186, 34 N. E. 1111; *Baer v. Terry* (1901), 105 La. 479, 29 South. 886; *First Nat. Bank v. Mitchell* (1899), 34 C. C. A. 542, 92 Fed. 565.

4. Applying these general principles to the case in hand, it is our conclusion that the validity of the notes in suit, as to the appellant Lida M. Garrigue, must be determined by the laws of Illinois, where it is alleged they were executed, notwithstanding the fact that the place of payment was in Indiana.

5. If the notes were executed in Illinois, as averred, and were valid there, the designation of a place of payment within this state will not be accepted as conclusive evidence, or as clearly manifesting an intention by the parties that their validity should be governed by the laws of Indiana, when such an interpretation would render them wholly void as to one of the makers. This conclusion is supported by the rule of sanity and honesty, "that no contract must be held as

intended to be made in violation of the law, whenever, by any reasonable construction, it can be made consistent with the law, and which it was competent for the ⁶⁸² parties to adopt": *Bell v. Packard* (1879), 69 Me. 105, 31 Am. Rep. 251; *Wharton on Conflict of Laws*, 3d ed., sec. 429.

6. The substantial essence of a contract evidenced by a promissory note is the undertaking by the makers to pay the principal sum of money named. The place of payment is an incidental matter. The makers are not discharged from their principal obligation by an unaccepted tender of the amount owing, at the time and place designated for payment, but by such tender are released only from liability for damages which otherwise would accrue from nonpayment. Makers of promissory notes cannot insist that they will pay at the place designated or not at all, but may be sued upon their obligation and payment of the principal amount enforced at any place where jurisdiction over their persons or property may be acquired.

In the case of *Union Nat. Bank v. Chapman*, 169 N. Y. 538, 88 Am. St. Rep. 614, 62 U. S. 672, 57 L. R. A. 513, a married woman executed a note as surety, in Alabama, payable in Illinois, and the court said: "It seems clear that the capacity of Mrs. Chapman to contract must be determined by the law of the state where the contract was executed, unless it can fairly be said that she, at the time of the execution of the instrument, clearly understood and intended that it should be governed by the laws of another state. Such an intention or understanding is not manifest in this case."

In the case of *Hauck Clothing Co. v. Sharpe*, 83 Mo. App. 385, the defendant was a married woman and resided in Missouri, where she executed a note for the accommodation of her son, and made it payable at a bank in Indiana, the court said: "The law of the place of performance does not in any way affect the capacity of a married woman to contract in a state which authorized her to make the contract, unless made with reference to real estate situated in the state of performance, or it is apparent from the terms of the contract that the parties intended to incorporate the laws of the state of performance in the contract."

From the case of *William Glenney Glass Co. v. Taylor* ⁶⁸³ (1896), 99 Ky. 24, 34 S. W. 711, we quote the following paragraph: "The mere fact that the note was made payable in New York and received by the payee in that city, under

the circumstances of this case, is not sufficient evidence of the fact that it was intended the law of that state should govern, or its validity to be tested by the statute in regard to usury. We will not assume, nor does the evidence authorize such a conclusion, that the brother living in Washington and executing the note in that place, and his sister executing the note in Bracken county, Kentucky, regarded or expected their liability to be determined by the statute of New York, and when sued in Kentucky could defeat the recovery upon the paper on the ground that the charge of the extra interest rendered the entire obligation void."

7. Our statute makes void, at her option, the suretyship contracts of a married woman executed within this state. If a promissory note executed within this state by a married woman, as surety, by merely inserting therein that it should be payable in Cincinnati, Chicago or St. Louis, might be made an Ohio, Illinois or Missouri contract, and thereby rendered valid and enforceable against her, our statute would be easily evaded, and its beneficent provisions in a large measure destroyed. We cannot so construe these contracts, but the declarations of principles above quoted accord with our views, and the conclusion follows that appellee's first paragraph of reply was sufficient, and the demurrer to the same was rightly overruled.

Appellant Lida M. Garrigue has cited a number of Indiana cases, in some of which the court has said that the maker of a promissory note will be held liable according to the place where it is payable. This and other like statements were made with regard to the liability of the maker to pay interest or damages after protest, and the decisions of the questions properly presented in those cases are not in conflict with the result reached in this case.

In the cases of *Hunt v. Standart* (1860), 15 Ind. 33, 77 684 Am. Dec. 79, and *Midland Steel Co. v. Citizens' Nat. Bank* (1904), 34 Ind. App. 107, 72 N. E. 290, the only question involved was the liability of the indorsers. In the cases of *Butler v. Myer* (1861), 17 Ind. 77, *Browning v. Merritt* (1878), 61 Ind. 425, *Gray v. State* (1880), 72 Ind. 567, and *Kopelke v. Kopelke* (1887), 112 Ind. 435, 13 N. E. 695, the contention related only to the rate of interest recoverable. In *Fordyce v. Nelson* (1883), 91 Ind. 447, the question was as to the negotiability of the note, and in *Brown v. Jones* (1890), 125 Ind. 375, 21 Am. St. Rep. 227, 25 N. E. 452, the

controversy was with regard to days of grace and the time of protest.

8. If the first paragraph of reply was sufficient, it follows also that the second paragraph is good. The second paragraph, in addition to the allegations of the first, averred that the notes in suit were given in payment of a prior note for the same amount, executed by the same parties in the state of Illinois, and payable in that state. The first note, upon the facts alleged, was a valid and enforceable obligation against both the makers. The surrender of this note was a sufficient consideration for the execution of the renewal notes, and by the execution of the renewal notes the appellant Lida M. Garrigue, as between her and the payee, became bound, not as surety, but as principal: *Vogel v. Leichner* (1885), 102 Ind. 55, 1 N. E. 554; *Young v. Hart* (1903), 101 Va. 480, 484, 44 S. E. 703; *Savage v. Fox* (1880), 60 N. H. 17; *New York Life Ins. Co. v. McKellar* (1895), 68 N. H. 326, 44 Atl. 516. In the case of *Young v. Hart*, 101 Va. 480, 484, 44 S. E. 703, the court said: "The circuit court was of opinion that, treating Mrs. Young as a mere surety on the Chicago notes, which she had the unquestioned capacity to make, she could have been sued upon them in either the state of Pennsylvania or the state of Kentucky, and personal judgment recovered against her, and that the renewal of the notes in the state of Pennsylvania under the facts of this case did not release her, nor lessen her liability." The court did not err ⁶⁸⁵ in overruling appellant Lida M. Garrigue's demurrer to the second paragraph of reply.

9. In answer to interrogatories propounded by the parties, the jury found the following facts specially: That the three notes were given in renewal of a note for three thousand seven hundred and fifty dollars, dated July 30, 1900, for money loaned to R. H. Garrigue, and upon which Lida M. Garrigue was surety, and for the payment of which collateral security was pledged, and which note was signed in Chicago, and sent by mail to the Noble County Bank at Kendallville, Indiana, and a draft for the amount, less exchange and revenue stamps, sent by mail to R. H. Garrigue at Chicago; that the notes in suit were executed in Chicago, Illinois, where the said Lida M. Garrigue then resided, and ever since has resided, and that at and before that time the statute hereinbefore set out was, and the same still is, in force in said state; that said notes were signed by Lida M. Garrigue as surety for her husband, who, with her consent, inclosed them in a sealed letter, and

mailed them, with a draft for the interest accrued on the old note, at Chicago, directed to the Noble County Bank at Kendallville, Indiana; that the notes were prepared and sent by the bank to R. H. Garrigue, at Chicago, who inserted the words "on or before," and signed and caused his wife to sign them, and that the signing and mailing at Chicago as aforesaid was done in pursuance of an agreement to that effect between R. H. Garrigue and appellee, president of, and acting for, said bank; that the bank received said notes by mail, and thereupon returned the old note by mail to R. H. Garrigue, at Chicago, and subsequently indorsed the notes to appellee; and that the bank and appellee at all times knew that Lida M. Garrigue was surety for her husband on said notes. These facts were not in conflict with the general verdict, but, in our opinion, support it; and what has already been said in discussing the sufficiency of the replies leads to the conclusion that there was no error in overruling ^{and} appellant Lida M. Garrigue's motion for judgment in her favor upon the answers to interrogatories, notwithstanding the general verdict.

Appellant Lida's motion for a new trial embraced a number of causes, many of which have been waived.

10. Appellee testified to a conversation between himself and R. H. Garrigue, had at Chicago the latter part of July, 1901, with regard to the payment or renewal of the note then outstanding and almost due, in which Mr. Garrigue said that he could not pay the note, but would make new notes on shorter time, and have his wife sign them, and the notes would then be sent to Kendallville, and that a wife could sign in Illinois, and her signature would be good against her property; and appellee said that would be satisfactory. Appellant Lida M. Garrigue insists that the admission of this evidence over her objection was error. Appellee suggests that the record does not show that she was not present during this conversation. Her absence is not shown, unless it may be implied from the objection itself. As we have already shown, it will not be inferred from the substance of the notes themselves that they were Indiana contracts, and appellee's case was already made out, without reference to this extraneous evidence. If the notes were Illinois contracts as against the principal maker, they were the same also as to the surety under the facts of this case. Appellant Lida M. Garrigue had no evidence, other than the notes themselves, upon which to rest her contention that they were Indiana contracts. It fol-

lows, therefore, that, conceding her absence, and that she could not be bound by the conversation to which objection was made, the utmost that may be said is that the evidence was harmless.

Exceptions were taken to the giving and refusal of the court to give, upon request, a number of instructions. The general ground of the objections of the appellant Lida M. Garrigue to these instructions was predicated upon the view ⁶⁸⁷ that the law of the place of payment governs the validity of the notes. This subject has been sufficiently discussed.

11. Objection is urged to instruction No. 13 given by the court; but we are unable to find this instruction, either in full or in substance, set out anywhere in the brief of appellant Lida, and must treat the objection as waived for non-compliance with subdivision 5 of rule 22 of this court: *Chicago Terminal Transfer Co. v. Walton* (1905), 165 Ind. —; *Penn Mut. Life Ins. Co. v. Norcross* (1904), 163 Ind. 379, 72 N. E. 132; *Barricklow v. Stewart* (1904), 163 Ind. 438, 72 N. E. 128.

The remaining question presented by the motion for a new trial is whether the verdict of the jury is sustained by sufficient evidence, or is contrary to law.

12. Appellant Lida M. Garrigue's counsel contends that the notes were not delivered in Illinois, but in Indiana, and if this contention is true then they are Indiana contracts, and the judgment must be reversed. A precedent agreement between the principal in the notes and the appellee acting for the payee was shown by the evidence, according to the terms of which the notes were to be signed by the makers in Chicago and sent to the payee by mail. They were properly signed, sealed in an envelope addressed to the payee, and delivered to the United States mail in the city of Chicago, according to agreement, and, in our opinion, the delivery was then and thereby completed.

In the case of *Purviance v. Jones* (1889), 120 Ind. 162, 16 Am. St. Rep. 319, 21 N. E. 1099, Justice Mitchell, speaking for the court at page 164, says: "While it is not indispensable that there should have been an actual, manual transfer of the instrument from the maker to the payee, yet to constitute a delivery it must appear that the maker, in some way, evinced an intention to make it an enforceable obligation against himself, according to its terms, by surrendering control over it, and intentionally placing it under the power of the payee, or of some third person for his use."

⁶⁸⁸ In the case of *William Glenny Glass Co. v. Taylor* (1896), 99 Ky. 24, 34 S. W. 711, involving conflicting laws, Pryor, C. J., in the opinion says: "The note, when signed by Mary D. Bradford in Kentucky, and inclosed to the payee, was an executed instrument; as much so as if the payee had been present and the note delivered to her in Kentucky."

In the case of *Barrett v. Dodge* (1890), 16 R. I. 740, 27 Am. St. Rep. 777, 19 Atl. 530, the court, speaking upon the question under immediate consideration, said: "In the absence of instruction to the maker as to the mode by which he should return them when signed, the payees must have contemplated that the maker would return them by the natural and ordinary mode of transmitting such obligations, and must be deemed to have authorized him so to return them. The natural and ordinary mode of transmitting them was by mail, the mode adopted by the maker. In such cases the postoffice may be regarded as the common agent of both parties; of the maker for the purpose of transmitting the note, and of the payee for the purpose of receiving it from the maker. By depositing the note in the mail with the intent that it shall be transmitted to the payee in the usual way, the maker parts with his dominion and control over it, and the delivery is in legal contemplation complete."

13. We accordingly conclude that the notes were fully executed by delivery in the state of Illinois, and are Illinois contracts, and under the laws of that state valid against both the makers. The notes being valid under the laws of Illinois are equally valid and enforceable in this state, by the principle of comity, unless their enforcement would be contrary to good morals, or in violation of public policy, or forbidden by positive law. It is clear that a contract of suretyship by a married woman, executed in a foreign state, is not in itself immoral, nor is its enforcement forbidden by our laws. In some states, where the common-law disabilities of married women still exist, it has been held that the enforcement ⁶⁸⁹ of such an alleged contract against them would be contrary to the public policy of the state, and that it was nonenforceable within that jurisdiction. Almost all the states of the Union have removed substantially all the disabilities of married women to contract, and in the interests of commerce and business, and upon the principle of comity among the states, have sustained and enforced contracts validly executed elsewhere, although the particular contract, if executed within such states, would have been unauthorized and invalid.

In the case of *Baer v. Terry* (1901), 105 La. 479, 29 South. 886, the supreme court of Louisiana, speaking to this point, said: "Nor do we agree with the counsel's contention that, assuming defendant to have been liable on the notes before she came to this state, the law of this state prohibiting wives from binding themselves for the debts of their husband precludes recovery against her. That law is satisfied and its whole object and purpose is accomplished when Louisiana wives are protected against binding themselves for the debts of their husbands; this protection is not extended to Missouri wives, and if these bind themselves in the state of their domicile for the debts of their husbands, they cannot be permitted to come to this state to be divorced from their obligations. When defendant crossed our borders as an immigrant to our soil the debt was already hers, and it has continued to be such. There is nothing in the atmosphere of Louisiana law and Louisiana jurisprudence to disintegrate, or dissolve, valid obligations; to such it is a healthful and bracing atmosphere": See, also, *Wright v. Remington* (1879), 41 N. J. L. 48, 32 Am. Rep. 180.

We hold, in accord with the great weight of authority, that the enforcement of the notes in suit against appellant Lida M. Garrigue is in no sense violative of the public policy of this state. There is no suggestion that any unfair means or undue influence was used to procure the execution ^{and} of the notes, and, their collection not being in conflict with our public policy, we affirm that the verdict is sustained by the evidence, and in accordance with the law, and that the motion for a new trial was properly overruled.

The judgment is affirmed.

The Remedies to be Pursued on Contracts are governed by the law of the forum, and all matters bearing upon the execution, interpretation and validity of contracts are determined by the law of the place where they are made. But if a contract is made in one state to be performed in another, it is governed as to its validity and effect by the laws of the latter: See *Swedish-American Nat. Bank v. First Nat. Bank*, 89 Minn. 98, 99 Am. St. Rep. 549, and cases cited in the cross-reference note thereto.

A Note Executed and Made Payable in Colorado by a citizen of Georgia is governed as to its validity, force, and effect by the law of the former state: *Bailey v. Devine*, 123 Ga. 653, 107 Am. St. Rep. 153. A note signed in Massachusetts, but payable in South Dakota, to which state it is sent to the payee by mail, is a South Dakota and not a Massachusetts contract: *Cherry v. Sprague*, 187 Mass. 113, 105 Am. St. Rep. 381. And a note signed in Tennessee and forwarded to the payee in Ohio, which by its terms is payable in that state, is an Ohio contract: *First Nat. Bank v. Shaw*, 109 Tenn. 237, 97 Am. St. Rep. 840.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

LEWIS v. VICKSBURG, SHREVEPORT AND PACIFIC
RAILWAY COMPANY.

[114 La. 161, 38 South. 92.]

RAILROADS—Care Required in Their Own Yards—Injury to Employé.—If a railroad company is operating its cars within its own yard, it is not bound at all times and under all circumstances to maintain a lookout upon the forward end of every car that is moved. The question of due precaution is one of reasonable sufficiency, and when the precaution taken is sufficient to guard against injury to an employé or to anyone save a person who does inadvertently that which he would otherwise do only with the intention of committing suicide, it cannot be said that such precaution is insufficient. (p. 339.)

RAILROADS—Care Required in Their Own Yards—Injury to Employé—Contributory Negligence.—The failure of a railroad company, operating its cars within the limits of its own yard, when it has taken reasonable precautions for the safety of others, to take every precaution that might have been required in a public and frequented thoroughfare, is slight in connection with the later negligence of its employé, the conditions of whose employment required that he should at all times be on the lookout, within those limits for moving cars, and whose failure to observe that precaution must, under all of the circumstances of the case, be regarded as the proximate cause of his injury. (p. 340.)

Hall & Jack, for the appellants.

Wise, Randolph & Rendall, for the appellee.

¹⁶² MONROF, J. Plaintiff brings this suit on behalf of the minor heirs of William Hart, deceased, to recover damages for the alleged negligent killing of their father. The answer is a general denial and a plea of contributory negligence. The facts, as they appear in the record, are as follows:

Speaking in terms of approximation (particularly as to the points of the compass), the defendant owns and uses as part of its railroad yard the east half of square 25 in

Shreveport, bounded north by Cotton, east by Marshall, south by Lake, and west by McNeil streets, and has established thereon a roundhouse, a sandhouse, a turntable, and several main and spur tracks and switches.

The roundhouse has exits on the McNeil street side, and stands about fifteen feet back from the banquette. Defendant's main track, running through from McNeil to Marshall street, lies to the south of the roundhouse, and on the south side of the main track there is another parallel track, which also runs through the square. Shortly before 6 o'clock on the evening of December 16, 1903, William Hart, whilst employed as the helper of Patterson, a machinist (who was doing some work on a locomotive that stood on the track last mentioned, some twenty or thirty feet east of the McNeil street line), was sent by Patterson to the roundhouse for a bucket of water. In going and returning it was necessary for him to cross and recross the main track mentioned, and also a spur track, which lies between the main track and the roundhouse, the distance between the roundhouse and the north rail of the main track being about twenty-five or twenty-eight feet. Hart reached the roundhouse safely, but in returning to the engine, where Patterson stood waiting for and watching him, he walked on the main track immediately in front of a car that was being pushed by a locomotive in the direction of Marshall street, and was so badly injured that he died within a few hours. The evidence indicates ¹⁰³ that the engine upon which Patterson was waiting was standing a few feet farther east than the point from which Hart left the roundhouse, so that his course was a trifle oblique with reference to the crossing of the main track, and he presented his right side in the direction from which the car approached, with his face and body turned slightly in the other direction. The car by which he was injured had been taken from the turntable (a little to the southeastward of the roundhouse) over the spur track, a distance of about one hundred and fifty or two hundred feet westward, from which point, having entered upon the main track, it was, as has been stated, pushed by the engine, which was moving forward over that track to the eastward. It was what is called a "combination" car, about sixty feet long, with a door in each side and each end,

and with a platform at the end next to the locomotive, but none at the other, or (as the car was moving) forward, end. The train, if it can be so called, was moving at the rate of from three to five miles an hour, and the fireman was ringing the bell of the locomotive, but there was no one on the lookout, and no light immediately on the forward end of the combination car. The yard foreman had been standing on McNeil street, and, seeing that that street was clear, and that the track beyond to the eastward was also clear, got on board of the combination car, as it passed, on the south side, and in the door upon that side, from which position he continued to look ahead, but, of course, could not see a person approaching from the other side. Another of the defendant's employes had thrown the switch, and (likewise seeing that McNeil street and the track beyond were clear) had given the signal for the train to move eastward, and he, too, got on board the combination car, as it passed, by means of the steps, next to the locomotive, on the north side.

There was also a helper on the pilot beam of the engine. The accident happened in the ¹⁰⁴ defendant's yard, at a point twenty-nine feet to the eastward of the east side of McNeil street, and the train was stopped within the length of the combination car, the injured man having been taken from between that car and the footboard of the locomotive. Patterson testifies (and his testimony is uncontradicted) that he saw Hart leave the roundhouse and approach the moving train, and, realizing (though at the last moment) that he was oblivious of the danger by which he was threatened, "hollered to him, . . . to warn him the car was coming; he was liable to get killed." Being asked, "You called as loud as you could?" he answers, "Yes, sir; as loud as I could holler." And it is shown that Hart was then but twenty feet distant from him, and about eight feet north of the center of the main track, which is four and eight-tenths feet in width.

There is no doubt that Hart could have seen the train if he had looked in that direction, though there was an engine in the roundhouse blowing off steam, and making a noise sufficient, possibly, to have prevented him from hearing it. It is shown, also, that, although the defendant has had for some years large signs posted, warning the

public from trespassing on its property, and though it had for a year a man stationed at its bridge over Marshall street to discharge that function, the public nevertheless make very free use of the track upon which the accident occurred, and of that which runs parallel to it, particularly, as we infer, a certain class of laborers going to and returning from their work. The injured man had been in the defendant's employ for a long time, and had been working for a year or two in the yard where he met his death. He is said to have been about thirty-four years of age, and to have been earning fifty dollars a month. There was a verdict and judgment in favor of the plaintiff in the sum of one dollar, and he has appealed. The defendant has answered, praying that the judgment be so amended as to reject the demand entirely, but the answer was not ¹⁶⁵ filed within three days before that upon which the case was set down for argument.

The first question to be decided is, not whether the defendant failed to discharge a duty which it owed to the public (because, as the result proves, it had sufficiently acquitted itself of its obligation to the public by seeing that McNeil street and the track beyond to the eastward were clear, before the train was permitted to move into that territory), but whether it failed to discharge a duty that it owed to William Hart, one of its servants, whilst he was engaged in work for which he was employed, and the ordinary risks of which he had assumed. And if this question be decided in the affirmative, the remaining question is whether the failure of the master or the imprudence of the servant was the proximate cause of the accident.

The defendant, before moving its train, not only saw that McNeil street was clear, but it saw that the track running through its private yard was clear beyond the point at which the accident occurred, and, as a further precaution, its yard foreman took a position in the side door of the forward car, from which he could see to the front and to the south side of the train, as it advanced, and also to the north side beyond the point at which his view was obstructed by the end of the car, up to which point he had just seen, from the street, that the track was clear. The only danger to have been apprehended at the place where the accident occurred, therefore, was that dur-

ing the interval of about a quarter of a minute which was to elapse between the foreman's last look from the street and the moment when the train should reach that point some one, not then visible, on or near the track, might place himself immediately in front of the train. This danger, the instinct of self-preservation and the obligation resting upon ¹⁶⁶ every man to take thought for his own protection considered, seemed exceedingly remote, and was one with respect to which, operating its train within the limits of its own yard, and considered with reference to its servant employed in that yard, we are of opinion that there was no failure of duty on the part of the defendant. A railroad yard, in which there is a roundhouse, turntable, main track, sidings, and switches, and where cars are sent to be cleaned and repaired, turned around, shifted, and made up into trains, is a place in which a railroad company must necessarily be allowed greater latitude than is permitted upon the streets of a city or town, and we are not prepared to hold that in such a place the company must at all times and under all circumstances maintain a lookout upon the forward end of every car that is moved. The question of precaution resolves itself into one of reasonable sufficiency, and when the precaution taken is sufficient to guard against injury to anyone save a person (and that person an employé, familiar with, and who has assumed, the ordinary risks of the place) who does inadvertently that which he would otherwise do only with the intention of committing suicide, it cannot reasonably be said that such precaution is insufficient.

Beyond this, and conceding that it would have been safer for the yard foreman to have maintained his lookout literally from the front instead of from the side of the car, it is extremely doubtful whether such additional precaution would have saved Hart's life, since the foreman might well have directed his attention for a quarter of a minute to the locomotive on the south side of the track, upon which side he was as much bound to keep a lookout as upon the north side; or, as was the case with Patterson, who was watching Hart from the engine in question, and, as is the case with motomeers, engineers, and drivers generally, he might not, from the mere fact that he saw a ¹⁶⁷ person walking toward the road, have realized, until too late, that

such person was oblivious of the existence and approach of the vehicle of which he was in charge. In any event, the failure of the defendant, operating its cars within the limits of its own yard, to take every precaution that might have been required in a public and frequented thoroughfare was slight negligence in comparison to the latter negligence of Hart, the conditions of whose employment required that he should at all times be on the lookout, within those limits, for moving cars, and whose failure to observe that precaution must, under all the circumstances of the case, be regarded as the proximate cause of his death. It is only necessary to say in regard to the cases relied on by the learned counsel for the plaintiff (*Hamilton v. Morgan's etc. S. S. Co.*, 42 La. Ann. 824, 8 South. 586; *Downing v. Morgan's etc. S. S. Co.*, 104 La. 508, 29 South. 207; *Lamkin v. McCormick*, 105 La. 418, 83 Am. St. Rep. 245, 29 South. 952; *South & N. A. R. Co. v. Donovan*, 84 Ala. 141, 4 South. 142; *Koegel v. Missouri Pac. R. R. Co.*, 181 Mo. 379, 80 S. W. 905; *L. & N. R. R. Co. v. Potts*, 92 Ky. 30, 17 S. W. 185), that the facts upon which they rest are very different from those here presented.

The answer of the defendant not having been filed in time, there can be no amendment of the judgment appealed from (*Code Prac.*, art. 890; *Succession of Trouilly*, 52 La. Ann. 76, 26 South. 851), and the same is accordingly affirmed.

For Authorities Bearing upon the Decision in the principal case, see *Reagan v. St. Louis etc. Ry. Co.*, 93 Mo. 348, 3 Am. St. Rep. 542; *Richmond etc. Ry. Co. v. Norment*, 84 Va. 167, 10 Am. St. Rep. 827. The pushing or driving of cars through a station-yard, the engine being detached, no light being kept in the front of the cars, and no signal or notice of their approach being given, is negligence in respect to employes whose duties require them to be in the yard: *Promer v. Milwaukee etc. Ry. Co.*, 90 Wis. 215, 48 Am. St. Rep. 905.

SUCCESSION OF CALDWELL.

[114 La. 195, 38 South. 140.]

ADOPTION—Decree—Attack—Burden of Proof.—If a decree of adoption made and rendered in another state is attacked as being repugnant to the law of the state where such attack is made in relation to the difference in ages between the respective parties, the burden of proving such fact is on the person attacking the judgment. (p. 347.)

ADOPTION—Decree—Collateral Attack.—A decree of adoption valid where rendered is conclusive against collateral attacks by parties and privies. (p. 347.)

ADOPTION—Conflict of Laws.—If a resident of one state obtains a valid decree from a court of competent jurisdiction in another state declaring that he adopted his niece, an adult, and a resident of the latter state as his child, such decree will be given full faith and effect in the former state under the provisions of the national constitution and principles of comity, when its enforcement is not repugnant to the law of that state and does not affect any of its citizens. (p. 347.)

A. Brian, for the appellants.

McCloskey & Benedict, for the appellee.

¹⁹⁶ LAND, J. Samuel Blagge Caldwell, for many years a resident of the state of Louisiana, died at his domicile in the city of New Orleans on October 24, 1903, intestate, leaving no resident heirs. His estate consisted principally of money in bank and other movables to the value of eleven thousand six hundred and thirteen dollars and thirty-nine cents, as shown by inventory subsequently taken.

His nearest of kin were eight nephews and nieces of the half blood, all residents of other states of the Union.

One of the nieces, Mrs. Susan B. Samuels, of the state of Massachusetts, arrived in New Orleans a few days after the death of the deceased, applied to be appointed administratrix of the succession, alleging that she was sole forced heir of the deceased, that the succession owed debts, and that an administration was necessary. On November 17, 1903, the court ordered that Mrs. Samuels be appointed administratrix, and that letters of administration issue to her on her complying with the legal requisites.

The other seven nephews and nieces sued ¹⁹⁷ to annul the said order of appointment on the ground that it had been obtained by false and fraudulent representa-

tions as to residence and heirship, and without the appointment of an attorney for absent heirs. They prayed that the order of appointment be annulled, that Henry B. Caldwell be appointed administrator, and that they, with Mrs. Samuels, be recognized as the heirs at law of the deceased.

For answer, Mrs. Samuels denied that she was guilty of fraud as alleged, and pleaded that she was lawfully adopted by the deceased as his daughter on October 8, 1895, by a decree of a probate court of competent jurisdiction in the state of Massachusetts, and was therefore entitled to all the rights of a forced heir.

Plaintiffs, by supplemental petition, denied the adoption as alleged, and averred that, if any decree existed, it was null for want of jurisdiction, and, if there was jurisdiction, the decree was inoperative. There was judgment in favor of Mrs. Samuels, maintaining her as administratrix, and recognizing her as the adopted daughter and sole heir of the deceased, Samuel Blagge Caldwell. Plaintiffs in the action of nullity appealed.

Mrs. Samuels, on the trial of the cause, filed in evidence a document duly certified according to the act of Congress, of tenor as follows, viz.:

“Commonwealth of Massachusetts.

“Middlesex S. S.

“[Seal.]

“Probate Court.

“To Samuel B. Caldwell of New Orleans, in the State of Louisiana:

“Whereas you have petitioned this court for leave to adopt Susan Blagge Samuels, a child born on the twenty-first day of October A. D. 1846, and the written consent required by law has been given thereto, being satisfied of the identity and relations of the persons, and the fitness and propriety of such adoption, I, George F. Lawton, Esquire, Judge of said County, by virtue of the power and authority vested in me, have decreed that from this day said Susan B. Samuels shall to all legal intents and purposes be your child. . . . You therefore assume the relation of parent to said Susan B. Samuels and will hereafter cherish, support, and ¹⁹⁸ otherwise provide for her as though you were her natural parent.

"In testimony whereof, I have hereunto set my hand and caused the seal of said Court to be affixed at Cambridge, this eighth day of October in the year of our Lord One Thousand Eight Hundred and ninety-five.

"[Signed] GEORGE F. LAWTON,
"Judge of Probate Court.

"Countersigned:

"S. H. FOLSOM,
"Register.

"A true record.

"Attest: S. H. FOLSOM,
"Register."

It appears that in the year 1895 Samuel B. Caldwell employed an attorney in Massachusetts to obtain the above decree of adoption. Mrs. Susan B. Samuels was then forty-nine years of age, and the mother of two children. It appears incidentally that she had obtained a decree of divorce from her husband.

The deposition of the attorney was taken. It sufficiently appears from his answers that the above document is a copy of the decree obtained by him, and is regular in form. It was duly recorded, and there is no evidence of any other or further proceedings in the case. The attorney, in his answer, furnished extracts from the statutes of Massachusetts as follows, to wit: "A person of the age of twenty-one years or upward, may petition the probate court in the county of his residence for leave to adopt as his or her child another person younger than himself or herself, unless such other person is his or her wife, husband, brother, sister, uncle, or aunt, either of the whole or half blood. If the petitioner has a husband or wife living, who is competent to join in the petition, such husband or wife should join therein, and upon adoption the child shall be deemed the child of both. If a person not an inhabitant of the commonwealth, desires to adopt a child residing here, the petition may be made to the probate court in the county where the child resides."

The attorney testified further as follows, viz.: "Under this statute a person not an inhabitant of the commonwealth of Massachusetts may adopt a person younger than him or herself as a child, provided the petition is brought in the county where the child resides."

Under this statute the only qualification as to age is that the person adopted must be younger than the person adopting, who must ¹⁹⁹ be of age of twenty-one years upward. The use of the word "child" in the last sentence cannot be construed as meaning a minor in the face of the preceding provisions fixing the qualification of age and applying the same term to any person younger than the person adopting.

The attorney further testified that under the statutes of Massachusetts the adopted child has the same right of succession to the property of the person adopting him or her as a child born in lawful wedlock would have.

We make the following extracts from the answers of the same witness, viz.:

"It is the law in the commonwealth of Massachusetts that if a person not a resident of this state submits himself to this jurisdiction, he is bound by such decrees and orders as may be made in his favor or against him. . . .

"The decree of adoption creates a status in both of the parties to the transaction. This status is recognized by all the courts of the commonwealth of Massachusetts where such status is created by sister states: See *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321."

We are of opinion that the adoption in question was legal and valid under the statutes of the state of Massachusetts, and fixed the status of both parties. It was the state of the domicile of the adopted daughter, and the adopted father voluntarily submitted himself to the jurisdiction of the court, and prayed that a decree of adoption be rendered pursuant to the laws of the state.

In the case of *Foster v. Waterman*, 124 Mass. 592, the court held that the statutes of New Hampshire did not authorize the adoption by nonresidents of a child domiciled in that state. If the statutes had authorized such an adoption, it is clear from the doctrine of *Ross v. Ross*, 129 Mass. 267, 37 Am. Rep. 321, that the status would have been recognized by the courts of Massachusetts.

The adoption being legal under the laws of that state, the only remaining question is whether our laws forbid the courts of this state to recognize the status thus created. ²⁰⁰ In *Ross v. Ross*, 129 Mass. 267, 37 Am. Rep. 321, the court said: "We are not aware of any case in England

or America in which a change of status in the country of the domicile, with the formalities prescribed by its laws, has not been allowed full effect as to the capacity thereby created of succeeding to and inheriting property, real as well as personal, in any other country the laws of which allow a like change of status in a like manner, with a like effect under like circumstances."

It is contended by counsel for appellants that since the enactment of Act No. 31 of 1872, page 79, the adoption of persons over the age of twenty-one years has not been permitted under the laws of this state.

In the determination of this question it is necessary to consider what were the laws of Louisiana on the subject of adoption prior to the passage of said statute, and how far its enactment modified or repealed the existing legislation on the subject.

The Civil Code of 1870 contained the following provisions on the subject of adoption, viz. (article 214):

"Any person may adopt another as his child, except those illegitimate children whom the law prohibits him from acknowledging; but such adoption shall not interfere with the rights of forced heirs."

"The persons adopting must be at least forty years old and must be at least fifteen years older than the person adopted. The person adopted shall have all the rights of a legitimate child in the estate of the person adopting him except as above stated. Married persons must concur in adopting a child. One of them cannot adopt without the consent of the other."

Particular rules were laid down in the Revised Statutes of 1870 concerning the adoption of minors: Secs. 2323-2325, 2328. A decree of court rendered with the consent of the parents or tutor, followed by a notarial act of adoption, was required.

In 1872 the legislature adopted a statute entitled: "An act providing the manner of adopting children," which reads as follows, viz.: "Section 1. That any person above the age of twenty-one years shall have the right by act ²⁰¹ to be passed before any parish recorder or notary public, to adopt any child under the age of twenty-one years: provided, that if such child shall have a parent or parents, or tutor, that the concurrence of such parent or parents

or tutor shall be obtained, and as evidence thereof shall be required to sign said act."

The statute (Act No. 31 of 1872, p. 79) is given above in full. It contains no repealing clause. It modified existing laws by providing that any person above the age of twenty-one years should have the right to adopt a minor child, and that adoption by notarial act should be sufficient. The act does not refer to the adoption of adults, and its exclusion of minors from the operation of Civil Code, article 214, leaves the provisions of that article in force as between adults. Repeals by implication are not favored. Succession of Vollmer, 40 La. Ann. 593, 4 South. 254, was a case of the emancipation of a minor by a notarial act under Act No. 31 of 1872, and the court held that judicial sanction was unnecessary. In the opinion it was said that "the purpose of the law was to provide for the form to be used for the adoption of minors" as indicated by the title of the act. Our conclusion is that the provisions of the Civil Code and of the Revised Statutes of 1870 relative to the adoption of adults were not repealed by Act No. 31 of 1872, page 79.

It is next contended that there was not a difference of fifteen years between the ages of the deceased and Mrs. Samuels. The certificate of death states that the deceased was seventy-five years of age. Mrs. Samuels was born in 1846. There is no direct or positive evidence as to date of the birth of the deceased. Mrs. Samuels' testimony amounts to nothing more than a guess or surmise. She states that her impression was that her uncle was born in 1834. Her brother testified that his uncle came to New Orleans in 1859, and was then an officer in the revenue marine. This witness said nothing about the age of his uncle, and it was not an issue raised by the pleadings.

²⁰² We cannot assume on this vague testimony that Mrs. Samuels was not fifteen years younger than her adoptive father. She presented a judgment of a court of competent jurisdiction of a sister state fixing her status, and binding on her adoptive parent and his heirs: 1 Am. & Eng. Ency. of Law, 2d ed., p. 736. If such a decree was repugnant to any law of this state, it was incumbent on plaintiffs to have alleged and proven the particular facts on which they relied to show that the enforcement of the decree would be violative of some provision of our code or statutes relative to adoption.

The deceased elected to petition the court of probate in Massachusetts, where his niece resided, for a decree permitting him to adopt her as his child and heir. The decree was

rendered as prayed for. It is valid in Massachusetts, and is "conclusive against all collateral attacks by parties and privies": 1 Am. & Eng. Ency. of Law, 2d ed., p. 736.

The court had jurisdiction of Mrs. Samuels by reason of her domicile, and acquired jurisdiction over the adoptive father by his voluntary appearance: See *Shields v. Thomas*, 18 How. 253, 15 L. ed. 368. A judgment of a state court has the same credit, validity, and effect in every other court within the United States which it has in the state where it was pronounced: *Hampton v. McConnel*, 3 Wheat. 234, 4 L. ed. 378. Hence we should give effect to the decree of adoption, unless it is clearly repugnant to our laws.

Our laws on the subject of adoption are similar to those of Massachusetts. Our Civil Code does not prohibit nonresidents to adopt residents of this state, and permits the adoption of adults by decree of court. On the mere principles of comity, we see no reason why we should not give effect to the decree of the court in question, as the adverse claimants are nonresidents, five of them being citizens of the state of Massachusetts, and as the property to be distributed consists exclusively of movables.

²⁰³ We are not prepared to hold that the decree of adoption was an absolute nullity because the adoptive father resided in Louisiana, and therefore the court in Massachusetts was without jurisdiction. Caldwell was a childless old man, and desired to adopt his niece, a divorced woman, with two dependent children, residing in the state of Massachusetts. To accomplish this laudable purpose he was compelled to appeal to the laws and courts of his niece's domicile. He did so voluntarily, and we think that the decree concluded him and his collateral heirs. There is nothing in this adoption contrary to public policy or good morals, or repugnant to our laws of inheritance.

Judgment affirmed.

The Adoption by One Person of the Children of another is the subject of a monographic note to *Van Matre v. Sankey*, 39 Am. St. Rep. 210-231. See, too, the recent cases of *Estate of McKeag*, 141 Cal. 403, 99 Am. St. Rep. 80; *Heidecamp v. Jersey City etc. Ry. Co.*, 69 N. J. L. 284, 101 Am. St. Rep. 707. That a decree of adoption rendered in one state cannot be impeached in another by showing a mere irregularity in the procedure or error in the rendition of the order, see *Van Matre v. Sankey*, 148 Ill. 536, 39 Am. St. Rep. 196. The adoption of a minor authorized by the laws of the state gives it the status of a child of the adopting parents, and this status will be recognized and upheld in every other state so far as not inconsistent with its own laws and policy: In *re Williams*, 102 Cal. 70, 41 Am. St. Rep. 163.

FULLER v. TREMONT LUMBER COMPANY.

[114 La. 266, 38 South. 164.]

RAILROADS—Negligence—Safe Roadway.—A railroad company must make and keep its tracks reasonably safe, and if it permits its roadbed and rails to remain out of repair and also permits the use of unsafe brakes on its cars, or loads its cars so that such brakes are useless, and injury to an employé or other person is the result, the injured person, if not at fault, is entitled to damages. (p. 350.)

MASTER AND SERVANT—Safe Place and Appliances.—A master must furnish his employés reasonably safe appliances and a reasonably safe place to work, and must keep them safe. This rule applies to a railroad company. (p. 351.)

MASTER AND SERVANT—Fellow-servants.—If an injury to an employé results from the negligence of the master and a fellow-servant, the fellow-servant doctrine does not release the master from liability. (p. 351.)

MASTER AND SERVANT—Negligence—Fellow-servants.—If the negligence of a master is combined with the negligence of a fellow-servant in producing the injury, and the negligence of neither alone is the efficient cause, both the master and fellow-servant are liable, and the injured servant may maintain his action against either, or both together. (p. 352.)

Price & Roberts and Stubbs & Russell, for the appellants.

Hudson, Potts & Bernstein and Clayton & Hawthorne, for the appellee.

²⁰⁷ **BREAUX, C. J.** Personal injury arising from an accident is the complaint, and ten thousand dollars the damage for which plaintiff sued.

The verdict was for five thousand dollars. From the verdict and judgment of the court the defendants have appealed.

One of the defendants, the Tremont Lumber Company, Limited, owns two sawmills, one at Tremont, the other at Eros, Louisiana, connected in running by a railroad company of their own worked jointly. With the aid of this railroad, Smith and Cartwright, as lumbermen, supplied these mills with logs, and they are the other defendants. Plaintiff was employed by Cartwright and Smith as locomotive fireman. On the 24th of August, 1903, the logging train on which he was at work derailed. ²⁰⁸ McGrady, the engineer, and Farney, the brakeman, were with him on the train as employés of defendants. This train, it appears, consisted of the locomotive and tender, and seven flat cars loaded with pine logs. The complaint in regard to the manner that the train was loaded was that the ends of the pine logs extended over the

ends of the cars and covered the handle of the brakes on each car, except one, thereby rendering the brakes useless, and placing it out of the power of the brakeman to apply his brakes to moderate the speed or stop the train.

There was a downward grade from the top of a hill to the place of the accident, which rendered the brakes an indispensable appliance.

At a point of the road at a downward grade, the engineer attempted to use his brakes, but failed by reason of the fact that the heavy logs rested on the handles of the brake. The speed of the train became great, and, in consequence, at a sharp curve in the track, the rails turned over and spread out, owing to the decayed ties, which had been made of pin oak, red oak, and mixed wood of poor quality, instead of white oak and other good timbers. In consequence, the locomotive and train took leave of the track, causing an immense jolt, which resulted in precipitating plaintiff to the ground, fastening and jamming him among the broken timbers of the cars and the logs, to his great injury and suffering. He was caught in the wreck and under the end of a log. The log was lying across his leg, and the leg was broken between the knee and the ankle.

The defendants in a joint answer denied liability, and said that plaintiff had no one to blame but himself and the engineer, his fellow-servant.

Upon these issues the parties went to trial, and examined a number of witnesses.

Unquestionably, the general rule is that companies must make their railroad tracks safe, or, as some of the cases have it, reasonably ²⁶⁹ safe. Furthermore, when a railroad company permits the use of unsafe brakes, or loads its cars so that they are useless, and injury is the result, the injured party, if not at fault, is entitled to damages.

In order to determine whether or not this rule has application, we have examined the conflicting testimony. The plaintiff has testified at some length in his own cause, and sought throughout to sustain his petition. We will not dwell upon the quality of the brakes complained of by him. They were the regular vacuum brake, and nothing in the testimony shows that it was unsafe to use such. As to whether they were in good order is one of the puzzling questions of the case, for the testimony on this, as well as on other points, is irreconcilably divergent.

The engineer of the company, witness for defendant, who was in charge of the engine, testified that the brakes of the engine were not in a state of good repair. The manner of loading the train with logs suggests itself as of some importance in determining the issue. The average length of these logs was sixteen feet, which were transferred to the car by machinery. It follows that some of the logs were long; others comparatively short. The cars, it must be said, were longer than the logs. This fact alone does not make it evident that the brakes were not covered by the logs. The defendant had a log loader. The logs were lifted to the car, and then this loader would drop them in position on the bunks. These log conveyances are skeleton cars. We understand that the pieces on the floor are the reaches, and the pieces where the logs rest are the bunks.

This laying of the logs in the car has some importance, because one of the issues is that the logs were not properly loaded, and that thereby the engineer was prevented, at the critical moment, from working the brakes. The engineer's testimony does not create the impression that the engine's brakes were very useful. We infer that they did not ²⁷⁰ yield to the pressure, if any was brought to bear upon them.

The brakeman testified that brake 6 was not set by him because the logs were on it, or there was no brakestaff. In a lengthy examination he testified that all the other brakes were on, and that there was nothing deficient as relates to brakes. The sixth brake, as we understand, was considered by him somewhat as it is with the fifth wheel in a wagon.

One of the defendant's witnesses who was on this train testified that it was running at about the rate of fifty miles an hour at the time the train was wrecked. If that be the rate at which this log-loaded train was running, it is small wonder that, upon the train meeting an impediment, this witness was pitched over the front of the tender—to quote his words: “Rolled to the bottom, and got up, and walked back to the track. The first thing I knew was getting up and looking around to see where the other fellows were”—and that for some moments he could not see anyone, and that it was always a mystery to him “where the engineer” was during the accident and consequent scramble. This witness further states that the engineer said, in language slightly profane, just prior to the derailment, that there was not a brake on the train, and that this utterance was met by plain-

tiff thus: "All right; let her go"; and that he (plaintiff) was firing all he could. The engineer also received injury from the accident. This brings this fireman very near to the charge that he was in accord with the rapid movement of the log train.

It remains that plaintiff was not in command, and the engineer was not to receive suggestion from him, but to act upon his own judgment.

This seems to have been a passing utterance; whether made in earnest or jest does not appear. With reference to the logs in the cars as placed therein, we incline to the ²⁷¹ view that they were not carefully laid. They should not have been placed therein so as to cover the brakes.

We pass from consideration of the train, its appliances, its burdens and movements, to a consideration of the track, rendered unsafe, it is charged by plaintiff, by the use of unsound cross-ties.

We infer from the weight of the testimony that under the pressure of the cars the rails must have yielded and spread. It would serve little purpose to again refer with some detail to the ties and consequent unsafety of the road. The weight of the testimony sustains the view that the road was not as safe as it might have been at the place of the wreck. The ties, made of poor material, were many of them rotten, and did not hold the spikes. Appliances reasonably safe must be had. It is the duty of the master to furnish his employes a reasonably safe place on which to work and keep it safe: *Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 92 Am. St. Rep. 847, 68 Pac. 896, 58 L. R. A. 320. It is required of the master to exercise care in running a train loaded with heavy logs.

Defendants invoke the fellow-servant doctrine, and urge that the fireman and engineer are fellow-servants.

The train was in charge of the engineer. The negligence was not confined to the engineer. It was more particularly that of those who had the repair of the roadbed in charge. They were not fellow-servants of the plaintiff.

If the facts were to sustain the view that both the master and his servant, the engineer, were negligent, then the following rule would have direct bearing: "Where the negligence of the master is combined with the negligence of a fellow-servant in producing the injury, and the negligence of neither is alone the efficient cause, both the master and fellow-servant are liable, and the injured servant may maintain his action

against either, or both together." This rule is sustained by a number of decisions cited in the English and American Encyclopedia of Law, volume 12, page 905, paragraph "d."

²⁷² The question of damages next arises for consideration. Plaintiff was twenty-eight years of age. He earned the wages usually paid to the average locomotive fireman, engaged at this was, in conveying logs, viz., one dollar and fifty cents a day. He unquestionably suffered and was badly shattered physically. We do not infer that he was permanently injured. The amount of the damage is fixed at three thousand dollars, with five per cent interest thereon from thirteenth day of April, 1904.

It is ordered, adjudged and decreed that the verdict of the jury and judgment of the court is affirmed to the amount of three thousand dollars, with five per cent interest from the date of the judgment of the district court.

It is further ordered, adjudged and decreed that the demand for a larger sum is rejected, and to that extent the judgment of the district court is amended.

Provosty, J., not having heard the argument, takes no part

A Railroad Company Owes to Its Employés operating trains the duty of using reasonable care to provide a safe track and roadbed. See *Rogers v. Cleveland etc. Ry. Co.*, 211 Ill. 126, 103 Am. St. Rep. 185, and cases cited in the cross-reference note thereto.

An Employer is Liable for an injury caused to an employé by the combined negligence of the master and a fellow-servant: *Buehner v. Creamery Package etc. Co.*, 124 Iowa, 445, 104 Am. St. Rep. 354; *Eureka Block Coal Co. v. Wells*, 29 Ind. App. 1, 94 Am. St. Rep. 259; *Sroufe v. Moran*, 28 Wash. 381, 92 Am. St. Rep. 847; *Chicago etc. Ry. Co. v. Gillison*, 173 Ill. 264, 64 Am. St. Rep. 117.

CITY OF CROWLEY v. ELLSWORTH.

[114 La. 308, 38 South. 199.]

APPEAL—Questions Reviewable.—If a case comes before the appellate court under a provision of a state constitution granting appellate jurisdiction of suits involving the constitutionality or legality of any fine or penalty imposed by a municipal corporation, no other question can be inquired into except that as to which jurisdiction is thus specially conferred. Whether the facts were sufficient to justify a conviction cannot be considered. (p. 354.)

MUNICIPAL CORPORATIONS.—Municipal Ordinances are not illegal because the reasons for their enactment are not given therein, nor because they punish as a nuisance what they do not expressly declare to be such. (p. 354.)

MUNICIPAL CORPORATIONS.—Municipal Ordinances which apply alike to all persons, firms, or corporations engaged in the business legislated against are not discriminatory, and every presumption is indulged in favor of their fairness. (p. 355.)

MUNICIPAL CORPORATIONS—Ordinances Regulating Keeping of Explosives.—Authority in a municipality to regulate the storage of combustible and inflammable materials within its limits includes power to prevent the storage of refined and other explosive oils within such limits. (p. 355.)

MUNICIPAL CORPORATIONS—Ordinances—Special and General—Repeal.—A special ordinance granting to a particular person permission to store refined oil within the limits of an incorporated city is repealed by a subsequent general ordinance making such storage of oils a criminal offense. (p. 356.)

MUNICIPAL CORPORATIONS—Ordinance Prohibiting Storage of Explosives—Constitutional Law.—An ordinance prohibiting the storage of explosive oils in large quantities within the city limits is not unconstitutional as depriving a person of his property without due process of law, when circumstances justify its enactment as a police regulation. (p. 356.)

Medlenka & Taylor, for the appellant.

T. R. Smith, for the appellee.

³⁰⁸ **PROVOSTY, J.** The defendant is the local agent of the Waters-Pierce Oil Company, ³⁰⁹ of Missouri, which company does a wholesale oil business in the city of Crowley. In April, 1898, said company obtained permission from the city council "to construct and erect three iron storage tanks" at a designated place within the corporate limits "for the purpose of storing illuminating, lubricating, and other oils for the sale and supply of the demand in the town of Crowley and vicinity." In July, 1904, the city council adopted an ordinance providing that "hereafter it shall be unlawful for any person, firm or corporation to keep on their premises or in storage tanks within the corporate limits of the city of

Crowley at any one time more than two barrels of gasoline, coal-oil or other refined oils of an explosive nature," and punishing by fine of not less than five dollars, nor more than one hundred dollars, or by imprisonment in the city jail for not less than two nor more than thirty days, any violation of the ordinance. Defendant was prosecuted and convicted in the city court for a violation of the ordinance, was fined one hundred dollars, and he has appealed.

His first contention is that the city authorities have hold of the wrong man; that he is a mere employé executing orders, and therefore not responsible. With this defense this court has nothing to do. The case comes here under the provision of the constitution granting appellate jurisdiction to this court of "suits involving the constitutionality or legality of any . . . fine or penalty imposed by a municipal corporation"; and no question can be inquired into except that as to which jurisdiction is thus specially conferred: *Burguières v. Sanders*, 111 La. 109, 35 South. 478.

Defendant claims that the ordinance under which he has been prosecuted and fined is unconstitutional for six reasons, which we now proceed to consider in regular order:

1. That no grounds are assigned as a cause for passing the ordinance, and that, although the storage of oil of an explosive³¹⁰ nature in quantities greater than two barrels is not a nuisance per se, the ordinance punishes it as a nuisance without having declared it to be such.

The first branch of this objection is clearly without merit. Clearly, a legislative body does not have to give any reasons for its enactments; not though such reasons "were plentiful as blackberries in June": *Dillon on Municipal Corporations*, 3d ed., sec. 318, note 2; *Elliott on Municipal Corporations*, p. 183.

The second branch is no better than the first. An ordinance which makes an act unlawful, by necessary implication declares it of a noxious character, and any further declaration on the subject would be mere useless tautology.

2. "The said ordinance is discriminatory, unreasonable, arbitrary, and unequal in its operation and effect, for the reason that it is confined exclusively to refined oils handled by the Waters-Pierce Oil Company, when in truth and in fact, to the express knowledge of the city of Crowley, other oils of an explosive nature are stored in large quantities within the city limits of Crowley, by other persons, firms, and corporations."

The ordinance applies alike to all persons, firms, or corporations engaged in the business legislated against, and is certainly not discriminatory. The discrimination is said to consist in that the ordinance applies only to refined oils, and not to crude oils. Conceding that this discrimination in favor of crude oils would be fatal to the ordinance if crude oil were shown to be equally explosive as refined oil, the evidence fails to show that fact, and every presumption is in favor of the fairness of the ordinance: Elliott on Municipal Corporations, p. 202.

3. "That the city of Crowley exceeded its chartered authority as conferred upon it by paragraph 9, section 16, of Act No. 136 of 1898, page 232, in excluding (which exclusion is an absolute prohibition of conducting of the wholesale oil business in the said city from its limits) the storage of refined oils of an explosive nature in quantities greater than two barrels; the said ordinance not regulating, but absolutely prohibiting, the Waters-Pierce Oil Company from carrying on its business."

³¹¹ The "chartered authority" thus referred to is conferred in the following terms: "The following additional powers are conferred upon the mayor and aldermen of cities and towns: . . . Ninth—To regulate the storage of powder, pitch, turpentine, rosin, hemp, hay, cotton and all other combustible and inflammable materials."

In the case of the same Waters-Pierce Oil Co. v. City of New Iberia, 47 La. Ann. 863, 17 South. 343, a similar ordinance was sustained by this court, although the authority to pass it was not so clearly conferred as in the present case.

4. "That the said ordinance is unreasonable, and in restraint of a lawful and legitimate business carried on and surrounded with the greatest precaution against danger of fire, explosion, or accident likely to entail the loss of life or property."

Clearly, an ordinance prohibiting the storage of oils of an explosive nature within the built-up parts of the city would not be unreasonable. Inasmuch as the ordinance is made to apply to the entire corporate limits, the inference is that there is no place within the corporate limits, where, in the judgment of the council, it would be safe to store the inflammable and explosive substance mentioned in the ordinance. The evidence shows that there are buildings within dangerous proximity to the storage tanks of which the defendant is in charge.

5. That the ordinance is unconstitutional in so far as it affects the employer of defendant, because it does not repeal the former ordinance granting permission to the said employer of defendant to erect tanks, etc.

The question here raised is that of repeal *vel non*, and therefore, at best, of the legality of the fine, and not of the constitutionality, *vel non*, of the ordinance.

Surely, the first ordinance, in so far as it may authorize the doing of anything which the second prohibits and punishes as a crime, is inconsistent with it, and therefore repealed. The manifest intention of the second ³¹² ordinance is that the storing of explosive oil in large quantities shall be unlawful for defendant's employers as well as for all others. To such a case the rule as to a special statute not being repealed by a general has no application.

6. "That the said ordinance is further illegal and unconstitutional and deprives the Waters-Pierce Oil Company of its property without due process of law, without compensation or indemnity, and violates the constitution and the laws of the United States and of this state, and more particularly the fourth, fifth, and fourteenth amendments of the United States constitution, articles 1, 2, 166, and 167 of the constitution of Louisiana, and article 497 of the Civil Code of Louisiana."

This exact point was passed on in the case of the same Waters-Pierce Oil Co. v. New Iberia, 47 La. Ann. 863, 1 South. 343.

Judgment affirmed.

POWER OF CITY TO REGULATE OR PREVENT KEEPING OF EXPLOSIVES IN CITY LIMITS.*

No doubt whatever exists of the right and power of a city by ordinance to regulate the use, storage or transportation, within its limits, of explosives of any kind including explosive oils, or it may even prohibit them from being kept within the city limits altogether. The validity of such ordinances is usually sustained on the ground that they are necessary police regulations. The authorities are everywhere agreed that municipal ordinances of this character are constitutional and valid exercises of the police power of cities conferred by general charter provisions: *Williams v. City Council of Augusta*, 4 Ga. 509; *Spiegler v. City of Chicago*, 216 Ill. 114, 74 N. E. 718; *Wright v. Chicago etc. Ry. Co.*, 27 Ill. App. 200; *Waters-Pierce Oil*

*REFERENCE TO MONOGRAPHIC NOTE.

Liability for keeping explosives: 67 Am. St. Rep. 124-126.

Co. v. Town of New Iberia, 47 La. Ann. 863, 17 South. 343; Commonwealth v. Parks, 155 Mass. 531, 30 N. E. 174; Foote v. Fire Department, 5 Hill, 99; Hays v. Village of St. Marys, 55 Ohio St. 197, 44 N. E. 924; City of Scranton v. Jermyn Oil Co., 5 Lanc. Law Rev. 277; Davenport v. City of Richmond, 81 Va. 636, 59 Am. Rep. 674.

Thus an ordinance prohibiting the storing within the city limits, and the transportation along its streets, of dynamite or nitroglycerin, in large quantities, is within the general power conferred upon cities and villages by statute: Hays v. Village of St. Marys, 55 Ohio St. 197, 44 N. E. 924. An ordinance regulating the keeping and retailing of gunpowder within the limits of a city is within the powers conferred by its charter, and authorized thereby: Williams v. City Council of Augusta, 4 Ga. 509. And an ordinance prohibiting any person from having or keeping gunpowder in any house or store within certain limits is valid, and extends to the mere act of receiving powder into a store, though for the purpose of being immediately packed and shipped to another state: Foote v. Fire Department, 5 Hill, 99.

A case similar in many respects to the principal case is Davenport v. City of Richmond, 81 Va. 636, 59 Am. Rep. 694, wherein it was decided that an ordinance requiring the removal of powder magazines from a city's limits is valid, although such city has sold the sites to the owners for the purpose of erecting thereon such powder magazines. A city ordinance prohibiting under a penalty the blasting of rock with gunpowder within the city limits without written consent from the board of aldermen is valid as a legitimate exercise of the police power conferred upon the city by statute: Commonwealth v. Parks, 155 Mass. 531, 30 N. E. 174.

An ordinance regulating the storage of petroleum and other inflammable and explosive substances within the city limits is legal and constitutional and not the taking of private property without due process of law, nor in restraint of trade: Waters-Pierce Oil Co. v. Town of New Iberia, 47 La. Ann. 863, 17 South. 343; City of Somerville v. Walker, 168 Mass. 388, 47 N. E. 127. "The preservation of the public health, the good order of the local community, the protection of the property of its citizens from the danger of fire, and the preservation of their lives from the danger of storing explosive substances in the limits of the corporation in thickly populated localities, are matters of vital local interest, and are of such character as to invite local sentiment in provoking necessary legislation and its rigid and exact enforcement. . . . No amount of testimony would convince us that steam, electricity and gunpowder and petroleum are not dangerous. Due and proper precautions may, under certain conditions, render them harmless. But these conditions may relax, and at unexpected moments they may be let loose from restrictions, and burst forth with immeasurable power and energy. Therefore, the legislation, in relation to these substances, is not to be controlled by the efforts to secure them from danger, when it is attempted to place them at desig-

nated points, where the least injury will be inflicted by accident. . . . We have not the least doubt that, under the clause of the act of corporations quoted, the city of New Iberia had the power of regulating the mode of keeping, and the sale of petroleum oil; that is, to prevent the storage of large amounts in a populated part of the city, and to require only such amounts to be kept in said localities as would meet the wants of the retail trade": *Waters-Pierce Oil Co. v. Town of New Iberia*, 47 La. Ann. 868, 17 South. 343.

In the exercise of its police power, a city organized under the general law has power to pass an ordinance regulating, in a reasonable manner, the handling of combustible oils in tank wagons or other vehicles upon the public streets of the city, and such ordinance is not rendered invalid, as delegating legislative power to the commissioner of public works, by a provision that each wagon or vehicle shall be equipped with a drip-pan or other device to prevent the spilling of oil on the streets, which device shall be subject to the approval of such commissioner: *Spiegler v. City of Chicago*, 216 Ill. 114, 74 N. E. 718. An ordinance imposing a license fee upon tank wagons which are used in handling combustible oils upon the streets, and which gives the mayor the right to revoke any license upon proof that the licensee has violated the provisions of the "ordinances" of the city is not invalid, as conferring judicial power upon the mayor, and it only refers to violations of the ordinances upon the subject covered by the license ordinance: *Spiegler v. City of Chicago*, 216 Ill. 114, 74 N. E. 718.

A municipal ordinance placing restrictions upon the keeping and storing of inflammable or explosive oils is invalid, and unconstitutional if it fails to specify the rules and conditions to be observed in such business, and which does not admit of the exercise of the privilege by all citizens alike, who will comply with such rules and conditions, and which does admit of the exercise of an arbitrary discrimination by the municipal authorities between citizens who will so comply: *City of Richmond v. Dudley*, 129 Ind. 112, 28 Am. St. Rep. 180, 28 N. E. 812, 13 L. R. A. 587.

RICHARD v. SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY.

[114 La. 794, 38 South. 563.]

INSURANCE—Foreign—Fire—Powers of Agent—Waiver.—If a foreign insurance company appoints an agent within the state and supplies him with blank policies signed by the president and secretary, to be filled up, countersigned, and issued as occasion may require, such agent must be considered as having the powers of a general agent as to a waiver of conditions contained in policies issued by him. (p. 362.)

INSURANCE—Powers of Agents.—An insurance agent having power to make contracts of insurance and to issue policies, binds the insurer by all waivers, representations or other acts within the scope of his business, unless the insured has notice of a limitation of his powers. (pp. 363, 364.)

INSURANCE—Powers of Agents—Waivers of Forfeiture—Limitation on Powers.—Insurance agents, whether local or general, with power to make and issue policies of insurance, represent the insurer within the territorial limits to which they are assigned. Their knowledge is imputed to the company and their acts as to waiver of forfeitures bind the insurer within the scope of their employment, and their apparent authority cannot, as to the public, be limited by private instructions unknown to the latter. (p. 365.)

INSURANCE—Fire—Powers of Agent—Waiver of Iron-safe Clause.—An insurance agent with power to make and issue policies has apparent power to waive, prior to loss, a breach of an iron-safe clause by him attached to the policy, resulting from the failure of the insured to make an inventory of stock within a certain time from the date of the issuing of the policy. (p. 365.)

Lewis & Lewis, for the appellant.

Clegg & Quintero and K. Baillio, for the respondent.

⁷⁹⁶ LAND, J. On August 25, 1903, plaintiff was insured by defendant against loss by fire in the sum of one thousand dollars on a small stock of merchandise. The policy was countersigned and issued by the Roos-Edwards Agency, of the town of Opelousas, Louisiana. The usual "iron-safe clause" was attached to the policy, and the following indorsement appears thereon, to wit: "Permission is hereby given for thirty days to take complete inventory of stock."

No inventory was taken, and on November 5, 1903, the agency made the following indorsement on the policy, to wit: "The assured, under the above-named and numbered policy, having been prevented through illness from completing the inventory of his stock of merchandise, a further period of thirty days additional is hereby given in which to complete said inventory."

On November 8th, five days later, the stock of merchandise was destroyed by fire. The company received notice of the total loss before it received notice by mail of the extension of thirty days.

Payment of the policy having been refused, plaintiff brought suit thereon to recover the full amount, and obtained judgment in the district court. The insurance company appealed to the court of appeal which reversed the judgment, and the case is now before us on a writ of review.

The court of appeal held that the policy was forfeited by the failure of the assured to make the inventory within thirty days, as stipulated, and that the agents had no power, express or implied, to waive such forfeiture by granting an extension of time for the completion of the inventory. It is to be noted that the written extension for thirty days is indorsed on the "rider" containing the iron-safe clause. It does not appear whether the agent overlooked the fact that the clause ⁷⁹⁸ itself granted this delay, or intended to grant a further delay of thirty days. Defendant's counsel, in their brief, suggest this doubt, and argue that the agent had no power to grant an extension of any kind.

The policy in question was signed by the president and secretary, and was to become valid when "countersigned by the duly authorized agent of the company at Opelousas."

This agent had full power to make the contract of insurance, to fill in the blanks, and to attach or indorse on the policy other provisions, agreements, or conditions. He was intrusted by the nonresident company with blank forms of policy, and the assured had no notice of the mandate, other than that conveyed by the policy itself, and the nature of the agent's employment. The last clause of the policy reads as follows, viz.: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affect-

ing the insurance under this policy exist or be claimed by the insured unless so written or attached."

It follows from the terms of this clause that "provisions, agreements or conditions" indorsed on or added to the policy were subject to waiver written upon or attached to such instrument. The iron-safe clause formed no part of the printed conditions of the policy, but was added thereto by the agent, and hence was subject to the written waiver referred to in the last clause of the policy.

The agent had power to issue and renew policies, to make waivers, and grant permits, and the only question for discussion is whether his mandate or employment included ⁷⁹⁷ the power to waive the forfeiture of the policy resulting from the failure of the insured to complete his inventory within the thirty days stipulated. Doubtless the company or its agent could have insisted on the forfeiture as a legal right, but at the same time would have been compelled to return the unearned premium for eleven months. The agent, being informed of the facts, was called upon to take some action in the premises. He elected to waive the forfeiture, rather than to cancel the policy and return the unearned premiums. This action induced the assured to rely on the policy as a still subsisting protection against loss by fire. This waiver was sent to the company by mail in the usual manner, but was not received until the day after the happening of the loss. The company did not notify the assured or the agent that the waiver was repudiated, and, after proofs were furnished, sent an adjuster to investigate the loss. The adjuster, however, acted under a nonwaiver agreement, and therefore all the defenses of the company were preserved.

The agent was furnished with blank policies signed by the president and secretary of the company, and was in the habit of issuing policies without requiring an application, and without referring the subject matter to the company in Springfield, Massachusetts. The agent had apparently undoubted power to issue policies, and to attach thereto all the usual and customary agreements and "riders."

It is argued, however, that the agent had no power to waive conditions added to or attached to the policy at the time of the issuance. The last clause of the policy authorized a written waiver of such conditions, provided it be annexed to the policy. The district judge said: "The term stipulated for the completion of the inventory is a mere incidental portion of

the contract entered into exclusively. for the benefit of the insurer. The extension of time and implied waiver of the expiration of the ⁷⁹⁸ original period for the completion of the inventory were acts done by the agent solely for the purpose of making the contract of insurance available to the insurer as well as to the insured."

The district judge cited authorities to show that the agent had general powers, and argued that, as the agent had authority to issue a new policy to the assured on the same conditions as those contained in the original policy, he had implied authority to recognize the validity of the subsisting contract, and to grant additional time for the completion of the inventory.

The court of appeal reversed the judgment of the district court on the authority of the case of *Murphy v. Royal Ins. Co.*, 52 La. Ann. 775, 27 South. 143.

While the case cited is a mine of insurance law, the decision simply recognized and enforced the last clause of the policy, to the effect that no officer or agent of the company should have power to waive or be deemed to have waived any condition of the policy, unless such waiver should be written upon or attached thereto, against the contention that at the very time of the making of the contract the parties thereto had entered into a verbal contract waiving the iron-safe clause and the three-fourths value clause, which were attached to the policy. The court decided correctly that the plain terms of the policy notified the assured that the agent had no power to waive, unless by writing on or attached to the policy.

In the case at bar the waiver was in writing attached to the policy, and was made several months after the contract was executed. The waiver was in due form, and the only question is one of power in the agent. There is in the last clause of the policy a necessary implication that agents, officers or representatives may waive provisions, agreements or conditions indorsed on or added to the policy, and may grant privileges or permissions affecting the insurance.

⁷⁹⁹ The iron-safe clause was therefore a subject matter of waiver. The printed policy is a general form applicable to all fire insurance business, and, by its terms, contemplates that the agent making the contract shall have power to add other "provisions, agreement and conditions," and to grant permits or privileges affecting the insurance. The policy bristles with forfeitures for causes existing at the date of the

contract or arising subsequently, unless otherwise provided by agreement indorsed on or added to the policy. It is clear that the agent making the contract of insurance under such a policy may modify or change the forfeiture clauses by indorsements on or additions to the instrument. With such power over the matter of forfeitures, it is not difficult to conclude that such an agent may waive a subsequent forfeiture, in the interest of the company which he represents.

"An agent authorized to issue policies binds the company by all waivers, representations or other acts within the scope of his business, unless the insured has notice of a limitation of his powers. The question always is, not what power the agent did in fact possess, but what power the company held him out to the public as possessing": May on Insurance, 4th ed., sec. 126.

"A person authorized to accept risks, to agree upon and settle the terms of insurance, and to carry them into effect, must be regarded as the general agent of the company pending negotiations": May on Insurance, p. 235. "And the possession of blank policies and renewal receipts signed by the president and secretary is evidence of such general agency": May on Insurance, p. 235.

"If a foreign company appoints A and B as local agents, and supplies them with blank policies signed by the company, and which they may fill up and countersign, they are its general agents: *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 11 Am. St. Rep. 121, 20 N. E. 77; May on Insurance, p. 235, note.

"That an insurance agent authorized to make contracts of insurance and issue policies may waive forfeitures, and reinstate and restore a void policy, is held by numerous cases": 2 Wood on Insurance, sec. 415.

In the *Murphy* case this court cited with approval the doctrine that an insurance company is bound by the acts of its agent "in all matters within the scope of his real or ^{soo} apparent authority," and that third persons in dealing with such agent, are not bound to go beyond the apparent authority conferred on him: *Murphy v. Royal Ins. Co.*, 52 La. Ann. 782, 27 South. 143. In the case at bar the agent apparently had original powers to make contracts of insurance without previous applications, and without referring the matter to the company. In issuing the policy in question he exercised such original powers, and the company acquiesced therein. The

agent had a power of attorney, but the assured knew nothing of its provisions, and it therefore matters not whether it was general or special. The testimony of the agent is positive that the second extension was not subject to the approval or ratification of the company, but was simply notified as in other instances. It is certain that it was written and attached to the policy prior to notice to the company.

Speaking of general agents, Ostrander says: "Having power to make a completed contract, they will also be presumed to have power, by agreement with the assured, to change, alter, or nullify its terms and conditions at any time after the delivery of the contract, and after it has become binding between the parties, unless limitations are imposed, of which assured has notice": Ostrander on Fire Insurance, p. 551, sec. 265.

Hence there can be no real distinction between a local agent with power to make contracts of insurance and issue policies, and general agents having the same power. The power to make and complete contracts differentiates such agents from solicitors and other intermediaries between the assured and the company.

Agents, whether local or general, with power to contract represent the company within the territorial limits to which they are assigned. Their knowledge is imputed to the company, and their acts bind the company within the scope of their employment. The question of the forfeiture of insurance policies comes clearly within such scope, and ⁸⁰¹ is within the apparent authority of such local agents. Every policy of insurance is full of forfeiture clauses, many of which do not affect the soundness of the risk, but at the same time may avoid the policy at the option of the insurer. We consider that it is within the province of a local agent in such cases to decide whether the policy shall continue in force or be canceled. Justice to the insured requires an immediate decision of such questions, which could not be had if the rules of the company required the reference of such cases to the general management, perhaps in a distant state or foreign country. No holder of a policy could afford to await the result of such a reference, nor could any insurance company afford to transact business under such conditions. The agent is present as the representative of his company in all matters of insurance within his territorial district, and his apparent authority cannot, as to the public, be limited by private instructions.

"The authority of an agent must be determined by the nature of his business, and is prima facie coextensive with its requirements": 1 May on Insurance, 4th ed., sec. 126, p. 231. "With respect to waiver of the breach of a condition in a policy, the most liberal view is that the agent's authority is coextensive with the business intrusted to his care": 1 May on Insurance, 4th ed., sec. 126, p. 232, note, citing *Weed v. London etc. Fire Ins. Co.*, 116 N. Y. 106, 22 N. E. 229; *German Ins. Co. v. Gray*, 43 Kan. 497, 19 Am. St. Rep. 150, 23 Pac. 637, 8 L. R. A. 70.

In the case at bar we are of opinion that the agent had the apparent power to waive the forfeiture resulting from the failure of the insured to complete the inventory within the thirty days specified in the contract.

This was the only issue discussed or decided by the court of appeal. As to keeping a set of books, the obligation did not arise until after completion of the inventory.

As to the charges of fraud and bad faith, they were decided by the district judge to be unsupported by evidence, and were not noticed by the court of appeal. The writ of review is intended to correct errors of law,⁸⁰² and this court will not review questions of fact, save in exceptional cases.

It is, therefore, ordered that the judgment of the court of appeal herein rendered be annulled and reversed, and it is further ordered that the judgment of the district court be affirmed, and that defendant pay costs in both appellate courts.

On the Waiver by Insurance Agents of conditions in policies of insurance, see the recent case of Johnson v. Aetna Ins. Co., 123 Ga. 404, 107 Am. St. Rep. 92, and note. According to *Mitchell v. Mississippi Home Ins. Co.*, 72 Miss. 53, 48 Am. St. Rep. 535, an insurance company, having insured a stock of goods, cannot set up a breach of an iron-safe clause in its policy, if its agent, when he issued the policy and collected the premium, knew that the insured had no safe and did not intend to have one.

JACKSON v. NATCHEZ AND WESTERN RAILWAY COMPANY.

[1-4 La. 981, 38 South. 701.]

CARRIERS—Duty to Protect Passenger in Dangerous Position.

It is the duty of the carrier to protect the passenger against his own negligence, under penalty of the failure to do so being regarded as the proximate cause of a resulting accident and injury to the passenger, when it has been the overcrowding of a railroad train resulting from the mismanagement of the carrier that has forced the passenger to occupy a dangerous position. (p. 373.)

CARRIERS—Injury to Passenger—Right of Excursionist.

Railroad excursionists have a right to return home on the train which took them out, and if, owing to the crowded condition of the cars, the platforms thereof are the safest place they can secure, they have a right to occupy them, and in so doing are not guilty of contributory negligence in case of accident and injury to them. (pp. 373, 374.)

NEGLIGENCE.—Plea of Contributory Negligence, when properly pleaded in the alternative, does not admit the negligence charged in the complaint. (p. 374.)

CARRIERS—Negligence—Failure to Carry Emergency Tools.

The failure of a railroad company to equip its train with tools usually carried for emergency use in case of wreck is negligence, and if, owing to the absence of such tools, a passenger is not rescued from the wreck as soon as he otherwise would have been, the company is liable in damages for his additional suffering caused by such delay, no matter whether the wreck was or was not caused by the negligence of the company. (p. 377.)

CARRIERS—Negligence—Collapse of Bridge.—A railroad company is liable for an injury to a passenger resulting from the collapse of its bridge unless it can show that the bridge as originally constructed was as safe as the highest degree of care and skill could make a bridge of that class, and that, to the fullest extent that the highest degree of care and foresight could suggest, it was inspected for discovering and remedying any defect that might have developed in it from the operation of the road or other causes, and, in case the defect was latent in the material, then that the material was tested before being put into position. (p. 378.)

H. H. Hall and S. L. Elam, for the appellant.

N. M. Calhoun and Dinkelspiel & Hart, for the appellees.

⁹⁸¹ **PROVOSTY, J.** The defendant railway company gave a Fourth of July excursion ⁹⁸² for colored people out of Vidalia to Turtle Lake, as had been done for several years past. Vidalia is a town situated on the Louisiana side of the Mississippi river, opposite Natchez, Mississippi. Turtle Lake is a picnic grounds near the station of the same name on the defendant's railway. Neither on the grounds nor at the station is there any protection whatever against

the weather for excursionists, save two or three negro cabins in the vicinity of the station, where shelter for a limited number of persons might perhaps be had for the asking.

It was a one-day excursion, going out in the morning and returning in the evening. The train was composed of one locomotive, one tank-car, one box-car, two coaches, two flat cars, and five box-cars. Going out, the train was crowded even to the platforms, and the regular afternoon train out of Vidalia carried more people to Turtle Lake. Others, who had come in wagons, stayed over to return in the evening on the excursion train. The train was taken to a station beyond Turtle Lake, to be brought back at about 9 o'clock; but, some rain having fallen, and the track being slippery, the locomotive was unable to pull the entire train, even in its empty condition, and five cars were dropped on the way. A drizzling rain had set in, and the night was so dark that a person could not recognize his elbow neighbor, except by the sound of his voice. A crowd of eight or nine hundred excursionists stood on both sides of the track, in the dark and the rain, awaiting the arrival of the train. It came on in the dark, without a single light aboard save the headlight of the locomotive. What took place might have been anticipated, and can be readily imagined. There was a wild scramble in the dark for getting aboard, even before the train had fully stopped.

Plaintiff, a healthy, vigorous young colored woman, was one of the excursionists. She says she scrambled with the rest to ~~get~~ get aboard, and got on the platform of one of the coaches, and secured a hold on the jamb of the door, while her companion and friend, Jennie Stewart, held on her, with an arm around her waist. Sam Gross testifies that he accompanied plaintiff to, and helped her on, the platform, and advised her to try to get inside, out of the weather.

After waiting some ten minutes for everybody to get aboard, the president of the road, Davis, who was in charge of the excursion, went around with a lantern to see how eight or nine hundred people had managed to crowd themselves on one locomotive, one tank-car, one box-car, two coaches, and two flat cars. In this enumeration of the

cars we intentionally include the locomotive, because it afforded coigns of vantage where not a few were lucky enough to get a foothold, and even also a handhold probably. Plaintiff was not so fortunate as that, if we are to believe defendant's contention that she occupied a position between two coaches, holding on by the tips of her feet to the edge of the platform of one coach, and by her buttock to the railing of the platform of another. A man says Davis, was found "standing with one foot on the platform of the coach, and his other foot on the head block of the box-car; and there was a little girl standing right up by the side of him. She was hanging by a brakeman's staff, with nothing else underneath, except she had her hand on a coupler."

Whatever plaintiff's position was, the train, after moving about one hundred yards and coming to a stop from the inability of the locomotive to pull it, finally started, and had made about three miles, at a rate estimated at from three to eight miles an hour, when a bridge gave way, right under where plaintiff was, and plaintiff fell among the wreckage, and suffered the injury for which she brings the present suit in damages, charging that the accident occurred through the negligence of the defendant company.

²⁶⁴ Plaintiff's end of the coach had dropped down until the coach stood at an angle of forty-five degrees. Plaintiff was found outside of the platform, half seated on the edge of it, holding onto the railing with both hands, up to her waist in the debris of the bridge, both her feet under the platform behind her, and both her legs caught, below the knee, between it and a piling, one of them apparently simply caught and pinned, the other held crushed and mashed against the piling.

In that position of torture she remained for about three hours, until an ax could be procured from a distance and the piling chopped away. The engine had gone out of commission for want of water, and could not be utilized for getting this ax, or for hauling to Vidalia that part of the train which had crossed in safety. The next morning it was supplied with water from the bayou by means of buckets, and plaintiff was taken to Vidalia, after she had remained on an improvised stretcher all night in the woods and in the weather. The record does not specify at what

hour she reached Vidalia, but by that time, although she had received medical aid immediately after she had been extricated from her horrible position, she was in a dying condition. The most powerful restoratives had to be administered to her, and for forty-eight hours her life hung by a thread. The mashed leg had to be amputated. The other, which had only a simple fracture, was reset. The record leaves it doubtful whether she has the use of this other leg; but she testifies that she can no longer earn a livelihood, and that she is now dependent upon her father for support.

The coach, in falling, became uncoupled from that in front, and the latter crossed safely. Defendant's contention is that, when the coaches separated, plaintiff lost her precarious foothold, and dropped straight down into the wreckage, and that her injury ^{was} was due exclusively to her fault in occupying this dangerous position. Plaintiff and her companion, Jennie Stewart, say that with the sudden dipping of the coach they slipped and fell, and that plaintiff's feet were caught in the wreckage, whereas only Jennie Stewart's dress was thus caught.

Accompanying Davis and his solitary lantern on the inspection tour before the starting of the train, there went Campbell, justice of the peace and mayor of Vidalia, Roundtree, deputy sheriff, and Johnson, colored deputy sheriff. All four testified for defendant. Davis says he found plaintiff in the acrobatic position between the two coaches described above. Campbell says that she "was sitting on the floor of the platform, just to the left of the door, with one foot stretched straight out on the platform, and the other sorter hanging over toward the step." Johnson says that he saw plaintiff sitting either on the floor of the platform, or on the hand-railing—he could not be positive which—"with her legs hanging down between the cars." Roundtree does not remember seeing plaintiff, nor having heard the colloquy described by Davis and Johnson as having taken place between her and Davis, wherein Davis is said to have urged her to get down and to have warned her of the danger of her position. Plaintiff and her companion, Jennie Stewart, deny positively that Davis spoke to plaintiff.

When the case came on for trial, defendant applied for a continuance, on the ground of the absence of four material witnesses, namely, Lucas Johnson, Joel Baer, Israel Garner, and Clarence Bryant. Davis, the president of the defendant company, made an affidavit to the effect that he expected to prove by these absent witnesses that they were "on the same coach with plaintiff at the time of the accident, and that plaintiff ^{was} was sitting on the guard or the hand-rail of the platform of the coach with her feet resting, or upon, the platform of the coach immediately in front of the coach on which plaintiff was sitting down on said guard or hand-rail"; that they were near plaintiff, "and could well see the position she was in." For the purpose of avoiding a continuance, plaintiff admitted that said witnesses, if present, would testify as stated in the affidavit.

Cross-examined as to the extent of his information touching these witnesses, Davis said that Lucas Johnson had told him that "there was a man right by the side of this girl, and he was pulling his feet out from behind the same tie that was in front of her, and that this was Israel Garner, and that he was in Arkansas." Questioned as to when and where Lucas Johnson had told him this, Davis answered: "It was, I think, in Judge Elam's office, on the day, if I remember, when we expected to try the case, the latter part of last week."

Questioned further, he answered: "I don't know whether it was that day or not. I saw him over here; he was here. Q. Is Lucas Johnson a colored man? A. Yes, sir. Q. Is he a black man or a mulatto? A. I didn't pay particular attention to his color; I did not see him but a few minutes. Q. Is he a tall man or a low man? A. I didn't pay particular attention to him; I expect he is an ordinary sized man. Q. Is he a slender man or a stout man? A. I think my answer will cover that. Q. But you actually did have a conversation with him? A. Yes, sir; that is, my attorney did, and I think I told him who he was."

Touching Clarence Bryant, he said: "I don't remember who—I think Tom Johnson—told me about Clarence Bryant. I believe so; I am not positive; and Clarence Bryant lives in Natchez, Mississippi. I don't know whether I talked with him or not. I did not talk with him in Judge

Elam's office. I saw him, and I may have talked to him, but that was last week, before this affidavit was filed."

Touching Joel Baer, he says: "Captain Richardson, of the Natchez and Vidalia Ferry, informed me in reference to Joel Baer, and I sent for Joel Baer and tried to have him to come down to the ferryboat on the Natchez side. He is a watchman, as I understand, on ²⁸⁷ the 'Betsy Ann,' and was asleep and would not come."

A great many witnesses on the trial were asked if they had seen any of these four men on the excursion, or at the picnic, and not one of them had seen any of them; and not one of them knew them, or of them, except one, Sol. Carter, who knows Lucas Johnson when he sees him.

Under the foregoing testimony, it is not over-certain that Clarence Bryant, Joel Baer and Israel Garner are not so many Mrs. Harrises, or that, if real creatures of flesh and blood, and produced on the witness stand, they would have testified as stated, or that Lucas Johnson would have done so; but certain it is that if they had so testified nobody would have believed them, for at the time of the accident there was not even the solitary lantern, and it is an incontestable fact in the case that the night was too dark for anything to be seen, and it is simply impossible that the witnesses should have seen the position of plaintiff's feet. Among the large number of witnesses who testified in the case, not a single one was able to name a single one of the persons who were on the particular car on which he or she was, except their own traveling companion of whose presence they were cognizant otherwise than by sight, and except also in a few instances where they recognized a neighbor by his or her voice.

The facts must be taken to be that the plaintiff was standing on the platform, and that with the sudden dip of the car she slipped, as she and her companion Jennie Stewart say they did.

Davis is flatly contradicted by plaintiff and her companion, Jennie Stewart, and by his own two witnesses who accompanied him on the inspection tour, by Campbell, who says that plaintiff was seated on the floor of the platform, and by Johnson, who says that plaintiff's "legs were hanging down between the cars"; and to some extent he is ²⁸⁸ contradicted by Sam Gross, who helped plaintiff to

get on the platform, and advised her to try to get inside, out of the weather; and is corroborated only by what it is admitted his absent witness, Lucas Johnson, and his three other more or less mythical, absent witnesses, would swear to if present. The jury evidently believed plaintiff's statement, and refused to credit Davis and his four continuance witnesses; and the case, as a whole, impresses this court in the same way.

So far as the pretended admissions made by plaintiff while her legs were being mashed between the car platform and the bridge piling, and after reaching Vidalia, are concerned, and so far as the statement made by some of defendant's witnesses to the effect that plaintiff was not suffering while pinned in the wreckage are concerned, the jury evidently did not believe them. The said admissions were not heard by the persons who were holding plaintiff up, or by any of the bystanders. These heard plaintiff crying out in her agony, and calling upon the Lord. From the excess of pain she fainted twice. By the time she reached Vidalia she was, as already stated, in a dying condition. The court believes the plaintiff when she says: "No, sir, I did not say anything like that. I did not have that much sense then."

Defendant's able counsel argue that plaintiff must have been standing outside of the railing of the platform, as testified to by Davis and his four continuance witnesses, because she was found outside of the railing after the accident; but while counsel argue that the spaces between the uprights of the railing were not sufficient to allow of plaintiff's having slipped through, the testimony on the point is silent, and, the court will add, unnecessarily and suspiciously silent.

A dilemma is presented to defendant. Plaintiff's position was reasonably secure, or it was not. If it was reasonably secure, her ⁹⁸⁹ adopting it as the only chance provided her for getting home that night out of the dark and rain was not negligence, on the same principle that riding on the platform of the coach is not negligence where no better accommodation is provided: 6 Cyc. 653. It is also to be noted that, if it be true that she occupied it, then that she occupied it safely until the bridge broke down, and, presumably, might have continued to occupy it safely

to the end of the journey but for the breaking down of the bridge.

On the other hand, if it were so insecure that her occupying it, even under stress of the circumstances, was unreasonable, then it was the bounden duty of Davis, as conductor of the train, to insist upon her getting down, even if his sole means of compelling her was to refuse to start the train until she had done so. He had no right to assume that she realized as fully as he did the danger of the position. Under certain circumstances it is the duty of the carrier to protect the passenger against his or her own negligence, under penalty of the failure to do so being regarded as the proximate cause of a resulting accident: 6 Cyc. 641. And all the more imperative is this duty in a case where it has been the overcrowding of the train, resulting from the mismanagement of the carrier, that has forced the passenger to occupy the dangerous position: 6 Cyc. 623.

Indeed, considering that people were riding on the top of the box-cars, on the engine, and virtually wherever they could manage to hold on—and all through defendant's fault by not providing better accommodation—and with the full knowledge of the president of the road, any charge against a passenger, especially against a young colored woman, of riding in a negligent manner, comes out of the mouth of the defendant with poor grace.

But it is not necessary to go into all these questions, since the court finds that plaintiff was riding on the platform.

²⁹⁰ Davis says that he went around the train telling those who were in dangerous places that they had to get off, but he does not say that he requested those who had been so fortunate as to secure standing room on the platforms to get down. His statement is that those on the platforms were not in so dangerous a position, because "they are protected by the guard-rails."

The clear duty of Davis was to exclude from the train all those who, not belonging to the excursion and unprovided with tickets, had no right thereon. His lame excuse that he could not control the crowd cannot serve. Nothing shows that he could not have done so; at any rate, he made no serious effort in that direction. He had in his

own hands the remedy of refusing to start the train until all those not belonging thereon should have got off. The truth of the matter is that the utter inadequacy of the accommodation, and the darkness, had brought about a situation of very great difficulty, calling for heroic treatment, and that Davis, instead of dealing seriously with it, followed the course least troublesome to himself, evidently not realizing the extent of his responsibility in the premises.

Those who were on the platforms had a right to remain there. Their contract entitled them to get home on that particular train (6 Cyc. 581), and, if the platform was the safest place they could secure, they had the right to occupy it. Defendant's witness Roundtree says that the cars were a perfect jam; that he tried to get on, but could not.

Under the circumstances—the choice lying between riding on the platform and staying the greater part of the night, if not all night, in the rain and the dark—it was not negligence for plaintiff to ride on the platform: 2 Rapalje & Mack's Digest, pp. 375, 503, No. 476; *Lynn v. Southern Pac. Co.*, 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710; 5 Am. & Eng. Ency. of Law, p. 678; 6 Cyc. 653, notes 38, 39. ⁹⁹¹ We conclude that plaintiff was not guilty of contributory negligence, and pass to the question of defendant's negligence.

The learned counsel for plaintiff argue that the defendant, having pleaded contributory negligence, which is a plea in confession and avoidance, has thereby admitted its negligence, and shifted the burden of proof in that regard. In reply to this, the learned counsel for defendant say that the answer does not contain a plea of contributory negligence, but that, on the contrary it expressly alleges that the injury of plaintiff was due entirely to her own negligence; that she was the sole cause of it.

It is true the answer reads in that way, but it must be taken to mean that the plaintiff contributed to the accident, not that she was the sole cause of it. To say that she was the sole cause of it would mean that she had caused the bridge to collapse and the coach to be precipitated. This, evidently, was not the idea meant to be conveyed, and no one in the lower court so understood the answer. It was taken to be a plea of contributory negligence, and the case was tried on that theory. On any other theory, nine-

tenths of the evidence offered by defendant would have been irrelevant, and the affidavit of its president to the materiality of the expected testimony of the four absent witnesses would have been untrue.

But the court does not agree with the contention that a plea of contributory negligence, when properly pleaded in the alternative (and it must be taken to have been so pleaded in this case, if at all), admits the negligence charged in the petition. Some courts have taken that view (5 Ency. of Pl. & Pr., p. 11), but no decision is cited where this court has done so, and we do not think that such a doctrine has any place in our liberal system of pleading. What the defendant says by such a plea, coupled with a general denial, as in this case, is that he is not guilty of the negligence charged; but that if he is, then ⁹⁹² that plaintiff by his or her own negligence contributed to the resulting injury, and for that reason cannot recover.

Before plaintiff can recover, she must show that her injury was caused by defendant's negligence. We copy verbatim her assignment of negligence, to wit:

"That her said sufferings, injuries and disabilities were caused by no fault or neglect of her own, but were proximately and directly caused by the imprudence, want of skill, care, and caution, and by the gross, willful, wanton, and cruel negligence of the said railway company, its managers and employes, in the following particulars, to wit:

"1. In overcrowding its cars and coaches beyond their capacity, as aforesaid.

"2. In bringing to bear upon its road and bridges, and especially upon bridge No. 26, a greater weight than they and it could bear.

"3. In the old and rotten condition of the road and its bridges, and especially of bridge No. 26.

"4. In the improper and faulty construction of its bridges, and especially of bridge No. 26.

"5. In the want of proper and timely inspection of its road and bridges, and especially of bridge No. 26.

"6. In the want of proper and timely repairs to its road and bridges, and especially to bridge No. 26.

"7. In the want of a proper equipment of its train with the necessary tools, instruments, and appliances needful

and useful in case of an emergency or wreck. In the want of suitable, proper, and sufficient accommodations and facilities for passenger traffic.

"8. In not carrying a proper and sufficient supply of water in the reservoir on its locomotive, or in negligently allowing same to leak out. In not providing a supply of water for its locomotives and engines at proper, convenient and suitable places.

"9. In not timely relieving petitioner from her perilous condition aforesaid.

"10. In allowing petitioner to remain in the woods all night without proper surgical and medical treatment and attention.

"11. In not quickly and speedily conveying petitioner to Vidalia or Natchez, where she could have obtained the care and attention of skilled physicians, surgeons, and nurses.

"12. In not timely providing the means of conveying petitioner from the place of accident to Vidalia or Natchez. In the want of proper care, prudence, caution, and skill in the management of its train and the handling of its passengers."

A railroad bridge should be so constructed as to sustain the weight of any train that may have to pass over it; hence the two grounds ²⁹³ of the overloading of the cars and of the deficiency of the bridge are in reality one and the same.

There can be no question whatever that the business of providing the excursionists with return transportation was most grossly and culpably mismanaged, but between that and the injury complained of there was no causal connection. It was the breaking down of the bridge that was the proximate cause of the injury. True, plaintiff would not have been injured if she had been provided with a seat, or even with standing room inside of the coach; but the failure to provide a seat or even standing room inside of the coach, on a cheap excursion, such as this one was, is not, as a matter of law, and is not shown as matter of fact to be, negligence such as, of itself alone, without the co-operation of any other or further negligence of the railway company, will give rise to a cause of action in behalf of an excursionist who is compelled thereby to ride on the platform, and, as a result of being there, is in-

jured by an accident occurring through no fault of the railway company.

The absence of the necessary tools for use in case of a wreck, and the faulty condition of the locomotive, did not contribute to the accident; but, as the event showed, the absence of the ax usually carried by railways for just such emergency use, or the absence of some other equivalent tool, contributed directly to the protraction of plaintiff's sufferings. Had there been such an ax or other equivalent tool, plaintiff would have been extricated promptly, and would have been spared the three hours of torture. Plaintiff was released within a few minutes after an ax had been procured. Whether responsible or not for the collapse of the bridge, defendant is certainly responsible for this easily avoidable protraction of plaintiff's sufferings.

The failure to carry this ax or other equivalent tool was not negligence simply, ⁹⁹⁴ but was negligence of the worst sort. Ordinary common foresight would have suggested the doing so, let alone the high degree of foresight to which a railway company is held for the safety of its passengers. For the additional sufferings which she thus endured, unnecessarily, through defendant's gross and unmitigated fault, plaintiff is entitled to judgment, regardless of what may be the issue of the suit on the question of negligence in connection with the bridge. The amount of this judgment we shall not fix at this time, preferring to leave it to be fixed by the jury when it comes to pass upon the case as a whole.

Whether the breaking down of the bridge was due to the negligence of the defendant company is left an open question by the record. Defendant sought to offer evidence on that subject, but the court ruled that the evidence was inadmissible, because the defense of contributory negligence admitted the negligence with regard to the bridge.

Logically it did. Without there be negligence, there cannot be contributory negligence. Nor shall we say that in the light of the authorities elsewhere on the subject, and in the absence of any announcement from this court, our learned brother of the lower court did not rule right from his standpoint; but, as indicated by what has already been said, the ruling cannot have the sanction of this court.

The two defenses, of denial of negligence and of allegation of contributory negligence, clash only in their verbal enunciation; in practice they do not. They depend upon two independent sets of facts: the one upon the conduct of defendant,

and the other upon the conduct of plaintiff. On the trial of the case they do not cause confusion or complication, and do not embarrass the plaintiff in the presentation of his case. all he has to do is to produce before the court all the facts. Both are valid defenses, and there can be no good practical reason for compelling the defendant ⁹⁹⁵ to elect between them. However logical it might be, there is in practice no good reason for it; and, in addition to being unnecessary, it might, in a large number of cases, prove downright mischievous. Even in the full light of all the facts as produced on the trial, it is not always easy, as this court, to its chagrin, knows but too well, to determine whether the law's judgment in the case should be founded upon absence of negligence on the part of defendant, or presence of contributory negligence on the part of plaintiff. To compel the defendant to make this election in the uncertain light of the early dawn of the case, would be to put aside practical utility and justice for the sake of mere abstract, superficial consistency.

The case will therefore have to be remanded for the reception of evidence on the question of the negligence vel non of defendant in connection with the bridge. But the taking of evidence will be restricted to that single point, and the burden will not be on plaintiff to show the negligence, but on defendant to show the absence of it (*Le Blanc v. Sweet*, 107 La. 355, 90 Am. St. Rep. 303, 31 South. 766); and the defendant will have to be held liable in connection with said bridge, unless it can show that the bridge as originally constructed was as safe as the highest degree of practical care and skill could make a bridge of that class, and that, to the fullest extent that the highest degree of care and foresight could suggest, it was inspected for discovering and remedying any defects that might have developed in it from the operation of the road or other causes, and, in case the defect was latent in the material, then that the material was tested before being put in position: 6 Cyc. 617-619; *Hutchinson on Carriers*, 2d ed., secs. 501, 512a, pp. 567, 581; 6 *Rapalje & Mack's Digest*, p. 255, Nos. 137 et seq., 162, 171; *Louisville City Ry. Co. v. Weams*, 8 Am. & Eng. Ry. Cas. 401; *Ingalls v. Bills*, 9 Met. 1, 43 Am. Dec. 346; *Bowen v. New York Cent. R. Co.*, ⁹⁹⁸ 18 N. Y. 408, 72 Am. Dec. 529. In other words, for rebutting the presumption of negligence, the defendant will have to show that the defective condition of this bridge was due to some cause which, by the exercise of the highest degree of care and skill and foresight, it could not have guarded against.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be set aside, and the case be remanded for further trial in accordance with the views herein expressed, with right to a jury; no further evidence to be taken, however, except on the sole point of the negligence vel non of the defendant in connection with the bridge; the damages, in the event defendant is found to have been negligent in that connection, to be for the entire case, but, in the contrary event, to be only for the additional sufferings and injury resulting to plaintiff from her not having been extricated from the wreckage as soon as might have been done had the train been equipped with the proper tools in prevision of such an emergency, the plaintiffs to pay the costs of this appeal.

A Railway Company Owes to Its Passengers the duty of exercising a high degree of care in maintaining its bridges and roadbed in a safe condition: Louisville etc. Ry. Co. v. Snyder, 117 Ind. 435, 10 Am. St. Rep. 60; Illinois Cent. B. B. Co. v. Beebe, 174 Ill. 13, 66 Am. St. Rep. 253; Furnish v. Missouri Pac. Ry. Co., 102 Mo. 438, 22 Am. St. Rep. 781; Ohio Valley Ry. Co. v. Watson, 93 Ky. 654, 40 Am. St. Rep. 211, and cases cited in the cross-reference note thereto.

If a Passenger Rides on the Side Steps of a street-car with the knowledge and consent of the conductor and from necessity for want of room to sit or stand inside, he is entitled to the same degree of diligence as other passengers to protect him from known and avoidable dangers; but if he rides in such position when it is reasonably practicable for him to stand or sit inside the car, he takes upon himself the risk of his position: Woodroffe v. Roxborough etc. Ry. Co., 201 Pa. St. 521, 88 Am. St. Rep. 827. For other recent cases on this question, see Freeman v. Pere Marquette R. R. Co., 131 Mich. 544, 100 Am. St. Rep. 621; Parks v. St. Louis etc. Ry. Co., 178 Mo. 108, 101 Am. St. Rep. 425; Fletcher v. Boston etc. R. R. Co., 187 Mass. 463, 105 Am. St. Rep. 414.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

WENZEL v. POWDER.

[100 Md. 36, 59 Atl. 194.]

EXECUTION, Interests Subject to.—Whenever an Individual has an Interest in Property which may be Alienated or Assigned, that interest, whether legal or equitable, is liable to the payment of his debts. (pp. 382, 383.)

TRUSTS, Creation of so that Property is not Subject to Execution.—Whenever the founder of a trust is the absolute owner of the property disposed of, and has a right to prescribe the terms on which his bounty shall be enjoyed, he may provide in direct terms that the property shall go to his beneficiaries to the exclusion of the latter's alienees and creditors. (p. 383.)

TRUST OF INCOME for Support, When Belongs Absolutely to the Beneficiary.—When the whole income or a definite sum is given to a beneficiary for his support, the whole belongs to him and is to be applied by him at his discretion, and the expression of the purpose for which it is given is not deemed to be an expression of an intention that the right to secure it shall not be inalienable, but when the right given is that of support out of a fund which is given to another, the right is in its nature inalienable, and the intention of the donor that it shall not be alienated is presumed. (pp. 383, 384.)

SPENDTHRIFT TRUSTS, When not Created by a Gift for Support.—If property is conveyed in trust, so that the trustee shall take the rents and profits and apply them to the support and maintenance of designated persons during their lives, the beneficiaries have the right to the whole of the fund thus created and not a mere right to support out of it, the trust created is not a spendthrift trust, but the interest of the beneficiaries is assignable and may be subjected to the payment of their debts by proceedings in equity. (p. 386.)

TRUST FOR SUPPORT, When Belongs to the Beneficiaries Absolutely.—If a deed gives the whole income for the support and maintenance of the beneficiaries, the whole belongs to them, and the statement of the purpose for which it has been given cannot be

deemed to be the expression of an intention that it shall not be alienable. (p. 386.)

TRUST, When does not Terminate.—If property is conveyed to be held in trust to receive the rents and profits and apply them for the support and maintenance of H. and his wife and children during the lives of H. and his wife, and after their death the property to belong to their children, share and share alike, the child of any deceased child to take only its parent's share, and H. dies leaving two daughters, after which the interest of the widow is conveyed to one of them, the trust does not terminate, because there is a contingent limitation over in favor of the children of the daughters who may come into being during the life of the widow. (pp. 386, 387.)

S. S. Field, for the appellant.

Frank Gosnell, George Ween Williams and James W. McElroy, for the appellee.

⁴² McSHERRY, C. J. The questions presented by the record now before us arise on a demurrer to a bill in equity which was filed by the appellant against the appellees in the circuit court of Baltimore City. The demurrer was sustained and the bill was dismissed, and from the decree so passed the pending appeal was taken. The facts which it is necessary to state are all set forth in the ⁴³ bill and are, of course, not disputed. It appears that by a deed dated March 25, 1881, duly executed and recorded, one Moses Hindes Powder conveyed all his property to himself as trustee, in trust to, for and upon the following uses, trust and purposes, namely: "In trust so that the said Moses Hindes Powder, trustee herein named, shall and will receive, take and collect all the rents, issues, income, profits and interest of said property hereby conveyed, and from all investments or changes of investments of the same, made or to be made, as hereinafter provided for, and apply the same to the support and maintenance of the said Moses Hindes Powder, and his wife and children, during the lives of the said Moses Hindes Powder and his wife, and after the death of both of them the principal of said estate and all increase thereof to become the absolute property of their children, share and share alike, the children of any deceased child to take only their parent's share, that is, that share thereof to which, if living, the parent would be entitled." In the year 1883 the Safe Deposit and Trust Company was substituted as trustee in the place of Moses Powder, and in October, 1894, the latter died.

In March, 1899, Algeria V. Powder, the widow of the settler, conveyed all her interest under the deed of trust to one

Sarah A. Danskin, and in May following the latter transferred the same interest to Beryl D. Powder and Margaret D. White, the only children of the settler. During the years 1899 and 1900 the plaintiff, Charles G. Wentzel, who is the appellant here, furnished the widow and two daughters, who all live together, with groceries and provisions, and for the sums due therefor he took the promissory notes of the two daughters and their mother. After parting with her interest in the trust property by the deed above alluded to Mrs. Powder applied for the benefit of the bankrupt law and was discharged from the payment of her debts. The appellant brought suit upon some of the promissory notes. Mrs. Powder pleaded her discharge and Beryl D. Powder, one of the daughters, pleaded infancy, but judgment was obtained against Mrs. White, the other daughter.

⁴⁴ The pending bill was then filed, first, to have the trust declared at an end and to subject the property covered by the deed to the payment of the judgment; or, as alternative relief, to have Mrs. White's share of the income impounded and applied in satisfaction of the judgment. The appellees resist the granting of the relief sought, first, because the trust has not terminated; and, secondly, because the trust created by the deed of 1881 is a spendthrift trust, and the income is therefore beyond the reach of the creditors of the cestui quod trustent. We will consider these two propositions in their inverse order.

Is the trust created by the deed a spendthrift trust? The terms of the deed must furnish an answer to this inquiry. It will be observed that there are no words used in the deed to indicate an intention on the part of the settler to make the income inalienable, unless the direction to the trustee to "apply the same to the support and maintenance of the said Moses Hindes Powder, and his wife and children during the lives of the said Moses Hindes Powder and his wife" can be interpreted as being sufficient to accomplish that result. Clearly, as respects the settler himself, neither the words above quoted nor any others could have protected the income from attachment and condemnation at the suit of his creditors: *Warner v. Rice*, 66 Md. 436, 8 Atl. 84. And so it comes down to this: Do the words "support and maintenance," the settler being now dead, preclude the income from being alienated during the lifetime of the widow? Whenever an individual has an interest in property, which he may alien or assign, that interest, whether it be legal or equitable, is liable for the payment

of his debts. "It is wholly against the policy of the law to allow property, whether legal or equitable, to be fettered by restraints upon alienation, and generally whenever property is subject to alienation by the owner it is subject to his debts": *Warner v. Rice*, 66 Md. 440, 8 Atl. 84. We all know that in England it is well settled that the devise of an equitable estate or interest for life to any person, other than to a married woman, carries with it, as a necessary incident, the right of alienation by the cestui que trust, and that it is liable for the payment of his ⁴⁵ debts, and no provision by way of inhibition, which does not operate as a cessor or limitation over of the estate, can protect it against the claims of creditors: *Smith & Son v. Towers*, 69 Md. 84, 9 Am. St. Rep. 398, 14 Atl. 497, 15 Atl. 92. But in this country the supreme court of the United States, the courts of last resort in some of the states and this court, have, after full consideration, determined that the power of alienation is not a necessary incident to an equitable estate for life, and that the owner of the property may so dispose of it as to secure its enjoyment by the beneficiary, without making it alienable by him or liable for his debts: *Smith v. Towers*, 69 Md. 84, 9 Am. St. Rep. 398, 14 Atl. 497, 15 Atl. 92; *Reid v. Safe Deposit etc. Co.*, 86 Md. 467, 38 Atl. 899; *Cherbonnier v. Bussey*, 92 Md. 421, 48 Atl. 923. The principle which lies at the root of the doctrine, applied for the first time in Maryland in the case of *Smith v. Towers*, is, that the founder of a trust being the absolute owner of the property disposed of, and having the right to prescribe the terms on which his bounty shall be enjoyed, may provide in direct terms that his property shall go to his beneficiary to the exclusion of the latter's alienees and creditors; because such a restriction is not repugnant to the estate or interest granted, nor is it such a restraint on the right of alienation as the law, for reasons of public policy, forbids.

Before proceeding to analyze the language used in the instruments with which this court dealt in the cases heretofore decided, it will not be amiss to state, in the words of the supreme judicial court of Massachusetts, the general principle applicable to the pending and similar inquiries. In *Slattery v. Wilson*, 151 Mass. 268, 21 Am. St. Rep. 448, 23 N. E. 843, 7 L. R. A. 395, it is said: "When the whole income or a definite sum is given to the beneficiary for his support, the whole belongs to him, and is to be applied by him at his discretion,

and the expression of the purpose for which it is given is not deemed to be the expression of an intention that the right to secure it shall not be inalienable, but when the right given is for a support out of a fund which is given to another, the right is in its nature inalienable, and the intention of the donor that it shall not be alienated is presumed."

⁴⁶ In the deed now under consideration there are no terms to denote an intention or purpose to impose a restraint on the alienation of the income other than the words we have pointed out; namely, that the trustee should apply the income to the "support and maintenance" of the cestui que trust, during the lives of the settler and his wife. Starting with the case of *Smith v. Towers*, 69 Md. 84, 9 Am. St. Rep. 398, 14 Atl. 497, 15 Atl. 92, the words which were there held to create a spendthrift trust were these: The testator devised certain real estate to a trustee in trust to collect the rents and profits and to pay the same to his son, Robert, "into his own hands and not into another, whether claiming by his authority or otherwise," and upon his death to convey the real estate to the children of the cestui que trust. The difference between the phraseology of that will and the deed before us is obvious at a glance, and we need not pause to comment on it. In *Maryland Grange Agency v. Lee*, 72 Md. 161, 19 Atl. 534, a testatrix devised all her property, real and personal, to her sons, in trust for the support, maintenance and education of their respective families, to be held by them, and the rents and profits thereof, and she declared that no part of the land should be made liable, in any event, for their debts and contracts; and it was held that the crops growing thereon were likewise exempted from liability. In *Reid v. Safe Deposit etc. Co.*, 86 Md. 464, 38 Atl. 899, it appeared that the testator devised and bequeathed to trustees all his property "in trust, to hold and manage the same and collect, etc., and to pay the net proceeds from time to time to my wife, Louise Presbury, for the term of her natural life, and especially so that the same shall not be liable for the debts or contracts of any future husband or in any manner subject to his control, or to be taken in execution or attachment or otherwise howsoever, and so that she shall not pledge or anticipate said property or said net proceeds of income, or any part thereof." It was said by the court, "These terms are too explicit and clear to be misunderstood," and it was held that the income in the hands of the trustee was not subject to attachment for

a debt due by the cestui que trust. In *Brown v. Macgill*, 87 Md. 161, 67 Am. St. Rep. 334, 39 Atl. 613, 39 L. R. A. 806, this state of facts existed: Before her ⁴⁷ marriage a woman conveyed her property to a trustee to collect the rents, etc., and to pay the net income to her and "into her own hands and not to another, whether claiming by her authority or otherwise, for her sole and separate use and upon her separate receipts without power of anticipation." After her marriage she became indebted to the plaintiff and charged her separate estate with the payment thereof, and it was held that the trustee under the deed should be required to pay the debt due to the plaintiff out of the income of the estate in his hands because she could not place her property beyond the reach of her own creditors. In *Jackson Square Assn. v. Bartlett*, 95 Md. 661, 93 Am. St. Rep. 416, 53 Atl. 426, the language of the will, in which a testatrix bequeathed property to a trustee with direction to pay the income to her son, was, "as it shall accrue and not by way of anticipation to my said son for the support of himself and his family, the receipt of my said son to be a sufficient acquittance to my said trustee therefor, but my will is that my said son shall have no power to charge, encumber or anticipate the said income"; and it was held that a spendthrift trust was created and that the interest of the cestui que trust in the income was not liable to attachment by his creditors.

The case at bar is in no respect analogous to those where a spendthrift trust has been sustained. There is no provision in the deed attempting to place a restraint on the alienation of the income, and there is no prohibition against that income being seized by creditors of the beneficiaries. In point of fact, one of the cestui que trustent has actually conveyed away her interest in the income to the others. The two daughters are consequently the only beneficiaries entitled to the income. The declaration that the trustee is to apply the income for their maintenance and support is simply the declaration of the general trust for their benefit. And the record shows that the parties have uniformly acted upon that theory. The trustee has never expended the income for the support and maintenance of the beneficiaries. The trustee has merely paid over to one of the beneficiaries at stated periods the income as it accrued and the party thus receiving it expended it. The debt ⁴⁸ which the appellant seeks to recover was contracted by the beneficiaries for food, and

therefore for articles used in their support and maintenance and if the interest to accrue on the trust fund is applied to the payment of that debt, it will be applied to the support and maintenance of the cestui que trust. Here the whole income is given to the beneficiaries for their support. The thing given is not a mere right to a support out of a fund in which event the amount bestowed would be indefinite, and would be in its nature inalienable and beyond the reach of creditors; but the thing given is the whole income without any arbitrary discretion being lodged in the trustee as to its application. Where trustees have an arbitrary power of applying such part of an income as they see fit to the support of a cestui que trust, and for no other purpose, it was held that nothing passed to the assignees of the beneficiary: *Perry on Trusts*, sec. 386B, citing *Twopenny v. Peyton*, 3 Sim. 487; *In re Sanderson's Trust*, 3 Kay & J. 497; *Lord Bun*, 2 Younge & C. 98; *Holmes v. Penny*, 3 Kay & J. 9. In the same section the author continues: "But if the power is not arbitrary, but is imperative on the trustees to pay over the income for the support of the cestui que trust and another person or persons, the assignees are entitled to take a part upon the insolvency of one, or the whole in the event of the death of the others"; citing *Rippon v. Norton*, 2 Beav. 6; *Wallace v. Anderson*, 16 Beav. 533; *Percy v. Roberts*, 1 Mylne & K. 4.

The case at bar does not fall within the principles applied in any of the decisions heretofore rendered by this court in sustaining a spendthrift trust, and to bring it within the former rulings on this subject the doctrine imposing a restraint on the alienation of an equitable life estate would have to be expanded and stretched much farther than it has hitherto been carried. As the deed gives the whole income for the support and maintenance of the beneficiaries, the whole belongs to them, and the statement of the purpose for which it has been given cannot be deemed an expression of an intention that it shall not be alienable.

2. We do not consider that the trust has terminated. There is a contingent limitation over to the children of the daughters who may come into being during the life of the widow of the settler, should either of the daughters die leaving issue during the life of the widow.

The conclusion we have reached is that the share of Mr. White in the income is liable for the payment of the judgment

recovered against her. As this view differs from the one reached by the circuit court, the decree dismissing the bill will be reversed and the cause will be remanded.

Decree reversed with costs above and below and cause remanded.

The Case of *Bennett v. Bennett*, 217 Ill. 434, 75 N. E. 339, involved questions similar to those considered in the principal case, and the conclusion reached in it does not seem in harmony with that announced in the Illinois case. By the will in question in the latter case it appeared that the testator gave to his wife "for her comfortable support and maintenance, the use, during her natural life, of all my estate, both real and personal, of whatever name or nature, together with the right and authority to dispose of the same, or any part thereof, as she may see fit, and to use the interest and so much of the principal of my said estate as may be necessary for her support and maintenance, as aforesaid, charged, however, and subject to the payment of the sum of \$3,000 to my trustee, David A. Syme, as hereinafter provided, for the benefit of my son, Charles W. Bennett, and also to the payment of a legacy of \$500 to my grandson, Ernest A. Blake, as hereinafter provided." The third clause of the will declared as follows:

"I give, devise and bequeath to my trustee, David A. Syme, the sum of \$3,000 in trust, to invest the same in notes and mortgages on unencumbered real estate, or other safe investments, as his good judgment may dictate, with interest semi-annually, to be collected and paid to my son, Charles W. Bennett, semi-annually until he attains the age of forty years, and if my said wife is then living, to pay to my said son, Charles W. Bennett, at such time, the said sum of \$3,000, which shall then become his absolutely; but if my said wife is not living when my said son becomes forty years of age, then and in that case said David A. Syme shall retain the said \$3,000 and invest the same, and pay the interest to my said son, Charles W. Bennett, as hereinbefore provided, for ten years thereafter, or until he arrives at the age of fifty years, at which time the said \$3,000 shall be paid to my said son and become his absolutely, and in case of his death before the time or times herein fixed for the payment of the \$3,000 to him, it shall go to his heirs."

Charles W. Bennett filed a bill in equity setting forth the facts hereinbefore stated, and the further fact that the sum of three thousand dollars had been separated from the rest of the testator's estate and since February, 1892, had been in the hands of Mary A. Bennett, as such executrix; that she had invested the same in a loan on a note secured by unencumbered real estate, payable in five years with interest at six per cent, payable semi-annually, and that the executrix had accounted to the complainant for interest up to the 16th of November, 1894. The complainant further alleged that

he was thirty-four years of age, in poor health, unable to perform manual labor, and without any trade or profession; that his only source of income was the interest realized on this three thousand dollars; that he was in debt eight hundred dollars, without means of paying, and he asked that a trust be appointed to whom the court should require to be paid out of said three thousand dollars a sum sufficient to pay the complainant's outstanding obligations, and a further sum to enable him to enter into some trade or business out of which he could earn money to support himself. He also alleged that by the terms of the will the said sum of three thousand dollars was subject to execution, and he feared that the indebtedness against him might be put into judgment and his interest in said three thousand dollars applied to its satisfaction. The trial court decided against the complainant, finding that the interest of the complainant in said sum of three thousand dollars was not subject to execution. On appeal, the judgment was affirmed, the appellate court being obviously of the opinion that the only question before it was whether the will under consideration created a spendthrift trust. Upon this subject it said:

"Many questions are raised and urged by appellant which, under the views we entertain of the will in question, seem to be unimportant and not applicable. We regard that trust here created and under consideration as what is known as a spendthrift trust, created for the purpose of providing for the maintenance of appellant and at the same time securing it against his improvidence and incapacity for self-protection. Such estates have become recognized, generally, by most of the courts of the United States, and their treatment of the question has gone into the books as the American doctrine upon the subject of and applicable to such trusts: 26 Am. & Eng. Ency. of Law, 2d ed., 137 et seq., and authorities there cited; Steib v. Whitehead, 111 Ill. 247. Most of the controversy arising in relation to such trusts has involved questions affecting the rights of creditors to the trust fund or property. No such question is here involved. The sole contention is by the appellant, who is the cestui que trust, and who claims that the trust is executed, and if not, that payment in whole, or pro tanto, should be accelerated that he might so apply it as to relieve his creditors.

"Appellant's first and main contention is that the trust is a dry or passive trust, so far as the provisions of the will are concerned, and that it is executed by the statute of uses, and that the title to the trust property vested in appellant at the death of the testator.

"It is a cardinal rule of construction of wills that the intention of the testator shall be ascertained from all that is contained within the four corners of the will, and when ascertained shall be given effect unless it contravenes some well-established principle of law. Whether the trust is executed or executory and whether the estate is vested or contingent are matters of sound construction following

the correct interpretation of the provisions of the instrument creating the trust.

"In determining the character of the trust here created, whether a spendthrift trust or not, we may look to the provisions of the will and the condition of the parties as disclosed by the bill: *Kaufman v. Breckinridge*, 117 Ill. 305, 7 N. E. 666. It is usual in such trusts to find a provision against alienation of the trust fund by the voluntary act of the beneficiary, or in invitum by his creditors. 'It is not necessary that an instrument creating a spendthrift trust should contain an expressed declaration that the interest of the cestui que trust in the trust estate shall be beyond the reach of his creditors, provided such appears to be the clear intention of the testator or donor as gathered from all parts of the instrument construed together in the light of the circumstances': 26 Am. & Eng. Ency. of Law, 2d ed., p. 141; *Stambaugh's Estate*, 135 Pa. St. 585, 19 Atl. 1058; *Appeal of Grothe*, 135 Pa. St. 585, 19 Atl. 1058; *Baker v. Brown*, 146 Mass. 369, 15 N. E. 783; *Patten v. Herring*, 9 Tex. Civ. App. 640, 29 S. W. 388. The fact that a trustee was appointed and vested with the estate and the beneficiary was given the income only is a circumstance from which the intention of the testator to create a spendthrift trust may be inferred: *Stambaugh's Estate*, 135 Pa. St. 585, 19 Atl. 1058."

Spendthrift Trusts are discussed in the monographic notes to *Garland v. Garland*, 24 Am. St. Rep. 686-697; *Smith v. Towers*, 9 Am. St. Rep. 405-408. See, too, the subsequent case of *Jackson Square Loan etc. Assn. v. Bartlett*, 93 Am. St. Rep. 416, and authorities cited in the cross-reference note thereto. To create a spendthrift trust, the following conditions must be observed: 1. The gift must be of the income only—the donee must take no estate whatever, having nothing to alienate, have no right to possession, have no beneficial interest in the land, but only a qualified right to support and an equitable interest only in the income; 2. The legal title must be vested in a trustee; 3. The trust must be an active one, not a mere dry trust which may be executed under the statute of uses: *Kessner v. Phillips*, 189 Mo. 515, 107 Am. St. Rep. 317.

MINERS' AND MERCHANTS' BANK v. SNYDER.

[100 Md. 57, 59 Atl. 707.]

CONSTITUTIONAL LAW.—The State may Change Its Mode of Procedure in its courts for the enforcement of existing contractual obligations so long as it does not thereby impair the substantial right secured by such obligations. (p. 392.)

CONFLICT OF LAWS.—Statutory Changes Pendente Lite.—No one has any vested right in any particular remedy or form of procedure. Hence, if, after the bringing of an action, the particular remedy to which the plaintiff resorted is abolished or modified, his remedy is abolished or modified accordingly. (p. 394.)

CONSTITUTIONAL LAW.—Statute Changing the Remedies of Creditors of Corporation Against Stockholders.—If, at the commencement of an action, a creditor has the right to maintain an action against each of its stockholders for double the par value of the stock held by him, and the statute is subsequently amended so as to require creditors, instead of suing separately at law, to unite with the other creditors in a suit against all the stockholders in a court of equity, where the rights of the several creditors and the liabilities of the several stockholders may be ascertained and enforced at the same time, such amendment is a change in the remedy which does not deprive the stockholder of any substantial right, and is constitutional and applicable to the suit already pending. (pp. 395, 398.)

Vernon Cook, W. Calvin Chestnut and Gans & Haman, for the appellant.

William S. Bryan, Jr., and N. Rufus Gill & Sons, for the appellee.

⁶³ SCHMUCKER, J. On September 5, 1903, the appellant, as a creditor of the City Trust and Banking Company, sued the appellee at law to enforce his statutory liability as a stockholder of that company ⁶⁴ for its debts. The defendant pleaded the general issue and a number of special pleas, to which the plaintiff demurred. At the hearing of the demurrer the court, looking to the first error in the pleadings, held that since the passage of chapter 337 of the acts of 1904, the case disclosed by the declaration could no longer be maintained, and sustained the demurrer as to that pleading. A judgment of dismissal was thereupon entered in the case and from that the appeal was taken. The defenses set up by the special pleas were not passed upon by the court below, nor is it necessary for us, in view of the conclusion which we have reached, to notice them here.

The act of 1904 took away the right theretofore existing in every creditor of a trust company to bring a separate action at law against any of its stockholders to enforce his statutory liability for its debts, and substituted for such action the exclusive remedy of a bill in equity on behalf of all the creditors against all of the stockholders residing in this state, with the privilege to nonresident stockholders to come into the case, and by so doing secure protection from suits against them in other jurisdictions. The act by its terms was to become operative as of January 1, 1903, and to cause the abatement of all pending actions at law instituted since that date against stockholders to enforce such statutory liability, but the plaintiffs' costs in the abated actions were to become part of the costs taxable in the equity proceeding provided for by the act if within sixty days after its passage such plaintiffs came into that proceeding.

This appeal brings up the issue of the validity of that portion of the act in question which relates to actions at law against stockholders instituted before its passage. The appellant contends that that portion of the act is invalid, because it attempts to impair the obligation of contracts in violation of article 1, section 10 of the federal constitution. It is admitted that the act does not operate directly upon the liability itself of the stockholder or attempt to change the persons to whom it is due, but it is insisted that the alteration made in the form of remedy for its enforcement is such as to substantially impair ⁶⁵ the value of his liability to the creditor for the corporate debts.

It was held by the supreme court of the United States in *Hawthorne v. Calef*, 69 U. S. 10, 17 L. ed. 776, that a state act, attempting to repeal a clause in the charter of a bank making its stockholders liable to the extent of the par value of their stock to its creditors, was void as to debts of the bank contracted before the date of its passage, because as to such debts it impaired the obligation of the contract with the creditors within the meaning of the federal constitution. On the other hand, it was said by the same high tribunal in *Tennessee v. Sneed*, 96 U. S. 69, 24 L. ed. 610: "Our own reports and those of the states are full of cases holding that the legislature may alter and modify the remedy to enforce a contract without impairing its obligation. . . . If a particular form of proceeding is prohibited and another is left or provided which affords an effective and reasonable mode

of enforcing the right, the contract is not impaired. Again, in *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 7 Sup. Ct. Rep. 757, 30 L. ed. 825, the same court, in construing a statute of Rhode Island modifying the remedy to be employed by the creditors of a corporation in enforcing an existing statutory liability of its stockholders for its debts, said: "As it [the statute] does not undertake to annul the liability of the stockholders for the debts of the corporation, but only modifies the form of remedy and the rules of evidence, it is not doubted that it is a constitutional exercise of the power of the legislature even as applied to debts contracted by the corporation before its enactment: *Hawthorne v. Calef*, 69 U. S. 10, 17 L. ed. 776; *Penniman's Case*, 103 U. S. 714, 26 L. ed. 602; *Ogden v. Saunders*, 25 U. S. 213, 26 L. ed. 349, 6 L. ed. 606; *Webb v. Den*, 58 U. S. 576, 15 L. ed. 353; *Curtis v. Whitney*, 80 U. S. 68, 20 L. ed. 513; *Tennessee v. Sneed*, 96 U. S. 69, 24 L. ed. 610"; *Oshkosh Water Works Co. v. Oshkosh*, 187 U. S. 439, 23 Sup. Ct. Rep. 234, 47 L. ed. 250.

The statute construed in *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 7 Sup. Ct. Rep. 757, 30 L. ed. 825, was entitled "An act defining and limiting the mode of enforcing the liability of stockholders for the debts of corporations"; and provided that no person should be imprisoned or continued in prison or his property attached upon a judgment ⁶⁶ against a corporation of which he was a stockholder. It further required an action of debt to be brought against the stockholder on the judgment against the corporation, and allowed him to make the same defenses to that action that the corporation could have made to the suit against it in which the judgment was obtained. Prior to the passage of that act the Rhode Island law permitted the person and property of the stockholder who was liable for the corporate debt to be taken on execution or attachment issued against the corporation for the debt.

The power of a state to modify or change the method of procedure in its own courts for the enforcement of an existing contractual obligation, so long as it does not thereby impair the substantial rights secured by the contract, has frequently been upheld by this court: *State v. Jones*, 21 Md. 432; *Madigan v. Workingmen's Building Assn.*, 73 Md. 317, 20 Atl. 1069; *Wilson v. Simon*, 91 Md. 1, 80 Am. St. Rep.

427, 45 Atl. 1022. In Madigan's case, it was held that such an act would embrace within its operation actions pending at the date of its passage.

We will now consider, in the light of the principles thus announced, whether the act of 1904, chapter 337, so affects the appellant's contractual rights as to fall within the constitutional inhibition.

Chapter 109 of the Acts of 1892, now section 85L of article 23 of the Code of Public General Laws, provides, in reference to trust companies, that "each stockholder shall be liable to the depositors and creditors of any such corporation for double the amount of stock at the par value held by such stockholder in such corporation," but the act is silent as to the form of remedy to be used or the tribunal to be resorted to for the enforcement of the liability. Section 14 of the act of 1896, chapter 344, by which the appellant was incorporated, provides that "the said corporation shall be subject at all times to the provisions of the act of 1892, chapter 109, and of chapter 279." Assuming, but not now deciding, because not necessary to this case, that this clause in the appellant's charter imposed upon the holders of its stock the same liability to its creditors and ⁶⁷ depositors that the general law imposed upon holders of the stock of trust companies organized under its provisions, let us see in what attitude the appellant stood toward the stockholders of the City Trust and Banking Company at the date of the passage of the act of 1904. The question here reserved of the true effect of section 14 of chapter 344 of the act of 1896 has been argued and will be decided in the case of *Murphy v. Wheatley*, 100 Md. 358, 59 Atl. 704, hereinafter referred to.

The act of 1892, chapter 109, which was then in force, created the liability of the stockholders of a trust company for its debts. That particular act has not heretofore been the subject of consideration by us, but we have several times had occasion to construe provisions of the code and special charters imposing a liability of like nature upon stockholders in manufacturing and other corporations. In those cases we determined that such liability does not constitute a corporate asset enforceable by a receiver of the corporation, but it is a debt due directly by the stockholder to those persons who became creditors of the corporation while he

held its stock. We further held that any such creditor could enforce the liability by a separate action against any stockholder from whom it was due and recover the debt from him to the extent of double the par value of the stock held by him at the time it was contracted. It was thus made possible for the creditor, by the exercise of superior skill and diligence, to secure payment in full of his debt from the stockholder sued by him to the exclusion of the other creditors: *Albert v. Matthews*, 24 Md. 535; *Norris v. Wrenschall*, 34 Md. 501; *Hammond v. Strauss*, 53 Md. 10; *Attrill v. Huntington*, 70 Md. 197, 14 Am. St. Rep. 344, 16 Atl. 651, 2 L. R. A. 779; *Colton v. Mayer*, 90 Md. 717, 78 Am. St. Rep. 456, 45 Atl. 874, 47 L. R. A. 617, and cases there cited.

It thus appears that prior to the passage of the act of 1904 the appellant and all others, who became creditors of the City Trust and Banking Company while the appellee was one of its stockholders, had a right to recover their debts from him to the extent of three thousand dollars, that being double the par value of his stock, but it was entirely problematical which creditor would succeed in enforcing that right for his own benefit or what ⁶⁸ share of it, if any, the appellant would be able to realize for himself. It is true that before the passage of the act the appellant had, in the assertion of the right under consideration, brought his suit at law against the appellee, but he had obtained no judgment and was entitled to no lien, nor had he any assurance that some other creditor would not, by securing an earlier trial of his case or by inducing the appellee to confess judgment, exhaust the liability of the latter and render the appellant's suit fruitless. "The bringing of a suit vests in a party no right to a particular decision, and his case must be determined on the law as it stands not when the suit was brought but when the judgment was rendered": *Madigan v. Building Assn.*, 73 Md. 321, 20 Atl. 1069; *Cooley's Constitutional Limitations*, 468. Nor has anyone a vested right in any particular remedy or form of proceeding: 1 Cyc. 705, and notes; *Wilson v. Simon*, 91 Md. 1, 80 Am. St. Rep. 427, 45 Atl. 1022.

The act of 1904 left the appellee liable, in respect to the debts of the trust company, to the same extent and to the same persons that he was liable before its passage. The

only change it made was to require those persons, instead of suing him separately at law, to unite with the other creditors of the trust company in a suit against all of its stockholders in a court of equity where the rights of the several creditors and the liabilities of the several stockholders might be ascertained and enforced at the same time. We are unable to see how any substantial injury is inflicted upon the appellant's contractual rights by insisting upon their enforcement by means of a creditor's bill in a court of equity, which is a tribunal regulated by principles and furnished with agencies well suited to the complete and fair adjustment of conflicting rights and varied interests, instead of leaving them to the uncertain results of a struggle between competing creditors in the pursuit of separate actions at law.

The adjustment and enforcement, in any tribunal and under any form of proceedings, of the rights of creditors as against stockholders in a case like this, where certain stockholders are liable to certain creditors and not to others, is a difficult ^{or} and complex undertaking, but the rights of the creditors in such a case are not materially lessened or impaired by a statute conferring upon courts of equity the exclusive jurisdiction to ascertain and enforce their respective rights against the several stockholders in a single proceeding. We withhold the expression of any opinion as to whether such a proceeding in equity, combining in one suit different plaintiffs of whom some have claims against certain of the defendants and others have claims against different defendants, would have been multifarious without the aid of the statute now under consideration. That question is directly put in issue in the case of *Murphy v. Wheatley*, 100 Md. 358, 59 Atl. 704, tried at the present term of this court, and it will be disposed of by the opinion to be filed in that case.

The appellant, in support of its contention, has quoted in its brief from a number of decisions of the supreme court of the United States strong assertions in varied forms of expression of the conceded doctrine of the invalidity of legislation, attempting to so change the remedy for an existing contractual right as to substantially impair the value of the right itself. An examination of those cases will show that none of them present a state of facts so closely resembling those at bar as to furnish a controlling precedent for the

determination of the present case. As was truly said in *V. Hoffman v. Quincey*, 4 Wall. 535, 18 L. ed. 403: "No attention has been made to fix definitely the line between alterations of remedy which are deemed to be legitimate and those which under the form of modifying the remedy impair substantial rights. Every case must be determined upon its own circumstances."

The other cases of *Woodworth v. Bowles*, 61 Kan. 569, 60 Pac. 331, *Dexter v. Edmunds*, 89 Fed. 467, *Western National Bank v. Reckless*, 96 Fed. 70, *Evans v. Nellis*, 101 Fed. 9, and *Webster v. Bowers*, 104 Fed. 627, which were much relied on by the appellant, all related to statutes changing the remedy for the enforcement of stockholders' liability for corporate debts, but they are all quite distinguishable from the one now under consideration. Although those cases arose in different jurisdictions, every one of them was a controversy between the creditors⁷⁰ and stockholders of a Kansas corporation, and it was admitted in each case that the issue was to be determined by the laws of that state regulating the remedies of the creditors of a domestic corporation against its stockholders.

The statute law of Kansas in force prior to 1897 made every stockholder of a banking corporation liable for its debts for an additional amount equal to the stock owned by him, and as the law then stood any creditor of the corporation could enforce this liability against any stockholder by suit at law or if he had already secured a judgment for the debt against the corporation, he could, by leave of court, issue execution thereon against the stockholder. Section 55 of the act of 1897 of the state of Kansas provided that at the expiration of a year from the closing of any banking corporation the receiver thereof should "institute proceedings in the name of the bank for the collection of the liability of the stockholders of such bank," and that the sums so collected should "become a part of the assets of the bank and be distributed pro rata to the creditors thereof in the same manner as other funds." The same act prohibited direct proceedings by any creditor against the stockholder to enforce the liability of the latter unless it should appear to the satisfaction of the court that the receiver had failed to bring suit as required by the act.

In *Woodworth v. Bowles*, 61 Kan. 569, 60 Pac. 331, the supreme court of Kansas was called upon to determine the

operation of the law of 1897, upon suits pending when it went into force, which had been instituted by creditors of an insolvent banking company against its stockholders to enforce their statutory liability for the debts of the corporation. The court in an exhaustive opinion held that the right of the creditors who had brought suit against the stockholders was a contractual one, and the act of 1897 could not be given a retroactive force so as to destroy or impair their right to maintain their pending suits. The reasons stated in the opinion in that case for the court's conclusion were that to give the act a retroactive operation would impair the contractual rights of the creditors who had already brought suit, because it would suspend for a year the ⁷¹ pursuit by them of the special remedy afforded by the laws in existence at the time of the making of their contracts, and because, secondly, if the receiver instituted proceedings at the end of the year, the creditors having brought suit were altogether deprived of their remedy, and the fund collected by the receiver would be distributed among all of the creditors pro rata and the substantive right of the suing creditor would be thereby affected. It was further pointed out in the opinion that under the old law a creditor by the exercise of diligence and vigilance might secure payment in full of his debt, whereas if he were compelled to await the result of the institution of the suit at the end of a year by the receiver he might fare much worse.

In the other four of the cases to which we have last referred the courts of other jurisdictions adopted and enforced the same construction of the Kansas law. In *Dexter v. Edmunds*, 89 Fed. 467, and *Western Nat. Bank v. Reckless*, 96 Fed. 70, the court rather broadly declared that a law forbidding the maintenance of a suit at law by the individual creditor against the individual stockholder, and requiring in lieu thereof an action in equity on behalf of all of the creditors against all of the stockholders, practically destroyed the substantial right of action of the creditor. It must, however, be remembered that the subject then under consideration was the effect of the Kansas act of 1897, and the expressions used by the courts must be understood as referring to its operation, and not as applicable to other laws which produced no such results as that one did.

The Kansas law absolutely deprived the creditor of a remedy at all for an entire year, and when the remedy provided by the statute was put in operation for his benefit, prosecution was under the control of the receiver, and its results were subject to the expenses of the receivership and the net sum realized from all of the stockholders was to be divided pro rata among all of the creditors. It was the probability of results of that character to which we referred in the case of *Colton v. Mayer*, 90 Md. 717, 78 Am. St. Rep. 456, 45 Atl. 874, 47 L. R. A. 617, in denying to the receiver of the corporation then before us the right to file a bill to enforce the ⁷² statutory liability of the stockholders in the corporate debts on behalf of the creditors to whom the liability was held to be due.

No such results will follow the use of the remedy provided by the act of 1904, chapter 337. Although all parties interested will be brought into one suit in equity, it will be the suit of the creditors themselves, and will be under their control, and the funds recovered from each stockholder will be apportioned according to equitable principles to the creditors only to whom he is indebted, and the creditor will be protected from the risk of losing his debt involved in the competitive rush of individual creditors and the possibility of the willingness of the debtor to benefit a particular creditor by a confessing judgment in his favor. A further commendable feature of the proceeding in equity provided by the present law is that it affords to the stockholders an opportunity to adjust their relative rights of contribution, and thus hold out to such of them as are nonresidents an inducement to come into the case and submit themselves to the jurisdiction of the Maryland court and meet their obligation to the citizens.

We are of opinion that the court below committed no error in sustaining the demurrer as to the declaration and dismissing the suit, and we will affirm the judgment of dismissal.

Judgment affirmed with costs.

Over Mere Remedial Procedure the power of the legislature is absolute, and laws regulating it involve so much of the consideration of public convenience and welfare that individuals cannot be conceded vested rights therein: *Oshkosh Waterworks Co. v. Oshkosh*, 109 Wis. 208, 95 Am. St. Rep. 870, and see the cases cited in the cross-reference note thereto. However, the remedy, where it affects

substantial rights, is included within the term "obligation of contracts," and cannot be altered so as materially to impair that obligation: *Welch v. Cross*, 146 Cal. 621, 106 Am. St. Rep. 63. See, also, *Gladney v. Sydnor*, 178 Mo. 318, 95 Am. St. Rep. 517. That there is no vested right in a rule of evidence, see *Burk v. Putnam*, 113 Iowa, 232, 86 Am. St. Rep. 372. As to whether there is a vested right in a defense, see *Baltimore etc. Ry. Co. v. Reed*, 158 Ind. 25, 92 Am. St. Rep. 293; *Danforth v. Groton Water Co.*, 178 Mass. 472, 86 Am. St. Rep. 495. There is no implied promise on the part of a state to protect its citizens against incidental injuries occasioned by changes in the law: *Stanford v. Coram*, 28 Mont. 288, 98 Am. St. Rep. 566.

DECK v. BALTIMORE AND OHIO RAILROAD CO.

[100 Md. 168, 59 Atl. 650.]

RAILWAYS, Commission of Policemen and Detectives in the Employ of.—In an action against a railway company for injuries claimed to have been sustained by the plaintiff in being shot by a special policeman or detective in the employ of the defendant, it is proper to prove how and in what capacity the policeman was acting and that he held a commission as policeman from the state. (p. 402.)

EVIDENCE of the Shooting of the Plaintiff by an Employé of the Defendant, When Sufficient.—In an action for injuries claimed to have been sustained by the plaintiff by being shot by a special policeman in the employ of the defendant, such shooting is sufficiently proved by showing that such policeman, in the presence of the plaintiff and immediately after the shooting, admitted that he did the shooting. (p. 403.)

EVIDENCE of the Employment of a Special Policeman by the Defendant, When Sufficient.—Where a witness testifies that he was employed and paid by the defendant railway company as a policeman, and his commission held from the state shows that he was appointed special policeman of the railway company, and other witnesses testify to the same effect, the evidence is legally sufficient to prove that such policeman was in the employ of such company. (p. 404.)

RAILWAY CORPORATIONS, Proof that a Special Policeman was in the Employ of, at the Time of a Shooting by Him.—Where it appears that a special policeman was present at the time of a shooting, and in fact shot plaintiff, and was then in the employ of the railway corporation, and that plaintiff and his companions had been on the train as trespassers and acting in a disorderly manner, it does not require much testimony to show that such special policeman was there, not on any business of his own, but for the purpose of protecting the company's employes and property. It will not be assumed that he was there for any other purpose than to perform his duty and act within the scope of his authority. (p. 404.)

MASTER AND SERVANT.—Whether the Act of the Servant Complaind of was Within the Scope of His Duty while acting in furtherance of his master's business is generally to be determined by the jury as a matter of fact and not by the court as a matter of law. (p. 405.)

MASTER AND SERVANT.—The Burden is on the Master to Prove that His Servant in Doing the Act Complained of was not engaged in the course of his business, where it may be difficult for the plaintiff to obtain a full and complete proof of the terms of the servant's employment. (p. 405.)

RAILWAY CORPORATIONS—Liability of for Shooting by Employé.—It cannot be said that a railway corporation, because it did not authorize the shooting of the plaintiff by a special policeman in its employ, is not liable for the resulting injury, where it appeared that it was the duty of such policeman to protect the company's trains and property and to look out for all violations of law along its road. (p. 405.)

MASTER AND SERVANT, Act of the Latter, When Treated as that of the Former.—If a servant is acting at the time in the course of his master's business and for his master's benefit within the scope of his employment, then his act, though wrongful and negligent, is to be treated as that of the master, although no express command or privity of the master is shown. (p. 405.)

RAILWAY CORPORATIONS, Special Policeman, Presumption as to Authority of.—It must be presumed that a special policeman employed by a railway corporation has some implied authority and duties, even if none are expressly proved, and it may be inferred from the general nature of the employment that it was his duty to remove trespassers from train. (p. 406.)

RAILWAY CORPORATIONS, Special Policemen, When Must be Assumed to be Employés of.—Where a special policeman, though commissioned by the state, was employed and paid by a railway corporation and was acting as its policeman or detective, he must be assumed to have been acting as an employé of such corporation and not as an officer of the state at the time of the shooting by him of a person who had been trespassing on a train. (p. 406.)

RAILWAY CORPORATION, Liability of for Shooting by Its Policemen.—If it appears by the evidence that the plaintiff, while trespassing on a train of the defendant railway corporation, was ordered therefrom, and immediately after leaving the train was shot by a policeman in the employ of the defendant corporation, this evidence is legally sufficient to justify the submission of the cause to the jury when the action is by the person so injured against such corporation to recover for his injury. (p. 407.)

WITNESS.—In Impeaching the Credit of a Witness, the Examination Must be Confined to His General Reputation and not be permitted to extend to particular facts. (p. 408.)

APPEAL AND ERROR—Remedy Without Injury.—If there is no attempt to deny the truth of testimony given by a witness, and it must therefore be assumed to have been true, no prejudicial error could have been committed by refusing to require him to answer a question asked for the purpose of impeaching him. (p. 408.)

JURY TRIAL—Instructions Contradictory in Terms.—An instruction to the jury to the effect that if they find that the defendant recklessly and wantonly shot the plaintiff, they must find for him, unless the shooting was done in self-defense, is erroneous, because the proposition so stated appears to be a contradiction in terms. (p. 409.)

PERSONAL INJURY—Liability for Shooting.—It is proper to refuse an instruction that the plaintiff cannot recover unless the jury find that the defendant intentionally shot him, where the right of

the plaintiff is not founded on the actual intention of the defendant, but on his reckless and wanton conduct as alleged in the complaint. (p. 409.)

Meyer Rosenbush and Gustavus A. Korb, for L. Deck.

^{Ad.}W. Irvine Cross and Duncan K. Brent, for the Baltimore and Ohio Railroad Company and Steiner.

^{Ad.}⁹₇¹⁰FOWLER, J. This is an action to recover damages for personal injury.

Louis Deck sues the Baltimore and Ohio Railroad Company and Charles A. Steiner. The ground of the action is that Steiner, who is alleged to have been in the employ of that company, in the regular course of his business, shot the plaintiff, seriously and permanently injuring him. The defendants pleaded the general issue.

During the taking of the testimony of the plaintiff, which was offered to establish the responsibility of the railroad company for the assault and shooting of the plaintiff, the plaintiff reserved four exceptions, which relate to rulings on the evidence. At the close of the plaintiff's testimony on this question a prayer at the instance of the defendant was offered, taking the case from the jury, from which ruling the plaintiff also excepted. Judgment was entered in favor of the railroad company and the plaintiff has appealed.

³¹¹⁷⁹In the further progress of the case against the remaining defendant, Charles A. Steiner, he reserved two exceptions—one to the ruling on evidence and the other to the granting of the plaintiff's two prayers and the rejection of his first prayer. Judgment was entered against the defendant Steiner, and he also appealed. There are, therefore, two appeals in this record, and we will consider them in the order in which they were entered. But before doing so we will briefly state the facts of, and the circumstances under which, the shooting was done.

It appears from his own testimony and that of other witnesses that on the 1st of July, 1899, the plaintiff and several companions, without authority, boarded a freight train of the defendant company and rode thereon to Oella, a short distance beyond Ellicott City, where they spent the day. On the same evening they boarded another freight train of the same company, without authority, for the purpose of

returning to Baltimore, and when it was approaching the city and was near Mt. Clare station the plaintiff and his companions were ordered to leave it. The plaintiff testifies that he was already off the train and about fifteen feet from it when he heard several shots fired, by one of which he was hit and seriously injured. First, then, we will consider the questions presented by the appeal of the plaintiff.

The plaintiff's first exception was taken to the refusal of the court to allow the witness to say whether, from the point where he was ordered off the train, if it was daylight, he could see the city of Baltimore, if looking toward the city. We are unable to see what relevancy the question or the answer thereto could possibly have had to the issues involved. The shooting took place about 11 o'clock at night and whether the city of Baltimore could or could not have been seen in daylight from the point indicated does not appear to be important or relevant. Nor do we find anything in the plaintiff's second exception which was taken to the ruling out of the testimony of the witness Thomas tending to show that the defendant Steiner was a Baltimore and Ohio Railroad detective, for testimony as to the facts of Steiner's employment by that company as a detective was subsequently admitted without objection.

¹⁸⁰ We find no error in the ruling complained of in the plaintiff's third and fourth exceptions. After testifying that he was a lieutenant of police and was employed by the Baltimore and Ohio Railroad Company as a policeman at the time of the shooting, and that he was paid by that company, the defendant Steiner was asked on cross-examination whether he held a commission as a policeman from the state. This question was allowed to be answered against the objection of the plaintiff. This constitutes the third exception. The witness answered that he had such a commission, and he was asked to produce it, which he did, and read it to the jury. Whereupon the plaintiff filed a motion to strike out all the testimony of this witness in relation to witness being commissioned as police officer by the state of Maryland. This motion was overruled, and this action of the court is the ground of the plaintiff's fourth exception.

We think it was very material that the jury should have been informed exactly how and in what capacity Steiner was acting. He had testified in chief that he was a police

officer of the defendant, that he was employed and paid by it, but this was not all. He was also a state's officer and as such commissioned as a special policeman of the Baltimore and Ohio Railroad Company. It was but right, we think, that the defendant should be allowed to inform the jury that it had availed itself of the provisions of law which were passed for the purpose of giving corporations the benefit of capable men commissioned by the state to protect their property, and that it had not selected one of its own employés for that purpose.

This brings us to the consideration of the only important question involved in this appeal, and that is presented by the plaintiff's fifth exception which is based on the ruling of the court granting the defendant's prayer taking the case, or this branch of it, from the jury.

Was there any evidence in the case legally sufficient to prove that the defendant Steiner did the shooting complained of? In the first place the plaintiff himself testifies that shortly ¹⁸¹ after he was shot and lying upon the ground, Thomas, a brakeman, came over with a lantern, and Steiner came also and asked what was the matter; that plaintiff replied that he was shot and Thomas picked him up and showed Steiner where the ball entered, and Steiner said, "Yes, if I hadn't shot the son of a bitch, I would have kicked his ribs in." It is true that the witness Thomas contradicted this statement of the plaintiff, but it was for the jury to determine which one they would believe. Again, the witness Carlin testifies that Steiner told him he shot the plaintiff. We conclude, therefore, that the testimony on this point was legally sufficient to show by whom the shooting was done.

2. Is there any legally sufficient evidence in the case that Steiner was in the employ of the defendant company at the time of the shooting? This question must also be answered in the affirmative, for Steiner himself testifies that he was employed and paid by the defendant company as policeman at that time, and the commission he held from the state showed that he was appointed as "special policeman" of the railroad company. Other witnesses testified to the same effect, either that he was a detective of the company as testified to by the plaintiff and the witness Morrison, or that

he was such special officer or policeman at the time in question.

But the important question remains to be considered, whether at the time of the shooting Steiner was attending to the business of the company, and if so, whether he was acting within the scope of his duty.

Assuming, for if what we have already said is correct we have a right to assume, that Steiner was present at the time of the shooting and that he was in the employ of the company as its special officer, detective or special policeman, and assuming also that the plaintiff and his companions had been on one of its trains as trespassers and acting in a disorderly manner, it would not require much testimony to establish the fact that he was there not on any business of his own, but for the purpose of protecting the company's employes and its property.

¹⁸² This was a laudable and proper purpose, but we do not think it incumbent on the plaintiff, under the circumstances of this case, to offer affirmative and direct testimony to establish that fact. He was employed by the company and he was there, and it will not be assumed he was there for any other purpose but to perform his duty—that is, as one of the witnesses said, "To look after all depredations on the company's property, such as robbing cars, breaking into trains, attempting to derail trains, and all violations of the law along the line of the road." If, then, he was present as an officer of the company, and as two witnesses testified he admitted he did the shooting, was he under all the circumstances of this case acting within the scope of his duty? Whether he was or was not so acting is ordinarily a question for the jury. It was contended on the part of the defendant company that conceding the testimony we have already recited to be true—namely, that Steiner admitted the shooting—still the defendant cannot be connected therewith unless there is some evidence of an express antecedent authority to Steiner to do the act or of a subsequent ratification thereof by the defendant. But the authorities cited to sustain this proposition are cases of false arrest or malicious prosecution, and the principles announced therein have no application to this case. Thus in the recent case of *Boyer v. Coxen*, 92 Md. 366, 48 Atl. 161, *Boyd, J.*, delivering the opinion of the court, said: "This court has heretofore followed the rule that the master is not exempted from liability for . . . damages merely because the act complained of was done by a servant, and

in many cases exemplary damages have been allowed against the master for acts done by the servant, without express authority from the former or ratification by him having been shown": See, also, *Evans v. Davidson*, 53 Md. 245-249, 36 Am. Rep. 400. Again, it is settled in this state, as we have said, that whether the act of the servant complained of is within the scope of his duty while acting in the furtherance of his master's business is generally to be determined by the jury as a matter of fact and not by the court as a matter of law: *Consolidated R. Co. v. Pearce*, 89 Md. 503, 43 Atl. 946. It may be very difficult, as is illustrated in this ¹⁸³ case, for the plaintiff always to obtain full and complete proof of the terms of the servant's employment, and therefore it was held, as we said in the case just cited, citing *Cleveland v. Newson*, 45 Mich. 62, 7 N. W. 222, that the burden was on the defendant to show that the servant was not engaged in the course of his employment. But it is clearly shown by the testimony of the plaintiff that Steiner was employed by the defendant company as a police officer and detective, and it is further shown that, as such, it was his duty to protect the company's trains and property and to look after all violations of the law along its road. And even if this proof had not been adduced, it would have been proper for the jury to infer from the nature of Steiner's employment that he was authorized by the defendant not only to drive trespassers from the train, but to arrest them for the violations of the company's regulations. And it cannot be said that because the defendant did not authorize the shooting, that therefore it cannot be held liable for the resulting injury to the plaintiff. In *Evans v. Davidson*, 53 Md. 245, 36 Am. Rep. 400, it appeared that the defendant had on his farm a negro, Lewis, who was employed to do general farm work; that on the day the plaintiff's cow was killed the defendant was away from home; that Lewis in driving the cow from the plaintiff's cornfield negligently struck her with a stone and killed her; that the defendant had given no orders in regard to driving the cattle out of the field, and that he did not know the cow was in the corn until after she was killed. The court below took the case from the jury; but Alvey, J., in delivering the opinion of this court, said: "If the servant be acting at the time in the course of his master's service and for his master's benefit, within the scope of his employment, then his act, though wrongful or negligent, is to be treated as that of the master, although no express command or privity of the master be shown. This

general principle is sanctioned by all the authorities." And in determining whether there was legally sufficient evidence to go to the jury, we said in the same case that in the very nature of the employment there must be some implied authority and duties belonging to it, and it was held, reversing ¹⁸⁴ the court below, that there was legally sufficient evidence to show that the servant was acting in the course of his employment, and that the first and second prayers of the plaintiff, leaving it to the jury to find whether the servant had so acted, should have been granted. Quite a number of authorities are cited on the brief of the appellant to the effect that in the very nature of the employment of a detective and special officer there are some implied authority and duties belonging to it, but we do not consider it necessary to discuss them, for "we suppose all would say" that it would be a positive duty of one who was employed as Steiner was by the defendant as a detective and special policeman, not only to eject trespassers from its trains, but to arrest them and use force in so doing.

This brings us to the question as to whether Steiner was acting as an employé of the company or as a commissioned officer of the state when the injury was inflicted. It appears to be clear from the testimony that he was employed and paid by the defendant at the time indicated, and that he was then acting as policeman and detective. As we have already said, it must be assumed that he had some implied authority and duties, even if none were expressly proved, and it certainly is not assuming very much to infer from the general nature of his employment that it was his duty to remove trespassers from the train. It must be remembered that, so far as the evidence shows there was not an actual attempt to arrest the plaintiff, but he was shot by the detective or policeman a few moments after he jumped from the train and before he had gone more than ten or fifteen feet from it.

This is a very different case from *Tolchester Beach Imp. Co. v. Steinmeier*, 72 Md. 313, 20 Atl. 188, 8 L. R. A. 846. In the first place, the case just cited was an action to recover damages for false imprisonment, and it was decided that the defendant company could not be held liable without proof of express precedent authority or subsequent ratification; but, as we have seen, this rule is not applicable to the case now before us. Again, the arrest, which was the injurious act complained of in *Steinmeier's* case, was not made on the premises of the company, nor, said the ¹⁸⁵ court, "can it be said

that it was done in the preservation of the company's property, for assuming that in the collection of drift logs the superintendent was acting for the company (which its president denies), still it is not contended that the plaintiff was interfering to prevent their securing and collection." The testimony only shows that the arrest was ordered and made because of the plaintiff's assault. And further it is said that that which the officer who made the arrest did, although paid by the defendant, was in the execution of the criminal law upon his own view of the affair, without warrant, and in discharge of what he supposed was his duty at common law, and that his act in no way inured to the benefit of the defendant company. It will be observed also that we said in the Steinmeier case that for the purposes of that decision it was not necessary to hold that the officer who made the arrest was in no sense an officer of the company, and that if called on to enforce its regulations, and he did so purely because of his relation to the company, it would be liable for acts done within the scope of his duty as such employé, although primarily he was a state officer. And whether he was acting in one capacity or the other is a question for the jury: *Dickerson v. Waldron*, 135 Ind. 507-526, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1, 24 L. R. A. 483, 488; *Brill v. Eddy*, 115 Mo. 597-605, 22 S. W. 488; *St. Louis etc. Ry. Co. v. Hackett*, 58 Ark. 387, 41 Am. St. Rep. 105, 24 S. W. 881.

We are of opinion, therefore, that there is legally sufficient evidence to be found in the record to have justified the submission of the case to the jury, and the court below having refused to do so, its judgment in favor of the defendant must be reversed.

Judgment reversed with costs and new trial awarded.

The remaining questions to be considered arise on the appeal of *Charles H. Steiner v. Louis Deck*, which, as we have seen, presents two questions: first, as to the correctness of the ruling of the court in refusing to allow the appellant, defendant below, to ask witness Carlin what there was in his record or in his standing in the community, that led Steiner to arrest ¹⁸⁶ him merely because he saw him on that occasion; and secondly, whether there was error in granting plaintiff's two prayers and the rejection of the defendant's first prayer.

First Exception: The record does not state what was the object in asking this question. On cross-examination, how-

ever, it would appear to have been the purpose of counsel to have the witness impeach his testimony already given, but the answer, if any had been given, must have been in the nature of a guess or an opinion, for it was impossible for the witness to state as a fact what there was in his record or standing which induced Steiner to arrest him merely because he saw him on that occasion. We find nothing in the record to support the assumption that the witness had been arrested merely because Steiner saw him. On the contrary, the witness had testified that he was walking through the company's yard that he was on the company's property, although he said he thought it was county property. What he may have meant by this last statement does not appear. If, as we have said, it was the purpose of counsel to impeach the witness, this could have been done (1) by disproving the fact testified to by him. But this was not attempted, although there was ample opportunity to have done so; or (2) by general evidence affecting his veracity. But in impeaching the credit of a witness the examination must be confined to his general reputation and not be permitted as to particular facts: 1 Greenleaf on Evidence, sec. 461. If it was intended to show that he had been indicted and convicted of some crime that would go to impeach his veracity, the proper evidence of such convictions should have been produced; but in spite of the fact that Steiner was subsequently examined as a witness in behalf of the defendant, he did not deny the testimony given by the witness Carlin, and it may be, therefore, assumed that it was true, and if so, the defendant was not injured by the refusal of the court to allow the question to be asked.

Second Exception: Was there any error in granting the plaintiff's prayers? The first of these prayers asked the court to instruct the jury "that if they find from the evidence that ¹⁸⁷ the plaintiff was walking on or near the tracks of the Baltimore and Ohio Railroad Company, as testified to, and that the defendant came within a short distance of the plaintiff and recklessly or wantonly fired a pistol toward the plaintiff and thereby shot and wounded him, then their verdict must be for the plaintiff, unless they are satisfied from the evidence that said shooting was done for the purpose of preventing the plaintiff from killing said Steiner or inflicting upon him great bodily harm, and that the facts at the time of the shooting were such as to warrant the reasonable belief in Steiner's mind, in the honest exercise of hi

judgment, that there was no other reasonably possible, or at least probable, means of preventing such injury to said Steiner and that his act was one of necessity." By this instruction the jury are told that if they find the defendant recklessly and wantonly shot the plaintiff, they must find for him, unless they find said shooting was done in self-defense. This proposition appears to be a contradiction in terms, for if the shooting was found from the evidence to have been reckless and wanton, the jury could not properly, from the same evidence, have found it to have been done in self-defense. In other words, having found from all the evidence that the shooting was unjustifiable, they could not find from the same evidence that said shooting was justified by an honest belief of Steiner that he was in danger of great bodily harm. We find no objection to plaintiff's second prayer. It properly states the rule of the measure of damages in a case like this. Defendant's first prayer told the jury that the plaintiff cannot recover a verdict unless they find that the defendant intentionally shot the plaintiff.

We cannot accede to this proposition, for the right of the plaintiff in this case to recover is founded, not on the actual intention of the defendant, but on his reckless and wanton conduct as alleged in the narratio.

By reason of the error in granting the plaintiff's first prayer the judgment against the defendant, Charles A. Steiner, will be reversed and the cause remanded for a new trial.

Judgment reversed with costs and a new trial awarded.

The Liability of an Employer where his watchman shoots a trespasser is discussed in *Holler v. Ross*, 68 N. J. L. 324, 96 Am. St. Rep. 546; *Lipscomb v. Houston etc. Ry. Co.*, 95 Tex. 5, 93 Am. St. Rep. 804; *Golden v. Newbrand*, 52 Iowa, 59, 35 Am. Rep. 257.

A *Special Police Officer* appointed on the application of the proprietor of a place of amusement is not, according to *Healey v. Lothrop*, 178 Mass. 151, 86 Am. St. Rep. 471, the servant of the proprietor; and if he commits an assault, the only remedy against the proprietor is on his bond. But in *Dickson v. Waldron*, 135 Ind. 507, 41 Am. St. Rep. 440, a theater manager is held liable for the act of his employé in wrongfully attacking and injuring a patron of the theater, although the employé is a special policeman.

MORROW v. FIDELITY AND DEPOSIT COMPANY.

[100 Md. 256, 59 Atl. 735.]

AN ADMINISTRATOR DE BONIS NON cannot maintain an action at law to recover for devastavit committed by a deceased executor. (p. 411.)

EXECUTORS AND ADMINISTRATORS.—Moneys received by an administrator and mingled with his own or other assets so wasted or misapplied or converted to his own use are regarded, so far as the rights and powers of an administrator de bonis non are concerned, as already administered. Hence, he acquires no title to such assets and has no right to bring an action against anyone for their recovery, and he cannot, therefore, sue for a devastavit committed by his predecessor in office. (p. 412.)

ADMINISTRATOR'S PROCEEDINGS to Recover Property Lost or Misappropriated by Deceased Executor.—If a devastavit is committed by an executor, who thereafter dies, a court of equity may appoint a trustee to sue on the bond of such executor to recover such portion of the property as was lost, wasted or misapplied by him. (pp. 412, 413.)

L. Allison Wilmer, for the appellant.

Washington Bowie, Jr., and Charles R. Miller, for the appellee.

²⁶¹ **BRISCOE, J.** This appeal is from a judgment in favor of the defendant upon a demurrer to the plaintiff's declaration. The suit was instituted by the plaintiff, as administrator de bonis non cum testamento annexo, of Benjamin C. Pearce, late of Cecil county, against the defendant corporation as surviving obligor of John S. Wirt, deceased, to recover the sum of thirteen thousand five hundred and fifteen dollars and seventy-two cents alleged to have been converted and misappropriated by him, as executor, under the will of Benjamin C. Pearce.

The facts are fully set forth and stated in the declaration and for the purposes of the case are admitted by the demurrer to be true. Briefly stated, they are as follows: The testator died in 1895, leaving a last will and testament wherein he bequeathed and devised his estate in the following manner: By the first clause of the will he devised and bequeathed to his wife Ann Jemima Pearce, for and during the term of her natural life the income, issues and profits of his entire estate and directed his executor to keep the property safely invested in good and profitable securities, and to pay the income, issues, and profits as the same shall accrue to his wife "for and during the period of her natural life." By the second

item of the will he gave the principal of the entire estate after the death of his wife to his three children, who are now living. John S. Wirt, his son in law, was appointed executor by the will, duly qualified on the 2d of October, 1895, in the orphans' court of Cecil county, and continued to act as such executor until his death in May, 1904.

The appellant, upon the death of Wirt, was appointed by the orphans' court of Cecil county, administrator de bonis non, cum testamento annexo, of Benjamin C. Pearce, and George R. Ash, of Cecil county, was appointed administrator cum testamento annexo of John S. Wirt.

The declaration states that by the administration account ²⁶² passed in the orphans' court of Cecil county there appears a balance of thirteen thousand five hundred and fifteen dollars and seventy-two cents in the hands of the executor (Wirt), distributed to him as such executor. By an order of the orphans' court of this county, he was required to safely invest the amount in good and profitable securities, and to pay the income, issues and profits to the widow under the will, but that he failed to invest the whole of the balance distributable in his name as such executor, but appropriated to his own use, or to other uses than for the benefit of beneficiaries named in the will, all the funds, moneys, securities and property (except a portion stated therein) which came to his hands as such executor. And there is a further allegation of the declaration, which is admitted by the demurrer, that there are at present no bonds, notes, evidences of debt, or money in the hands of the personal representatives of the executor belonging to the estate, but they were converted and misappropriated by the executor in his lifetime.

Now, it is quite clear, we think, upon this state of facts that this suit was improperly brought and cannot be maintained by the appellant. It is well established both at common law and by the decisions of this court that an administrator de bonis non cannot bring an action at law to recover for a devastavit committed by a deceased executor. The authority conferred upon an administrator de bonis non by section 70 of article 93 of the code is to administer all things "not already administered," described by the act as assets, not converted into money and not distributed and delivered or retained by the executor. And by section 72 of article 93 of the code it is provided the court shall, on application of the administrator de bonis non, order the administrator of a

deceased administrator to deliver over to him all the bonds, notes, accounts and evidences of debt which the deceased administrator may have taken, received or had as administrator at the time of his death, and also to pay over to him the money in his hands as such.

²⁶³ In *Stewart & Duffey v. Fireman's Ins. Co.*, 53 Md. 5, it is said: "To the administrator *de bonis non* is committed only the administration of the goods, chattels and credits of the deceased, which remain in specie and have not been 'ready administered.' Our statute limits his authority to the administration of such assets as have not been 'converted into money and not distributed and delivered or retained by the executor or former administrator, under the direction of the orphans' court.' In view of this law, and the source from which it was borrowed, money received by the administrator and mingled with his own or other assets sold, wasted or misapplied or converted to his own use are regarded, so far as the rights and power of the administrator *de bonis non* are concerned, as already administered, and hence he acquires no title to such assets, has no authority to bring an action against anyone for their recovery, and cannot therefore sue for a devastavit committed by his predecessor in office."

This has been the unvarying construction placed by the courts upon the acts of assembly applicable to this case. See *Hagthorp v. Hook*, 1 Gill & J. 271; *Gardner v. Simmes*, 1 Gill, 425; *Sibley v. Williams*, 3 Gill & J. 64; *Baker v. Bow*, 74 Md. 467, 22 Atl. 133; *United States v. Walker*, 109 U. S. 209, 3 Sup. Ct. Rep. 277, 27 L. ed. 927.

As it appears, then, in this case, from the allegations in the declaration, which are admitted by the demurrer, that this suit was brought to recover for assets converted, misapplied and misappropriated by the appellant's predecessor in his lifetime, and which do not now exist in specie, there is no authority given by the statute to the appellant to maintain this action against the appellee.

But assuming, without deciding, that a devastavit was committed, as stated in the declaration in this case, it would be competent for a court of equity under the facts of this case upon a proper application, at the instance of the beneficiaries under the will, to appoint a trustee, who could maintain an action against the appellee corporation to recover such portion of the property which has been lost, wasted, or misapplied by the appellant's predecessor in office.

²⁸⁴ The condition of the bond, dated the second day of October, 1895, is that John S. Wirt should well and truly perform the office of executor of Benjamin C. Pearce according to law, and should in all respects perform the duties of him required by law as executor, without any injury or damage to any person interested in the faithful performance of the office.

The declaration states that the property was distributed by the orphans' court of Cecil county to the executor, under the will, as such executor, and was held by him in his name as such executor, and had been directed by an order of the court to be invested in his name as executor for the benefit of the beneficiaries under the will.

The executor would, therefore, be liable for the property and funds that came to his hands as such executor, and if it be shown that the executor was liable to the beneficiaries under the will, it could hardly be disputed that this liability would also attach to the appellee corporation, the surviving obligor, in a suit by the trustee against the appellee corporation.

As there can be no recovery by the appellant against the appellee in this case, the judgment of the circuit court of Cecil county will be affirmed.

Judgment affirmed, with costs.

ADMINISTRATORS DE BONIS NON.

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I. Appointment of.

a. When Authorized.—In this note we shall use the term “administrator de bonis non” to indicate one who has been appointed to complete the administration of an estate, whether such administration was in the first instance that of an executor or of an administrator. Strictly speaking, one appointed to succeed an executor is an administrator de bonis non cum testamento annexo, while one appointed to succeed an original administrator is an administrator de bonis non only. Whether the decedent died testate or intestate, the death, resignation or other removal of his executor or administrator, without completely discharging the duties of his office, makes proper, and generally indispensable, the appointment of a successor: *Finn v. Hempstead*, 24 Ark. 111; *Crafton v. Beel*, 1 Ga. 322; *Byers v. Wee*, 105 Mo. App. 72, 79 S. W. 485; *Chase v. Ross*, 36 Wis. 267; or administrator: *Clemens v. Walker*, 40 Ala. 189; *Brattle v. Gust*, 1 Root, 425; *Taylor v. Brooks*, 4 Dev. & B. (20 N. C.) 273; *Frost v. Frost*, 45 Tex. 324. The appointment of an administrator de bonis non cannot be the original proceeding. If the decedent left a will it must first be admitted to probate and an executor or an administrator with the will annexed appointed before there can be an administrator de bonis non. Although, for some reason, the executor named in a will declined or became incompetent to act (*Chase v. Ross*, 36 Wis. 267), even though, without waiting for the probate of the will and letters testamentary thereon, he entered upon the administration, “the administering is an act in pais of which a spiritual court cannot take notice, and they must commit administration according as it appears to them judicially, and not according to the fact, and yet the acts done by the executor are good” (*Wankford v. Wankford*, 1 Salk. 299). Not only must there have been an appointment of an original executor or administrator, but a contingency must have arisen which such appointment can no longer satisfy. In other words, such executor or administrator must have lost authority to proceed, and this can only be by his death, resignation or removal from office, express or implied, and an appointment while he still retains his office is wholly unauthorized: *Methews v. Douthitt*, 27 Ala. 273, 62 Am. Dec. 765; *Rambo v. Wynn*, 32 Ala. 363, 70 Am. Dec. 544; *Hooper v. Scarborough*, 57 Ala. 515; *Sands v. Hickey*, 135 Ala. 322, 33 South. 827; *The Justices v. Salsbery*, 6 Ga. 432; *Griffith v. Frazier*, 8 Cranch, 9, 3 L. ed. 471; *Ex parte Crafts*, 28 S. C. 281, 5 S. E. 718. There appear to have been no instances in which, where two or more persons were appointed executors of the court, on the death of one of them, appointed an administrator de bonis non in his place: *Packer v. Owens*, 164 Pa. St. 185, 30 A. 314. We apprehend that this course cannot be sustained, unless

some special statute. In such a case, the authority which before the death was vested in all the original appointees becomes, on the death of one of them, vested in the survivor or survivors, and there is no necessity, and hence no authority, for the appointment of an administrator de bonis non: *Lewis v. Brooks*, 6 Yerg. 167.

It is necessary to authorize the appointment of an administrator de bonis non that there be unadministered property to administer upon. It is not sufficient that the decedent had property at the time of his death, nor that he had property which came to the hands of his executor or administrator which has not been accounted for or paid over to his heirs or other persons entitled thereto. Such property may, nevertheless, have been administered upon, and if so, the appointment of an administrator de bonis non is not required, unless some statutory enactment upon the subject has made such appointment proper: *Meservey v. Kalloch*, 97 Me. 91, 53 Atl. 876; *State v. Fidelity etc. Co.*, 100 Md. 256, ante, p. 402; *In re Herckelrath's Estate*, 1 Ohio Dec. 696. The subject of what are administered assets which may justify an appointment will be considered here under subdivision II. If, on the other hand, unadministered assets exist, the appointment of an administrator de bonis non must be made on timely application therefor by a proper party: *Chamberlin's Estate*, 70 Conn. 363, 39 Atl. 734, 41 L. R. A. 401; *Donaldson v. Raborg*, 26 Md. 312; *Kirby v. State*, 51 Md. 383; *Van Giessen v. Bridgford*, 83 N. Y. 348; *In re Nesmith*, 48 Hun, 621, 1 N. Y. Supp. 343; *Corley v. Goll*, 8 Tex. Civ. App. 184, 27 S. W. 819; *Williams v. Verne*, 68 Tex. 414, 4 S. W. 548. Such assets may consist of choses in action, including claims for negligence or other torts, provided they are such as might have been enforced by proper action by the original executor or administrator: *Merkle v. Township of Bennington*, 68 Mich. 133, 35 N. W. 846. The assets, whatever their character in other respects, must be of such a nature that administration upon them may be authorized. Hence, if they consist of family portraits, to the possession of which no administrator is entitled, they cannot justify the appointment of an administrator de bonis non. "The law never does a useless thing. Administrators will be appointed only where there is occasion for their appointment": *Haven v. Haven*, 69 N. H. 204, 39 Atl. 972.

The existence or nonexistence of unsatisfied claims against the estates of decedents is by no means conclusive for or against the duty of the court to appoint an administrator de bonis non. The absence of such claims, or their failing to amount to the sum required by statute, or their being nonenforceable, is not a sufficient reason for denying the appointment where other reasons exist making the appointment necessary: *Glover v. Hill*, 85 Ala. 41, 4 South. 613; *In re Hubbard*, 185 Mass. 22, 69 N. E. 349. If, on the other hand, though it is conceded or established that no enforceable claims remain, still the course of practice in the state wherein the question arises may be

such that further duties remain to be performed by the administrator to the performance of which heirs, legatees or other persons interested in the estate may be entitled. If so, an administrator de bonis non must be appointed to represent the estate and take such measures as are necessary to its final settlement and distribution: *Scott v. Crews*, 72 Mo. 261; *Francisco v. Wingfield*, 161 Mo. 542, 61 S. W. 842; *Strickland v. Sandmeyer*, 21 Tex. Civ. App. 351, 52 S. W. 8.

Of course, the cases in which an administrator de bonis non may be appointed may be limited or extended by statute. In one state the language of its statutes upon the subject has been construed as limiting the power of appointment to cases in which there have been no formal settlements of the administrator, and it has hence been held that if an administrator is discharged on the ground that he could discover no assets, the appointment of an administrator de bonis non becomes proper and necessary to the subsequent discovery of assets: *Landsdale v. Woollen*, 99 Ind. 575. If, on the other hand, there is a decree of final settlement and discharge, it has been held under this statute, unless in some manner vacated, to amount to an adjudication in rem that the estate of the decedent has been fully administered, and to bar any subsequent proceeding for the appointment of an administrator de bonis non: *Pate v. Moore*, 79 Ind. 20; *Croxton v. Renner*, 163 Ind. 223, 2 N. E. 60. We doubt whether the statute here in question was correctly interpreted. However this may be, we know of no other statute upon the subject to which a like effect has been judicially attributed. The settlement of the accounts of an administrator and his discharge as such merely exonerate him from further duties and liabilities. Facts then known, or subsequently discovered, may require subsequent proceedings, and if so, the appointment of an administrator de bonis non is as clearly justified as if the original executor or administrator had died or been removed from office when it was concluded that he had not discharged the functions of his office: *Bratt v. Converse*, 1 Root, 174; *Appeal of Mallory*, 62 Conn. 218, 25 Atl. 109; *Enlow's Admr. v. Trustees of Bethel College*, 24 Ky. Law Re. 31, 67 S. W. 989; *Michigan T. Co. v. Probasco*, 29 Ind. App. 109, 6 N. E. 255; *Howell v. Jump*, 140 Mo. 441, 41 S. W. 976; *Ratliff v. Magee*, 165 Mo. 461, 65 S. W. 713; *Frost v. Frost*, 45 Tex. 324; *Bailey v. Babcock's Estate*, 115 Wis. 409, 91 N. W. 982.

b. At Whose Instance may be Appointed.—In the absence of any statutory limitation of the right, an administrator de bonis non may be appointed on the application of any person interested in the further administration of the estate, such as a creditor or legatee, whose claim or legacy remains unsatisfied and to the satisfaction of which further proceedings may probably contribute: *Appeal of Mallory*, 62 Conn. 218, 25 Atl. 109; *Deans v. Wilcoxson*, 25 Fla. 98, 7 South. 163; *Tillson v. Ward*, 46 Ill. App. 179; *Buss v. Buss*, 1 Mich. 163, 42 N. W. 688; *Cole v. Shaw*, 134 Mich. 499, 96 N. W. 57.

c. **Who may be Appointed.**—The right to appointment as administrator or as administrator de bonis non is generally founded upon an express statutory designation, and we shall not here undertake to compile or consider the special or local statutes bearing upon the subject. Where such statutes exist, no one can have the right to appointment in opposition to their terms, although particularly interested in the administration which is sought: *In re Spinning's Will*, 1 Tuck. 78. The mere fact that disputes have arisen among those interested does not justify the appointment of a stranger: *Donahay v. Hall*, 45 N. J. Eq. 720, 18 Atl. 163. The fact that the applicant was named as executor in the will and declining to act procured the appointment of her daughter as administrator with the will annexed does not entitle the mother, on the death of the daughter, to any preferable right to administration de bonis non: *Thornton v. Winston*, 4 Leigh, 152. Sometimes the judge has been authorized by statute to disregard the claims of next of kin and appoint any suitable person: *Russel v. Hoar*, 3 Met. (Mass.) 187. The statutes of each state usually designate the person, or classes of persons, entitled to administration, and we apprehend that these statutes must generally be regarded as equally controlling in the appointment of administrators de bonis non: *Fairland v. Percy*, L. R. 3 P. & D. 217.

d. **Time of the Appointment.**—In the absence of any special statute of limitation necessarily bearing upon the subject, it cannot be said that an application for the appointment of an administrator de bonis non is barred by lapse of time, or that it must be refused because of delay or laches. Hence, such appointment can be made though twenty years or more have elapsed since the death or removal of the former administrator or executor: *Crossman v. Crary*, 37 Iowa, 684; *In re Holmes*, 33 Me. 577; *Neal v. Charlton*, 52 Md. 495; *Bancroft v. Andrews*, 6 Cush. 493. In at least one state it has been expressly provided that the appointment might be made "after any lapse of time": *Adams v. Richardson's Estate*, 5 Tex. Civ. App. 439, 27 S. W. 29. We apprehend, however, that as an appointment is generally, if not always, sought for the purpose of asserting some claim or right, the court is not obligated to make such appointment in all cases and as a matter of course, but may to some extent, at least, inquire into the equities of the applicant, and, if he finds none, may deny his petition (*Pinney v. Gregory*, 102 Mass. 190; *San Ramon v. Watson*, 54 Tex. 254), or may refuse to proceed because he has been guilty of such gross laches as to warrant the conclusion that he ought not to be assisted: *Grayson v. Weddle*, 63 Mo. 523; *Darge v. Hill*, 103 Mo. App. 281, 77 S. W. 105; *Murphy v. Menard*, 14 Tex. 62.

e. **The Court Having Jurisdiction.**—The business of an administrator de bonis non is but to complete a proceeding previously instituted for the settlement, or administration, of the estate of a dece-

dent. His appointment must hence be made by the court which appointed the original executor or administrator, or by a court which has succeeded to the jurisdiction of such court: *People v. White*, 11 Ill. 341; *Pawling v. Speed*, 5 T. B. Mon. 580; *Burnett v. McDonald*, 7 B. Mon. 277, 26 Am. Dec. 517; *Byerly v. Donlin*, 72 Mo. 270; *Clapp v. Beardsley*, 1 Vt. 151; *Ex parte Lyons*, 2 Leigh, 761.

f. Notice of the Application.—It is easy to conceive of statutes which, either expressly or by implication, give authority to appoint an administrator de bonis non without notice to anyone: *Sively v. Summers*, 57 Miss. 712; *Steen v. Bennett*, 24 Vt. 303. Surely such cannot be the case if the court has discretion to exercise or where its decision necessarily involves an inquiry as to whether the circumstances are such as to require the appointment, or whether the person in whose behalf it is sought is entitled thereto as against other persons who claim to belong to the class designated in the statute: *Thomas v. Knighton*, 23 Md. 318, 87 Am. Dec. 571.

g. Collateral Attack Upon Appointment of.—Whether the right of an administrator de bonis non to act when his appointment purports to be made by some court may be collaterally assailed with success may depend on the character of the appointing court. If it is of special or limited jurisdiction, its judgments or orders must usually be supported to the same extent only as those proceeding from other courts of like inferior jurisdiction, and if the court is of general jurisdiction, its orders will be supported by the same presumptions and will be entitled to the same immunity from collateral assault as are those of other courts of general jurisdiction. If letters of administration de bonis non issue to the person named therein, his right to act can rarely be defeated on the ground that the appointment was void. Whatever is necessary to sustain it will generally be presumed, unless the contrary necessarily appears. In other words, it will be presumed, on collateral assault, that sufficient reason existed for making the appointment: *Lyon v. Odom*, 31 Ala. 234; *Henley v. Johnston*, 134 Ala. 646, 92 Am. St. Rep. 48, 32 South. 1009; *Jepson v. Martin*, 116 Ga. 772, 45 S. E. 75; *Barney v. Babcock's Estate*, 115 Wis. 409, 91 N. W. 982. Hence, on such an assault, it will be presumed that there was a pre-existing vacancy in the administration: *Ikelheimer v. Chapman*, 32 Ala. 676; *Beau v. Chapman*, 62 Ala. 58, 73 Ala. 140; *Sims v. Waters*, 65 Ala. 442; *Morgan v. Casey*, 73 Ala. 222; *Sands v. Hickey*, 135 Ala. 322, 33 South. 827; *Warfield v. Brand*, 13 Bush, 77; and that it left property not fully administered: *Watson v. Collins*, 37 Ala. 587; *Rogers v. Johnson*, 125 Mo. 202, 28 S. W. 635; *Corley v. Coll*, 8 Tex. Civ. App. 184, 27 S. W. 819. Nor can the order of appointment ordinarily be avoided because of any mere irregularity of proceeding: *Macey v. Stark*, 116 Mo. 481, 21 S. W. 1088; or any error in the exercise of discretion vested in the appointing court: *Frost v. Frost*, 45 Tex. 324. Jurisdictional statements found in the record must be accepted as true at least until the con-

trary is shown, as where it states that the appointment was made by consent of all parties interested: *Oakes v. Buckley's Estate*, 49 Wis. 592, 6 N. W. 321. Nevertheless, an appointment may be absolutely void, and where such is the case, that fact may appear on a collateral assault as well as in a direct proceeding. The petition for appointment may be so deficient in some respect as not to give the court jurisdiction of the proceeding, but no mere irregularity, such as a failure to verify, can have this result: *Moore v. Willamette T. & L. Co.*, 7 Or. 359. If the record, or though there is not technically any record, the proceedings and moving papers as they appear in writing on the minutes and files of the court, show beyond question that some contingency essential to authorize the appointment did not exist, then the appointment, when made, was void: *Sitzman v. Paquette*, 13 Wis. 291. Thus, as we have already shown, there can be no administration de bonis non unless there has previously been a grant of administration or of letters testamentary, followed by a vacancy in the administration. An executor or administrator and administrator de bonis non of the same estate cannot coexist. Hence if it appears, even upon collateral attack, that the original executor or administrator had not died nor been otherwise removed from office prior to the granting of the administration de bonis non, or, though an order of removal had been made, that it was void, then such grant is void: *Goodwin v. Hooper*, 45 Ala. 613; *Hooper v. Scarborough*, 57 Ala. 510; *McDowell v. Jones*, 58 Ala. 25. But if an administrator is on his own petition appointed administrator de bonis non, the appointment may be sustained on collateral attack on the ground that such petition operated as a surrender of his office: *Henley v. Johnson*, 134 Ala. 646, 92 Am. St. Rep. 48, 32 South. 1009. So, where the statute requires notice of the application to be given and the proofs on file show that such notice was not given for the time prescribed, the jurisdiction of the court cannot be sustained: *Kammerer v. Morlock*, 125 Mich. 320, 84 N. W. 319. If the court granting letters of administration de bonis non is of general jurisdiction, it is clear that its jurisdiction in the particular case will be presumed, and that this presumption cannot be rebutted by parol or extrinsic evidence: *Strickland v. Sandmeyer*, 21 Tex. Civ. App. 351, 52 S. W. 87; nor has any case come within our observation in which a collateral assault has been made with success on parol evidence, or, indeed, on any evidence except such as, from being found on the minutes and files of the court, may be regarded as analogous to evidence by the record.

II. Property Which Vests in.

This topic has a dual importance, first, because, unless there is property which can so vest, the appointment is unnecessary and unauthorized; the second, except as to such property, there is no right of possession on the part of the administrator de bonis non after his

appointment, and no remedy which can be employed by him to recover its possession or for its conversion or for injuries thereto. In the first place, except where the common law has been changed by statute, the appointment of an administrator de bonis non cannot be justified except as to assets not administered upon, nor can his appointment give him any right of recovery beyond such assets: *Gilbert v. Hardwick*, 11 Ga. 599; *Oldham v. Collins*, 4 J. J. Marsh. 49; *Morse v. Clayton*, 13 Smedes & M. 373; *McMahon v. Allen*, 4 E. D. Smith, 519. Unadministered assets may, we think, be described as those assets which vested in the original executor or administrator by virtue of his appointment and qualification, and which remain in specie and respecting which no change has occurred to relieve the administrator from liability to account for those specified articles, and contradistinguished from their proceeds or value: *Kelly v. Kelly*, 1 Ala. 908, 44 Am. Dec. 469; *Swink v. Snodgrass*, 17 Ala. 653, 52 Am. Dec. 190; *Abney v. Pickett*, 21 Ala. 739; *Haynes v. Bessellieu*, 2 Ark. 499; *Thomas v. Hardwick*, 1 Kelly, 78; *Short v. Johnson*, 2 Ill. 489; *Floyd v. Breckenridge*, 4 Bibb, 14; *Bradshaw v. Commonwealth*, 3 J. J. Marsh. 632; *Graves v. Downey*, 3 T. B. Mon. 353; *Slaughter v. Froman*, 5 T. B. Mon. 19, 17 Am. Dec. 33; *Neale v. Hagthorpe*, 3 Bland, 551; *Alexander v. Stewart*, 8 Gill & J. 226; *State v. Fidelity & D. Co.*, 100 Md. 256, ante, p. 402; *Byrd v. Holloway*, Smedes & M. 323; *Gambel v. Hamilton*, 7 Mo. 469; *Hodge v. Hodge*, 90 Me. 505, 60 Am. St. Rep. 285, 38 Atl. 535, 40 L. R. A. 33; *Pott v. Smith*, 3 Rawle, 361, 24 Am. Dec. 359; *Villard v. Robert*, 1 Strober, 393. At the common law "unadministered goods" meant, as is said by Judge Carr, in the elaborately considered case of *Coleman v. McMurdo*, 5 Rand. 51, "goods, chattels, and credits which were of the testator or intestate at the time of his death." "This definition," says the judge, "turns our minds at once to the question: What amounts to an administration of assets, so far as regards the administrator de bonis non? Executors and administrators took the legal title to the goods and chattels of the deceased; nor were they, before the statute of distribution, 22 & 23 Car. II, 1670, bound to distribute the surplus after the payment of debts and legacies. Both held in autre droit; and therefore neither could dispose by will of the property remaining in specie; both had the power, while living, of changing, altering, and converting the property, and whatever was thus altered or converted became their own goods, and descended on their deaths to their own representatives. Such change or conversion of the goods was (so far as regarded the administrator de bonis non) a complete administration, and put them as effectually beyond the reach of his commission, as if they had never belonged to the testator or intestate." His honor then referred to many English decisions, and continued: "These are few of the many cases scattered through the reports of the last three centuries, showing the settled course of the law. I might bring to my aid many

others, where the contest was between the representative of the administrator and the administrator de bonis non; and the question uniformly turned upon the point of conversion; all agreeing that a conversion extinguished the right of the administrator de bonis non, as it was an administration, and his goods reached only to the goods and credits unadministered. Sometimes equity will follow the property where at law there might be said to be a conversion; as if the first administrator vested money of his intestate in the funds or transferred it from one fund to another. This, as it showed no intention of making the money his own, would not be considered in equity a conversion. Sometimes there will be a conversion in equity where none exists at law; that is, where some act is done by the administrator showing a clear intent to convert. These differences result from the different modes of administering justice in the two systems; and do not in the least affect the question; for, before whichever forum the case is brought, if it be decided that the subject matter of dispute has been converted, that is regarded as decisive to show that the administrator de bonis non has power over it."

If the administrator has sold any chattel of the decedent and received the proceeds either in money or evidence of indebtedness, or any other thing taken in payment: *Saffran v. Kennedy*, 7 J. J. Marsh. 188; *Maraman v. Trunnell*, 3 Met. 146, 77 Am. Dec. 167; *Sloan v. Johnson*, 14 Smedes & M. 47; *Cutlar v. Quince*, 2 Hayw. (3 N. C.) 60; *Calder v. Pyfer*, 2 Cranch C. C. 430, Fed. Cas. No. 2299; or has converted any such chattel to his own use: *In re Assignment of Richart*, 58 Ill. App. 91; *Reed v. Hume*, 25 Utah, 248, 70 Pac. 998; or collected any chose in action: *Wilson v. Arrick*, 112 U. S. 83, 5 Sup. Ct. Rep. 75, 28 L. ed. 617; or has otherwise received money to which the decedent was entitled: *Dorsey v. Dorsey*, 5 J. J. Marsh. 280, 22 Am. Dec. 33; *United States v. Walker*, 109 U. S. 258, 3 Sup. Ct. Rep. 277, 27 L. ed. 927; or collected the rents and income of property, or made loans and given notes or other evidences of indebtedness in his own name: *Caulkins v. Bolton*, 98 N. Y. 511; *Miller v. Alexander*, 1 Hill Eq. 25; the property resulting from these transactions, or any of them, is, in contemplation of the common law, administered, and with it the administrator de bonis non has nothing to do and its existence cannot be the occasion of his appointment: *Myers v. Forbes*, 74 Md. 355, 22 Atl. 410; *Baker v. Bowie*, 74 Md. 467, 22 Atl. 133; *Getty v. Long*, 82 Md. 643, 33 Atl. 639. If, as the result of administration, property is turned over to a tenant for life, it must be regarded as fully administered upon, and upon his death no title thereto or right to the possession thereof passes to the administrator de bonis non: *Myers v. Safe Deposit & T. Co.*, 73 Md. 413, 21 Atl. 58.

The general test respecting the rights of an administrator de bonis non to property which his predecessor in office might have recovered is, that it would have been necessary to sustain such a recovery

to make profert of his letters of administration. "When the property in any effects of the deceased has been changed by the original executor or administrator, and has vested in him in his individual capacity, such effects will go to his own executor or administrator and not to the administrator de bonis non": *Harney v. Dutcher*, 15 Mo. 89, 55 Am. Dec. 131. Hence, if balances are found against an administrator in his accounting or exist, whether he has accounted or not, they must be the result of transactions on his part by which the title to such balances vested in him, so that had they come to the possession of a third person, the administrator might have recovered from him suing in his personal capacity and without making profert of his letters, and hence the administrator de bonis non cannot recover such balances by suit against the original executor or administrator or his sureties: *Gray v. Harris*, 43 Miss. 421; *Dement v. Heth*, 45 Miss. 388; except when by statute the duty has been created against the latter to pay such balances over to the administrator de bonis non: *Lemmon v. Hall*, 20 Md. 168; *Donaldson v. Raborg*, 26 Md. 312.

Claims existing in favor of the decedent in his lifetime do not pass by mere appointment and qualification of an administrator, vest in him. Therefore, if he does not collect them, the title passes to the administrator de bonis non on the appointment of the latter. Hence interest coupons, though in the possession of the original executor or administrator, must be deemed unadministered property: *Adams v. Board of Trustees*, 37 Fla. 266, 20 South. 266; as well as accounts in bank, which, though standing in the name of the decedent, were continued in the name of the original administrator after his appointment: *Getty v. Long*, 82 Md. 643, 33 Atl. 639. The existence of a power of disposition on the part of an executor or administrator if unexecuted, leaves the property not administered upon, and may therefore, give rise to the necessity for administration de bonis non: *Cushman v. Albee*, 183 Mass. 108, 66 N. E. 590.

If an administrator makes an assignment or delivery of property and such assignment is found void, or such delivery, for some reason, does not affect the title, the property remains subject to further administration after his death, and an administrator de bonis non is entitled to its possession: *Connecticut T. & S. D. Co. v. Security Co.*, 67 Conn. 438, 35 Atl. 342; *Adams v. Board of Trustees*, 37 Fla. 266, 20 South. 266; *Seabrook v. Brady*, 47 Ga. 650; *Weaver v. Meyer*, 32 Ind. App. 587, 70 N. E. 409; *Reed v. Reeves' Admr.*, 13 Bush, 447.

A debt due from an executor or administrator to the decedent has been held to be deemed not administered upon prior to its payment, and hence to be recoverable in an action by an administrator de bonis non: *Kelsey v. Smith*, 1 How. (Miss.) 68; and if the latter is surety on the bond of the administrator, he becomes liable, on his appointment, for the amount of the debt so due from his predecessor in office: *Jacobs v. Morrow*, 21 Neb. 233, 31 N. W. 739. The better

view, however, with respect to debts due from an executor or administrator to the decedent, we think, is, that on his appointment and qualification, they become assets with which he is chargeable and which, so far as his liability thereon is involved, must be treated as if actually collected. The debt as such becomes extinguished by his appointment and is not revived by his death or removal, and hence does not constitute an unadministered asset nor a demand capable of assertion by the administrator *de bonis non*: *Hodge v. Hodge*, 90 Me. 505, 60 Am. St. Rep. 285, 38 Atl. 535, 40 L. ed. 33.

In many of the states statutes have been enacted in which the authority and powers of administrators *de bonis non* have been greatly enlarged, and such statutes, either expressly or by necessary implication, increase the property which justifies the appointment of such an administrator and which he is entitled to possess, and for the recovery of which he may maintain an action or other appropriate proceeding after his appointment, for the law must be construed as conferring property rights corresponding to the authority vested in, and the duties imposed upon, such administrators: *State v. Hunter*, 15 Mo. 190; *Little v. Walton*, 23 Pa. St. 164; *Redfearn v. Craig*, 57 S. C. 534, 35 S. E. 1024; post, subdivision III, b.

III. Authority and Duties of.

a. **Generally.**—At the common law, as we have already shown, an administrator *de bonis non* is entitled as such to receive possession only of the goods of the decedent not already administered upon: *Bates v. Woolfolk*, 5 Ga. 329; *Kendall v. Lee*, 2 Penr. & W. 482. Therefore, where his authority has not been extended by statute, it must be limited to such goods and his doing with them of such acts as are necessary to complete the administration. He has undoubted authority to receive and hold possession for the purpose of administration of all goods of the testator or intestate remaining in specie: *Carroll v. Connet*, 2 J. J. Marsh. 195; *Scarborough v. Watkins*, 9 B. Mon. 540, 50 Am. Dec. 528; *Alexander v. Stewart*, 8 Gill & J. 226; *Lea v. Hopkins*, 7 Pa. St. 385. Certain equities may exist, however, authorizing the courts to restrict his authority to so much only of such property as may be requisite for the settlement of the estate: *Browne v. Doolittle*, 151 Mass. 595, 25 N. E. 23. He cannot disturb the title of a purchaser from his predecessor or with success claim specific property held under an agreement which it was competent for such predecessor to make: *Hagthorpe v. Neal*, 7 Gill & J. 13; nor can he call into question the acts of his predecessor, or sue him on account of a devastavit or a performance or nonperformance of his duties: *Yale v. Baker*, 2 Hun, 468. If his predecessor in his official capacity was entitled to the possession of any character of property or to the rents and profits thereof, then the administrator is authorized to take possession and collect such rents and profits: *Kline v. Molton*, 11 Mich. 370. He cannot call his predecessor to an accounting or main-

tain an action against him or his sureties for money due to the estate: *Searles v. Scott*, 14 Smedes & M. 94. The theory of the common law was, that with respect to those matters, the heirs at law or other persons injuriously affected by the failure of the executor or administrator to account for or pay over moneys received by him or to make a proper disposition of any other property in his hands, which, in contemplation of law, had not been administered upon, had their remedy by suit to which it was not necessary that the administrator *de bonis non* be made a party. He did not represent the estate, and could not be deemed to have authority to act for, them, and could not be deemed to have authority to maintain any action which, for its maintenance, depended on the action of such heirs. Therefore, conceding that an administrator had made a sale void for want of authority on his part to make it, but which the heirs might, at their election, ratify and make valid, still the administrator *de bonis non* could not maintain an action to recover the purchase price or the proceeds of the sale. To sustain such a recovery it is necessary that the heirs should have ratified the sale, and this the administrator *de bonis non* could not do for them by commencing and maintaining the action: *Wood v. Legg*, 91 Ala. 511, 8 South. 342. If money collected by an administrator remains in specie, unmingled with his moneys, it has been held that his administrator *de bonis non* is entitled to the possession thereof: *Marvel v. Babbitt*, 143 Mass. 226, 9 N. E. 566. Nothing which an administrator can do after his removal from office can confer on him a right to acquire or retain possession of the money of the decedent. Hence, if, after such removal, he collects a demand due the decedent, the money so collected belongs to and must be turned over to the administrator *de bonis non*: *Salter v. Cain*, 7 Ala. 478.

b. **Statutory Modifications of the Law Respecting.**—In very many of the states of the American Union the common law respecting administrators *de bonis non* has been greatly modified, and their powers, duties and liabilities have thereby been much enlarged. Some of these statutes have been content with declaring in general terms that such an administrator has the same powers and duties and is subject to the same liability as an original administrator: *Orme's Estate v. Brown*, 22 Ind. App. 569, 52 N. E. 1005; *Shawhan v. Loffer*, 24 Iowa 217; *McMahon v. Allen*, 4 E. D. Smith, 519; *Grant v. Bell*, 87 N. C. 34; *Shackelford v. Bunyan*, 7 Humph. 141. Language of this purport may not, however, have a very extensive operation. It does not necessarily change the relation of an administrator *de bonis non* to his predecessor in office, nor establish the power of the former to demand and receive of the latter property remaining in his hands, which, by the rules of the common law, must be regarded as administered upon, or to sue for the balance remaining in his hands, or to compel him to account, or to maintain actions against him and his sureties for such accounting or for any devastavit or other wrong committed by him: *Lucas v. Donaldson*, 117 Ind. 139, 19 N. E. 758.

Generally, however, the modern statutes have been construed as authorizing an administrator de bonis non to demand and recover from his predecessor and the latter's sureties all moneys due to the estate: *Lobit v. Castille*, 14 La. Ann. 779; *State v. Heinrichs*, 82 Mo. 542; *Meiser v. Eckhart*, 19 Pa. St. 201; *Slaymaker v. Bank*, 103 Pa. St. 616; *Hibberd v. Bailey*, 129 Fed. 575. In many of the states the functions of probate and surrogate courts, and consequently of those of administrators de bonis non, as well as of executors and administrators, have been greatly enlarged by the vesting in those courts of jurisdiction to make a complete settlement of the estates of decedents and to prepare them for final distribution and make such distribution among the heirs and other persons entitled thereto. Where such is the case, it is doubtless essential for the administrator de bonis non to do all acts necessary to be done after his appointment for the purpose of collecting and preparing for distribution all the estate of the decedent, and such an administrator may, therefore, not only do every act which might rightfully be done by the original administrator or executor for that purpose, but may further take all such proceedings as may be requisite to obtain possession of property remaining in the hands of his predecessor in office and to compel a full accounting by the latter and the payment from him and his sureties of all moneys due to the estate. In those states the words "administrator de bonis non" sometimes do not appear, and whenever there is a vacancy in the administration and a necessity for further proceedings, an administrator may be appointed who, so far as his authority is concerned, may be regarded as if he were the original administrator, and the executors and administrators previously in office may by him be treated as persons under liability to the estate, which liability it is both the province and the duty of the administrator last appointed to enforce: *Ellyson v. Lord*, 124 Iowa, 125, 99 N. W. 582; *Minot v. Norcross*, 143 Mass. 326, 9 N. E. 662; *State v. Fulton*, 35 Mo. 323; *Judge of Probate v. Claggett*, 36 N. H. 381, 72 Am. Dec. 314; *Lansdell v. Winstead*, 76 N. C. 366; *Gilliam v. Watkins*, 104 N. C. 180, 10 S. E. 183; *Tulburt v. Hollar*, 102 N. C. 406, 9 S. E. 430; *Dawson v. Dawson*, 25 Ohio St. 423, 443; *Foster v. Wise*, 46 Ohio St. 20, 15 Am. St. Rep. 532, 16 N. E. 687.

c. **Under Powers Created and Conferred by Wills.**—Where the law imposes a trust on an executor of a personal nature or gives him powers of any character in addition to those resulting from his office, and he refuses to act, or for any other reason it becomes necessary to appoint an administrator with the will annexed, such powers rarely, if ever, by the rules of the common law, vest in such administrator, and the same reasons must result in their denial to administrators de bonis non: *Hinson v. Williamson*, 74 Ala. 180; *Cox v. Shelby County T. Co.*, 26 Ky. Law Rep. 50, 80 S. W. 789. The question of

who may execute powers under wills, having already been made the subject of a monographic note in this series, will not be re-entered upon: Note to Crouse v. Peterson, 80 Am. St. Rep. 102.

IV. Actions and Suits by.

a. General Rule.—It would be vain to assert that an administrator de bonis non had a right and at the same time deny him a remedy for its enforcement, or to deny him a right and at the same time to maintain the existence of a remedy in his favor. Therefore the test to determine whether he is or is not entitled to a remedy is to inquire whether he is or is not entitled to the right which he claims. We have already referred to American statutes, under the provisions of which administrators de bonis non have, for all substantial purposes, been placed in the same position as to rights as original executors and administrators and under which the distinction between administered and unadministered assets has been practically abolished, provided the estate still has an interest in the assets and they are further required for the purposes of its settlement or distribution or its payment over to the persons entitled thereto as creditors, heirs, legatees, devisees or otherwise: Subdivision III, b, ante. By such statutes it is clear that the actions and suits which may be commenced and maintained by such administrators must be as ample and varied as may prove necessary for the vindication of the rights conferred, including proceedings against their predecessors in office and their sureties for an accounting of the enforcement of any other duty or obligation resting on him or them: *Wilson v. Hinton*, Ark. 145, 38 S. W. 338; *American Surety Co. v. Piatt*, 67 Kan. 272, 72 Pac. 775; *Mayer v. McLure*, 36 Miss. 389, 72 Am. Dec. 19; *State v. Hunter*, 15 Mo. 490; *Morehouse v. Ware*, 78 Mo. 100; *Book v. Armstrong*, 93 Mo. 49, 4 S. W. 727; *Thompson v. Badham*, 70 N. C. 141; *University v. Hughes*, 90 N. C. 537; *Neagle v. Hall*, 115 N. C. 420, 20 S. E. 516; *Tracy's Admr. v. Cord's Admr.*, 2 Ohio St. 431; *Jelks v. Goldsmith*, 52 Ohio St. 499, 49 Am. St. Rep. 730, 40 N. E. 16; *Carter v. Trueman*, 7 Pa. St. 315; *Pennsylvania Co. for Insurance v. Philadelphia etc. Co.*, 153 Pa. St. 160, 25 Atl. 1043. Sequestration (*Aderson's Admrs. v. ———*, 2 Hayw. (3 N. C.) 22) or other summary proceedings may be resorted to: *Wickham v. Page*, 49 Mo. 526. Sometimes, as in Maryland, the action or proceeding must first be authorized by an order of the court having jurisdiction of the administration of the estate: *Johnson v. Farmers' Bank*, 11 Md. 412; *Stewart v. Hart*, 57 Md. 234.

b. For the Recovery of Specific Property.—Even where the common-law rules prevail without modification, an administrator de bonis non is entitled to the possession of all the personal property of the decedent which remains in specie unadministered upon, and may maintain an action for its recovery: *Chamberlin's Estate*, 70 Conn. 363, 39 Atl. 734, 41 L. R. A. 204; either against his predecessor

office (*Nolly v. Wilkins*, 11 Ala. 872; *Paschall v. Davis*, 3 Ga. 256; *Walton v. Walton*, 2 Abb. Pr., N. S., 428), or against third persons, and this though the latter claim under purported sales or other transfers by the original executor or administrator, if in law they are not of a character to divest the estate of its title: *Swink v. Snodgrass*, 17 Ala. 653, 52 Am. Dec. 190; *Hull v. Clark*, 14 Smedes & M. 187; *Prestidge v. Pendleton*, 24 Mass. 80; *Fornquet v. Forstall*, 34 Mass. 87; *Cowgill v. Linnville*, 20 Mo. App. 138; *Hendrick v. Gidney*, 114 N. C. 543, 19 S. E. 598; *Bell v. Speight*, 11 Humph. 451; *Todd v. Willis*, 66 Tex. 704, 1 S. W. 803; *Williams v. Verne*, 68 Tex. 414, 4 S. W. 548. The action may also be against the former executor or administrator and his sureties on his official bond: *Waterman v. Dockray*, 78 Me. 139, 3 Atl. 49; *Boulware v. Hendricks*, 23 Tex. 667; *McDonald v. Alford*, 32 Tex. 36. If a sale made by an executor or administrator, though not authorized, is such that the heirs or other persons interested in the estate may ratify, and they in fact recognize its validity, it is said that an administrator *de bonis non*, because he cannot exercise the right to elect or disaffirm the sale, cannot maintain an action for the recovery of the property: *Elliott v. Branch Bank*, 20 Ala. 345.

c. **For the Conversion of Personal Property.**—In considering the question of the right of an administrator *de bonis non* to maintain an action for conversion, the common-law rule must always be kept in mind, unless it has been abrogated by statute, that he has no cause of action with respect to property administered upon by his predecessor in office: *Bliss v. Seaman*, 165 Ill. 422, 46 N. E. 279; *Meservy v. Kalloch*, 97 Me. 91, 53 Atl. 876; *Hagthorp v. Hook*, 1 Gill & J. 270; *Bradway v. Holmes*, 50 N. J. Eq. 311, 25 Atl. 196; and that goods converted or wasted by such predecessor are, in contemplation of the common law, administered upon, and hence no cause of action therefor can exist in favor of an administrator *de bonis non*: *Chamberlain v. Bates*, 2 Port. 550, 27 Am. Dec. 667; *Finn v. Hempstead*, 24 Ark. 111; *Green v. Byrne*, 46 Ark. 453; *Appeal of American Board of Commissioners*, 27 Conn. 344; *Gregory v. Harrison*, 4 Fla. 56; *Short v. Johnson*, 25 Ill. 489; *Newhall v. Tourney*, 14 Ill. 338; *Anthony v. McCall*, 3 Blackf. 86; *Lucas v. Donaldson*, 117 Ind. 139, 19 N. E. 758; *Warfield v. Brand's Admr.*, 13 Bush, 77; *Felts v. Brown*, 7 J. J. Marsh. 147; *Stubblefield v. McRaven*, 5 Smedes & M. 130, 43 Am. Dec. 502; *Rives v. Patty*, 43 Miss. 338; *Brownlee v. Lockwood*, 20 N. J. Eq. 239; *Smith v. Carrere*, 1 Rich. Eq. 123; *Douglas v. Day*, 28 Ohio St. 175; *Kendal v. Lee*, 2 Penr. & W. 482; *Stott v. Alexander*, 2 Sneed, 650; *Curtis v. Curtis*, 13 Vt. 517; *Coleman v. McMurdo*, 5 Rand. 51; *Cheatham v. Burfoot*, 9 Leigh, 580; *Reed v. Hume*, 25 Utah, 248, 70 Pac. 1000; *Beall v. New Mexico*, 16 Wall. 535, 21 L. ed. 292. In some of the states where the common-law rule is retained, in the event of the death of an executor or administrator,

it is so modified, when he is removed for some cause, that he is subject to an action by the administrator de bonis non for waste, mismanagement or for breach of duty: *Hanifan v. Needles*, 108 Md. 403; *McDonald v. O'Connell's Admr.*, 39 N. J. L. 320; *Parker Stevens*, 61 N. J. Eq. 163, 47 Atl. 573. If the conversion is not by the original executor or administrator, but by some other person, whether in the lifetime of the former or not, the property converted cannot be held to be administered upon. The estate of the decedent still retains a right to it in specie, and an action by the administrator de bonis non may be maintained for its possession or conversion: *Larence v. Wright*, 23 Pick. 128; *Barlow v. Nelson*, 157 Mass. 395, N. E. 359; *Buttrick v. King*, 7 Met. 20.

d. **On Choses in Action.**—If a promissory note or other chose in action in favor of the decedent is such that it might be enforced by an action brought by his executor or administrator, who dies or is removed from office without enforcing it, the right of action passes to the administrator de bonis non. Such a note or some other contract for the payment of money may, however, be given to an executor or administrator, who may afterward die or be removed from office without enforcing or undertaking to enforce it. Decisions may be found to the effect that, though the consideration of the note or contract was the property of the estate and the money recovered thereon must belong to the state, yet that no action is maintainable by the administrator de bonis non: *Newhall v. Tournay*, 14 Ill. 338; *Caulkins v. Bolton*, 98 N. Y. 511; *McCoy v. Gilmore*, 7 Ohio, pt. I, 268. The weight of authority is otherwise, whether or not the common law respecting the rights and duties of such administrators has been modified, and they are regarded as so far in privity with the original executor or executor to whom the note or other obligation was given as to be entitled to maintain an action thereon: *Caller's Exr. v. Bolton's Admr.*, Minor, 296; *King v. Griffin*, 6 Ala. 387; *Dunham v. Grant*, 12 Ala. 105; *Sheets v. Peabody*, 6 Blackf. 130, 38 Am. Dec. 132; *Sullivan v. Holker*, 15 Mass. 374; *Morse v. Clayton*, 13 Smedley & M. 373; *Eure v. Eure*, 3 Dev. (14 N. C.) 206; *Rodgers v. Good*, 87 N. C. 442; *Matthews v. Meek*, 23 Ohio St. 272; *McGuinness v. Whalen*, 17 R. I. 619, 24 Atl. 44; *Abington v. Tyler*, 6 Coldw. 50; *Wood v. Tomlin*, 92 Tenn. 514, 22 S. W. 206; *Tobler v. Stubblefield*, 32 Tex. 188.

e. **On Judgments in Favor of Predecessors.**—It is said that if a judgment is recovered by an executor or administrator in his official capacity, it cannot be executed by an administrator de bonis non: *Grout v. Chamberlin*, 4 Mass. 613. This probably means that it cannot, without further proceedings, take out execution thereon. It may, however, prosecute a scire facias and obtain a remedy in that way: *Warren v. Rist*, 16 Ala. 686; *Duncan v. Hargrove*, 18 Ala. 7; *Paine v. McIntire*, 32 Me. 131; or may maintain an action of debt.

thereon: *Grout v. Chamberlin*, 4 Mass. 611; *Smith v. Pearce*, 2 Swan, 127; *Dykes v. Woodhouse*, 3 Rand. 287.

f. **Against Predecessors for Balances in Their Hands or for an Accounting.**—Where the common-law rules upon the subject remain without modification, it is very rarely that an administrator de bonis non can maintain an action against his predecessor for moneys remaining in his hands. Probably such an action is maintainable where the moneys have been received as part of the assets of the decedent and are still in specie and not mingled with the moneys of the original executor or administrator: *Marvel v. Babbitt*, 143 Mass. 226, 9 N. E. 566; but where they have resulted from the sale of property or consisted of mere balances due, they are, by the common law, regarded as assets administered upon for which an administrator de bonis non can maintain no action, for the sufficient reason that he is not entitled to their possession and the right of recovery is vested in the heirs and distributees or other persons entitled thereto: *Slaughter v. Froman*, 5 T. B. Mon. 19, 17 Am. Dec. 33; *Dement v. Heth*, 45 Miss. 388; *Carriek's Admr. v. Carriek's Exr.*, 23 N. J. Eq. 364; *Parker v. Stevens*, 61 N. J. Eq. 163, 47 Atl. 574; *Smith v. Waugh*, 84 Va. 806, 6 S. E. 132; *United States v. Walker*, 109 U. S. 258, 3 Sup. Ct. Rep. 277, 27 L. ed. 927; *Wilson v. Arrick*, 112 U. S. 83, 5 Sup. Ct. Rep. 75, 28 L. ed. 617. The right to recover such balances exists in many of the states, but is the result of statutes either expressly creating it or so changing the general duties and powers of administrators de bonis non that they must be deemed to be vested with authority to collect all assets of the decedent and apply or hold them for the purposes of administration, or of disposing of them as may be directed by the final decree distributing such assets among the parties judicially determined to be entitled thereto: *Weld v. McClure*, 9 Watts, 495; *Trueman v. Trueman*, 3 Clark, 101, 4 Pa. L. J. 462; *Carter v. Trueman*, 7 Pa. St. 315; *Miller v. Alexander*, 1 Hill Eq. 25; subdivision III, b, ante. The action is generally brought upon the bond of the predecessor against the latter and his sureties: *Morehouse v. Ware*, 78 Mo. 100; *Ham v. Kornegay*, 85 N. C. 119; *Curtis v. Lynch*, 19 Ohio St. 392; *Douglas v. Day*, 28 Ohio St. 175; *Murphey v. Menard*, 11 Tex. 173; *Dwyer v. Kalteyer*, 68 Tex. 554, 5 S. W. 75; *Helsley v. Craig*, 33 Gratt. 716; and sometimes this remedy is made exclusive of all others: *Curtis v. Lynch*, 19 Ohio St. 392; *Douglas v. Day*, 28 Ohio St. 175. So where an accounting is necessary to determine what remains due from the former executor or administrator, a suit therefor can be maintained by the administrator de bonis non only when authorized by statute: *Oglesby v. Gilmore*, 5 Ga. 56; *Gilbert v. Hardwick*, 11 Ga. 599. Nor can he, without statutory authority, maintain a suit to set aside or correct an order, judgment or decree attacking or settling the accounts of the former executor or administrator: *McDonald v. Alford*, 32 Tex. 36; *Brown v. Franklin*, 44 Tex. 559.

g. Suits in Equity.—An administrator de bonis non may, as a general rule, maintain any suit in equity which is necessary to enforce or protect the rights represented by him: *Shell v. Boyd*, 32 S. C. 311, 11 S. E. 205; *Shackelford v. Runyan*, 7 Humph. 141; *Whittaker v. Whittaker*, 12 Lea, 393. He may, therefore, sue in equity for the enforcement of a promissory note executed to his predecessor in office where the legal remedy is inadequate: *Burrus v. Roulhac*, 2 Burr. 39; or to enforce a vendor's lien on property of the estate sold by his predecessor, the purchase price of which remains wholly or partly unpaid: *Hudgens v. Cameron*, 50 Ala. 379. He may maintain a bill to procure the advice of the court, where his duties are doubtful, difficult or embarrassing: *Sellers v. Sellers*, 35 Ala. 235; or to compel his predecessor to release property purchased by him at his own sale: *Duffy v. State*, 115 Ind. 351, 17 N. E. 615; *Green v. Sargeant*, 23 Vt. 466, 56 Am. Dec. 88; or to enjoin the enforcement of a judgment against his predecessor when such enforcement is inequitable: *Price v. Taylor*, 51 Ark. 75, 9 S. W. 854. In South Carolina, it has been held that an administrator de bonis non cannot maintain a suit to set aside a transaction between his predecessor and a debtor of the estate on the ground of fraudulent collusion between them. This holding was not based upon the ground that an improper tribunal was resorted to, but solely for the reason that the original executor or administrator could not bring such a suit, and that his successor in office was bound by his acts: *Johnston v. Lewis*, Rice Eq. 40, 33 Ala. Dec. 74; *Steele v. Atkinson*, 14 S. C. 154, 37 Am. Rep. 728. Where this rule prevails, the remedy, when it exists, must be pursued by the creditor or distributee. Under the statutory law controlling administrators de bonis non in the greater number of states of the United States the reason urged in South Carolina could not prevail, because under such statutes, it is not true that an administrator de bonis non is necessarily bound by the acts of his predecessor: See subdivision V, post; and it is true that such administrators for most purposes represent the estate and all persons interested in it to the same extent as does an original administrator.

V. When Bound by and may Take Advantage of Proceedings for or Against or Acts Done by Their Predecessors in Office.

The position that there is no privity between an executor or administrator and an administrator de bonis non, and hence that a judgment for or against the former is neither conclusive nor admissible for or against the latter, is well supported by authority: *Rogers v. Granniss*, 20 Ala. 247; *Martin v. Ellerbe's Admr.*, 70 Ala. 326; *American Board of Commissioners' Appeal*, 27 Conn. 344. Therefore, it has been held that a judgment in favor of an administrator is not a bar to a subsequent action against an administrator de bonis non, though the two actions present the same issues: *Hummel v. First Nat. Bank*, 2 Colo. App. 571, 32 Pac. 72; and that a judgment in favor of the former is not evidence of indebtedness in actions brought by

The omissions of his predecessor are admissible in proceedings against him: *Starke v. Keenan's Exr.*, 5 Ala. 590; *Pharis v. Lach*, 20 Ala. 662; *Simonds v. Harris*, 92 Ind. 505; *Duncan v. Watson*, Miss. 187; *Fuller v. Mowry*, 18 R. I. 424, 28 Atl. 608; *Johnson v. Rice*, 33 Am. Dec. 74; *Coleman v. McMurdo*, 5 Band. 51. The promises of an original executor or administrator which are sufficient to prevent the operation of the statute of limitations, or to remove a bar created by it, lose none of their force on the appointment of an administrator de bonis non: *Newhouse v. Redwood*, 7 Ala. 9; *Emerson v. Randolph*, 16 Mass. 429; *Lashlee v. Jacobs*, 9

Humph. 718. "In many respects the acts of an administrator within the sphere of his duty and power are obligatory upon his successor so far as to charge the estate. They bind the administrator de bonis non, because the estate came into his hands charged with them by the acts of the administrator which he might legitimately do in the management of the estate while in his hands": *Duncan v. Watson*, Miss. 206. It has been intimated that an administrator might estop himself from asserting a lien or right on behalf of the estate, but that the estoppel could not apply against the administrator de bonis non: *Masterson v. Pullen*, 62 Ala. 145. We apprehend, however, that this is not true, and that if an act or omission of an executor or administrator can be urged with success against him when acting in his representative capacity, it may be urged with equal success against his successor in office acting in a like capacity. The test in all cases is, Did the executor or administrator, in what he did or failed to do, represent and speak with authority for the estate? If he did, the administrator de bonis non is not affected. Hence, in any action or proceeding he may take, he cannot be bound or estopped by an illegal or unauthorized act which his predecessor in office assumed or attempted to do: *Martin v. Ellerbe's Admr.*, 70 Ala. 326; nor can he be estopped by the failure of such predecessor to speak for the estate in behalf of the estate when his duty required him to do so: *Sell v. Cheney*, 70 Ga. 790.

VI. Liabilities.

The liabilities of administrators de bonis non must correspond to their powers and duties and be controlled by the principles applicable to original administrators, except in so far as the laws in force in the respective states may withhold from the one some authority which they concede to the other. For the acts or contracts of the predecessors administrators de bonis non cannot be held personally responsible: *Savage v. Benham*, 11 Ala. 49; *Pearce v. Smith*, 2 B. & C. 360, 4 Am. Dec. 588; *McBeth v. Smith*, 3 Brev. 511. Hence, they are not accountable for the proceeds of sales made by such predecessors or for moneys otherwise collected by them: *In re Place*, 1 Redf. 8, 276; *Roper v. Burton*, 107 N. C. 526, 12 S. E. 334; *In re Small's Estate*, 5 Pa. St. 258. It is their duty, however, where the rules of common-law prevail, to collect and receive all unadministered assets. Also *Alsup v. Mather*, 8 Conn. 584, 21 Am. Dec. 703; and where those rules have been modified by statute, to collect and receive such further assets as the statutory modifications require. They are not only accountable for the property which actually comes to their hands, but are further liable for a want of reasonable diligence in collecting and obtaining possession of moneys or other property to the possession of which they are entitled, when their negligence occurs either in omitting to pursue with diligence their remedies against their predecessors in office, or against some other person: *Wilkinson v. Hunt*.

Ala. 268; Whitworth's Distributees v. Oliver, 39 Ala. 286; Eubank Clark, 78 Ala. 73; Grant v. Reese, 94 N. C. 720; Tyler v. Nelson, Gratt. 214; Higgs v. Garrison (Tex. Civ. App.), 27 S. W. 34; Lidderdale v. Robinson, 2 Brock. 159, Fed. Cas. No. 8337. If one, after his removal as an administrator, is appointed administrator de bonis non, the assets in his hands in the former capacity are thereby transferred to him in the latter, and in such capacity he and his sureties become at once responsible therefor: Erricks v. Powell, 2 Strobl. Eq. 6. In one case, where a sale of property had been made, the purchase price for which was payable partly during the original administration and partly during that of the administrator de bonis non, it was held that he would be presumed to have received all the proceeds of the sale, and to escape liability therefor, must show as a special defense his inability to collect from his predecessor the portion received by the latter: New Orleans G. & B. Co. v. Webb, 2 La. Ann. 526. Perhaps, there may be circumstances in which the burden of disproving negligence must be assumed by an administrator de bonis non, but the general rule must be that he is not to be held answerable except for assets received, unless he is shown to have been guilty of some neglect operating to the prejudice of the estate or of some person interested therein: Waller v. Ray, 48 Ala. 3; Bowers v. Grimes, 45 Ga. 616.

STERN v. BENNINGTON.

[100 Md. 344, 60 Atl. 17.]

AMENDMENT OF RECORDS, Authority of Courts to Make.—A court of general and original jurisdiction is authorized to make its records conform to the facts which actually transpired before it. (p. 435.)

JUDGMENT Nunc Pro Tunc, Entry of.—If a judgment is by the court ordered to be entered, and its clerk, either inadvertently or through a misconception in supposing that recording of the verdict in effect the entry of a judgment, omits to make the formal entry of the judgment, it is clearly within the jurisdiction of the court to direct the judgment entered as of the date on which it should have been entered. (p. 435.)

JUDGMENT, Nunc Pro Tunc, Entry of, on What Evidence may Be Based.—Parol evidence is admissible to prove that the court orally directed the clerk to enter judgment, and such evidence, when admitted, warrants an order directing the entry of such judgment nunc pro tunc of the date when it was so orally ordered to be entered. (p. 436, 437.)

JUDGMENT, Nunc Pro Tunc, Entry of, When Will not be Valid for Laches.—If, in September, 1903, a judgment is directed

to be entered on a verdict, which a clerk, through misapprehension of his duties, fails to enter, and in February, 1904, the defendant moves to strike out the verdict, and in March following the plaintiff moves for the entry of judgment *nunc pro tunc* as of the date when it was ordered, the motion cannot be denied on the ground that he has been guilty of laches, since the failure of the clerk to do as directed was due to his misapprehension and not to the fault of the plaintiff. (438.)

APPEAL AND ERROR.—A Motion Asking the Trial Court to Vacate a Verdict is a motion for a new trial, and from a ruling on that motion no appeal lies to the court of appeals of Maryland. (438.)

Isaac Lobe Straus and Thomas H. Robinson, for the appellant.

W. H. Harlan, for the appellee. ,

³⁴⁴ McSHERRY, C. J. An order passed by the circuit court for Harford county on the twenty-fifth day of May, 1904, refused to strike out and set aside a verdict rendered in an action of ejectment, and ³⁴⁵ in addition directed the clerk to enter up judgment on that verdict as of September 17, 1903. From that order the defendant in the ejectment suit has brought the record into this court by appeal. The two controlling questions, which embody a few subsidiary ones, are: 1. Had the circuit court power and authority to direct on May 25, 1904, the judgment to be entered as of September 19, 1903; and 2. Has this court jurisdiction to reverse that part of the order appealed against which refused to strike out and set aside the verdict rendered by the jury on September 17, 1903?

As it is out of the facts that the law arises, a brief statement of the undisputed circumstances must now be made.

On December 27, 1902, the appellees brought an action of ejectment against the appellant in the circuit court for Harford county. The defendant, the appellant here, was duly summoned, and in February following he appeared by counsel who filed a plea of non cul. on the 26th of that month. The case was placed upon the special trial docket of the May term of 1903, but was not reached for trial. It was then put upon the special trial docket of the ensuing September term, when issue was joined on the plea, a jury was impaneled, and, the defendant and his counsel being absent, the plaintiffs adduced their evidence, and a verdict was returned in their favor on September 17th. It appears from the affidavit of Judge V. Bibber, who before going on the bench was counsel for, a

ried the case in behalf of, the plaintiffs, that after the expiration of the period allowed under the rules of court for the filing of motions in arrest of judgment and for new trials, he inquired whether any such motion had been interposed, and being informed by the clerk that no motion had been made, he, the counsel, thereupon in open court asked that judgment be entered on the verdict, and the court then and there instructed the clerk to enter the judgment. The entry was not made because, as the docket clerk testified, he erroneously supposed that the recording of the verdict was sufficient and was in effect a judgment. On February 23, 1904, the appellant ³⁴⁶ filed a petition in support of a motion to take out and set aside the verdict entered against him, and based the application on the ground that neither he nor his counsel had been notified that the case would be called for trial at the September term; and that by the trial thus ordered he was deprived of due process of law, inasmuch as he could not have presented a meritorious defense. The appellees answered the petition, and then filed a motion for the entry of judgment on the verdict *nunc pro tunc*. Upon the hearing of these petitions and motions, the affidavits above alluded to were introduced and were objected to by the appellant. The order from which this appeal was taken was then passed. The question was: Had the circuit court power to direct a judgment to be entered as of the date of September 19, 1903? The authority of a court of general and original jurisdiction to make its records conform to the facts which actually transpired in proceedings had before it, is too well understood and too thoroughly established to admit of any doubt whatever: *Park v. Citizens' Nat. Bank*, 61 Md. 254; *State v. Logan*, 33 Md. 1. If, therefore, a judgment was in reality ordered by the circuit court to be entered on September 19, 1903, and the clerk, either inadvertently or through a misconception in supposing that the recording of the verdict was in effect the entry of a judgment, omitted to make the formal record of the judgment, it would seem to be clearly within the jurisdiction of the circuit court to direct the judgment to be entered as of the day it should have been entered. It was said by the supreme court of the United States in *Mitchell v. Overman*, 103 U. S. 26 L. ed. 369: "Whether a *nunc pro tunc* order should be made depends upon the circumstances of the particular case. It should be granted or refused, as the justice of the case may require." In the same case the supreme court said: "The rule established by the general concurrence

of the American and English courts is, that where the delay in rendering judgment or decree arises from the act of the court—that is, where the delay has been for its convenience or has been caused by the multiplicity or press of business, or the intricacy of the question involved, or ³⁴⁷ for any other cause not attributable to the laches of the parties, but within the control of the court—the judgment or decree may be entered retrospectively, as of a time when it should or might have been entered up.” This statement is so concise and clear that we need not discuss any further the question as to the court’s power to enter a judgment *nunc pro tunc*; and we are brought to the inquiry whether the power was rightly exercised in the pending case.

The verdict entitled the plaintiffs to a judgment. No judgment nisi causa having been entered, it was competent for the plaintiffs, after the lapse of the two days allowed under the rules of that court for filing a motion in arrest or for a new trial, to move in open court for judgment on the verdict, and, according to Judge Van Bibber’s affidavit, this was done, and when done the court verbally directed the clerk to enter the judgment. But it is insisted that parol evidence is not admissible to prove that a judgment was directed to be entered. It is the universal practice in the law courts of this state for the judge in open court to orally direct the clerk to enter up judgments. Mr. Poe in his work on Practice, section 357B, says: “Orders may be given, or judgments directed to be entered orally or in writing. Of those orally given, memorandum on the docket should be made at once.” If the clerk inadvertently omits to make the proper entry, there is no reason for excluding parol evidence to prove the fact that such an order had been given, that would not apply to the admissibility of precisely the same kind of evidence to show, as was done in *Montgomery v. Murphy*, 19 Md. 576, 11 Am. Dec. 652, that an entry of “judgment confessed” was inaccurate? If the clerk makes the entry as ordered by the judge, the judgment will appear on the record. If the clerk omits to make the entry when the order to do so is oral, there is no other way to prove that the order had been given except by the parol evidence of those who heard it given. To reject such parol evidence would preclude all proof whatever, unless the view taken in *Marshall v. Taylor*, 97 Cal. 42, 32 Pac. 515, be adopted. It was held in that case that the pleadings, the minutes of the court, and ³⁴⁸ the verdict

an action are sufficient record evidence to sustain the action of a court in ordering an entry of a judgment *nunc pro tunc*, although more than six months had elapsed from the rendition of the verdict. If a judgment has been verbally ordered to be entered in open court by the judge, and the clerk omits to make the proper entry, there must be some method to correct the error, unless it be held that the clerical mistake cannot be remedied at all. But no such alternative could be tolerated. A fact resting in parol can only be proved by parol. To say that a judge may in open court direct by a verbal order a judgment to be entered, and then to say, when the entry has not been made, that you cannot prove by parol that the order to make it had been given, is practically to deny the right of the court to correct its records to conform to the facts as they actually existed.

The appellant's able counsel in his admirable argument cited quite a number of cases to support the proposition that a judgment could not be proved by parol. Take, for illustration, the case of *Balm v. Nunn*, 63 Iowa, 641, 19 N. W. 810, where it was said: "There can be no judgment until it is entered in the proper record of the court. It cannot exist in the memory of the officers of the court, nor in memoranda entered upon books not intended to preserve the record of judgments. . . . It is not competent to prove a judgment in any other way than by the production of the proper record thereof." But there is a distinction between proving a judgment by parol and proving by parol that a judgment had been ordered to be entered. It is because there was no entry when there ought to have been an entry that an entry *nunc pro tunc* is made. It is made now for then, simply because it had not been made then; that is, when it should have been made. The evidence adduced did not tend to prove by parol that a judgment had been entered on September 19, 1903, but merely that an order had been given by the judge in open court directing the judgment to be then entered.

There is nothing in the record to show that the appellees were guilty of laches. Shortly after Mr. Van Bibber asked ³⁴⁹ in open court for a judgment on the verdict, and after the judge then presiding had directed that it be entered as requested, Mr. Van Bibber went upon the bench, and of course his connection with the case then ceased. No other attorney appears to have been employed until March 9, 1904, after the motion to strike out the verdict had been filed. On

March 21st the motion for judgment nunc pro tunc was made. There was no unreasonable delay in this. The failure of the clerk to enter up the judgment was not attributable to the laches of the plaintiffs, but was due to the misapprehension of the docket clerk, and consequently the error was a matter "within the control of the court": *Mitchell v. Overman*, 1 U. S. 63, 26 L. ed. 369.

It does not appear from the record that there has been a change of parties since the rendition of the verdict, and even if the court had no authority to enter the judgment nunc pro tunc, no injury was done to the appellant, because a judgment as of a later date could be entered upon that verdict and the present judgment were stricken out.

2. Has this court jurisdiction to review that part of the order appealed against which refused to strike out and set aside the verdict of the jury? The motion asking the lower court to vacate the verdict was a motion for a new trial, and from a ruling on that motion no appeal will lie to this court. *Poe's Practice*, sec. 349, and cases cited in note 1. This is fully settled as the law of Maryland that we would not justify in further discussing it.

As we find no errors in that part of the order which we have jurisdiction to consider on this appeal, we will affirm the judgment with costs.

Judgment affirmed with costs above and below.

The Power is Inherent in Courts of law and equity to make entry of judgments or decrees nunc pro tunc in proper cases and in furtherance of the interests of justice: *Knefel v. People*, 187 Ill. 212, 121 Am. St. Rep. 217; *Ware v. Kent*, 123 Ala. 427, 82 Am. St. Rep. 13. A court which has ordered a judgment which the clerk has failed to enter in the record has power, even after the term at which it was rendered has passed, to order the judgment to be entered nunc pro tunc, provided there is satisfactory evidence as a basis for such action: See the monographic note to *Ninde v. Clark*, 121 Am. St. Rep. 830; *Hyde v. Michelson*, 52 Neb. 680, 66 Am. St. Rep. 533. And in entering an order nunc pro tunc, the court is not confined to an examination of the judge's minutes or written evidence, but may proceed on any satisfactory evidence: *Harris v. Jennings*, 64 Neb. 80, 97 Am. St. Rep. 635, and see the cases cited in the cross-reference note thereto.

NORTHERN CENTRAL RAILWAY COMPANY v. STATE.

[100 Md. 404, 60 Atl. 19.]

RAILWAYS, Effect of Open Gates at Crossings.—The fact that gates are open at a crossing, where it is the duty of a railway to keep them closed when a train is approaching, amounts to a statement and notice to the public that the line is at that time safe for crossing, and is evidence of negligence to go to the jury. (p. 444.)

RAILWAYS, Open Gates at Crossing, Care to be Exercised notwithstanding.—Though a railway corporation has placed safety gates and stationed a watchman at a crossing, this does not relieve a person about to cross the track of the duty of looking and listening for trains as he approaches and goes over the crossing, and if he had looked and listened he must have seen or heard an approaching engine by the exercise of ordinary care to avoid injury, he cannot recover if injured. (pp. 444, 445.)

RAILWAYS, Weight to be Given Testimony That a Bell at a Crossing was not Heard to Ring.—It is proper to instruct the jury that the testimony of witnesses that they did not hear a bell rung as a locomotive approached a railway crossing is not entitled to be regarded by the jury as of as great probative value as is the positive evidence that it was so rung. (p. 445.)

RAILWAYS.—Testimony of Witnesses That They Did not Hear a Bell Rung as a locomotive approached a crossing is evidence that it was not rung which the jury should not be instructed to disregard, where such witnesses were at a place and under circumstances where they feel sure they would have heard it had it been rung. (p. 445.)

John J. Donaldson and Shirley Carter, for the appellant.

William Colton and W. H. Lawrence, for the appellee.

SCHMUCKER, J. This is an appeal from a judgment of the court of common pleas of Baltimore City in favor of the equitable appellee for damages for the death of his son as the result of an accident at a railway crossing. There is not one bill of exceptions in the record and that is from the court's rulings on the prayers.

The evidence as to the locus in quo of the accident and of the situation of the parties involved in it, down to a few minutes before its occurrence, is uncontradicted, but as to the circumstances ⁴⁰⁹ of the accident itself there is the most positive conflict of testimony. The accident occurred at the intersection of Eastern avenue, which runs east and west, and the tracks of the appellant, which run north and south, in the bed of Ninth street. At that point Eastern avenue is seventy feet wide, and Ninth street, on which the railroad

tracks run, is one hundred feet wide. There are two main tracks of the railroad in the middle of Ninth street, and there are two freight tracks to the west of the main ones, making in all four tracks, occupying about forty feet in width of the bed of the street. On each side of this set of tracks there is a pair of safety gates, across the bed of Eastern avenue which are operated from a watch-box at the south end of the gates on the east side of the tracks. Anyone standing on the westernmost of the four tracks at its intersection with Eastern avenue has a clear view southerly for a mile, if no cars are on that track. At the time of the accident a row of boxcars standing on that track and extending north to the line of the south side of Eastern avenue greatly shortened the view southerly, but even then by leaning forward or taking a step or two easterly the full length of the view would have been restored.

On the day of the accident John Gilmore, aged eighteen years, the son of the equitable plaintiff, was engaged in driving a one-horse coal cart. About 2 o'clock in the day, while he was going easterly on Eastern avenue across the railroad tracks with his cart loaded with a ton of coal, the cart was struck on the south side by one of the appellants' engine going north and thrown upon his feet, and such injuries were inflicted upon him that he died therefrom. The accounts as to the precise method of the occurrence of the collision between the engine and the cart are very conflicting.

Thomas Kenny testified that he was standing in the doorway of his residence at the northeast corner of Eastern avenue and Ninth street at the time of the accident and saw it happen. He said that Gilmore, riding upon his cart and immediately followed by a similar cart, was going east on Eastern avenue, and came to the gates on the west side of the 410 tracks and found them down. After a few minutes the gateman, who was on the east side of the tracks, raised the gates and beckoned for the carts to come over the crossing and that Gilmore thereupon jumped down from his cart, took his horse by the head on the north side and started to cross the tracks. When crossing the second track the cart was struck on the south side by the appellant's engine and pushed over onto the boy's feet. The witness said that he, standing in his doorway, saw the smoke and smokestack of the engine over the boxcars, but could not see the engine before it came out from behind the cars, nor in his opinion could the boy

who was injured see the engine from his position leading his horse. Witness heard no bell rung nor signal given from the engine as it approached, and felt sure that from the position he occupied he could have heard the bell if it had rung. He was standing only about twenty feet from the cart when it was halted by the western gate being down.

Henry Dean, the driver of the second cart, corroborated Kenny's testimony as to the facts throughout, and said that he heard no bell rung or whistle blown from the engine. Charles Miller, who was present at the time of the accident, also corroborated Kenny's testimony as to all of the facts of the occurrence, except that he does not mention the circumstance that Gilmore was riding on the cart as he first approached the crossing, nor does he say anything pro or con in reference to signals from the engine as it approached.

Henry Ruth, a cart driver, testified that he was familiar with the crossing and that he was on the spot at the time of the accident. That by reason of the condition of the streets at the crossing it was necessary for the driver of a loaded coal cart to get down and take his horse by the head when crossing the tracks. "That the engine didn't ring any bell or blow any whistle there. There was nothing at all done, only after the boy was in danger and could not get out if the gatekeeper tried to make him come back; it had him dead then and he could not get out of the way." The witness was standing by Mr. Kenny's saloon and saw Kenny standing in the door.

411 On the other hand, James McGinness testified for the defendant that he was an eye-witness of the accident. That as Gilmore came down Eastern avenue toward the railroad crossing he was beating the horse and causing it to plunge violently, and just as he got to the crossing the trace or something snapped and the horse went out of the harness. The boy got down from the cart and spent about five minutes fixing the harness. In the meantime the witness heard the bell of the east safety gate ring as that gate came down, and that the western gate against the boy (Gilmore) also came down, and the gatekeeper was growling at the boy, who began to beat his horse again and it gave a lunge, and just then the engine came along like a flash and struck the cart.

The engineer, fireman, a conductor and two brakemen, all of whom were on the engine, testified in substance that it

was coming north on the second track at a speed of about five miles an hour, with its bell ringing, when the first they saw of the horse it jumped right in front of the engine and although every effort was made to stop the latter, it struck the cart and shoved it six or seven feet before coming to a standstill. The engineer testified that as he approached the crossing he was standing in his proper position on the right-hand side of the engine, in full sight of the gateman and received no warning or danger signal from him.

The gatekeeper testified that he saw the boy coming down Eastern avenue beating the horse and driving recklessly and that when he first saw the engine it was about six hundred feet away, and at that time the cart was under the gate on the west side of the tracks with the horse's front feet standing between the two rails of the west track. The witness could not put down the west gates because the cart was under them and he might have prevented its backing out. He put down the east gates and called to Gilmore to back out of there, but got no answer or attention from him. Gilmore got off his cart to look at his harness, which was out of order. By the time he got the harness fixed the engine which was coming on all the time, was within twenty-five or thirty feet away, when the horse made a plunge from ⁴¹² the west track to the one on which the engine was approaching, and that was the last moment he saw the horse as the engine got between it and him. He had seen the horse continuously up to that time. The bell on the engine was ringing as it came up the track. The witness, when the boy refused to back off the tracks, called out to him, "As long as you have been staying there that long, damn it, stay another half hour till the engine gets past," but he paid no attention to the call.

The plaintiff offered three prayers, all of which were granted. These prayers were such as have repeatedly received the sanction of this court. In fact, the appellant did not on its brief or in the argument of the case object to the form of these prayers, but insisted on its special exception to the first one, on the ground that there was no legally sufficient evidence that any negligence on its part had caused the injury complained of.

If the testimony was true of the witnesses who swore that they saw Gilmore wait outside the western gate until the

gatekeeper raised the gate and beckoned to him to come across the tracks, and that he then took his horse by the head and started to obey the invitation of the gatekeeper, and was struck by the engine and injured before he could cross the second track, there was evidence from which the jury were entitled to believe that the defendant was guilty of negligence causing the injury. We have often held it to be the duty, under ordinary circumstances, of a person about to cross the tracks of a steam railway to look and listen for approaching trains, and in his view be obscured, to stop, look and listen, but here the circumstances testified to by many witnesses were special. According to these witnesses the boy on nearing the tracks respected the danger signal of the closed gates, and stopped his cart until the gates were opened by the man in charge of them, who beckoned him to come across. He then went to his horse's head and started to lead him across, but was struck by the engine before he had gotten halfway over. The gateman himself testified that the engine as it approached the crossing was in his sight for six hundred feet and until it struck the cart. He gave no signal to the engineer to stop, and if the plaintiff's ⁴¹⁸ witnesses are to be believed, he invited the boy to cross the tracks. We cannot say, under these circumstances, that there was no legally sufficient evidence of negligence on the part of the defendant or its agents causing the injury. In *Baltimore etc. R. R. Co. v. Stumpf*, 97 Md. 4, 54 Atl. 978, in discussing the significance of open safety gates at railroad crossings, it was said by this court: "In *Northeastern R. W. v. Wanless*, 7 Eng. & Ir. App. 12, Lord Cairns held where it was the duty of the railway to keep the gates closed when any train is approaching, that the fact that they were open amounted to a statement and notice to the public that the line at that time was safe for crossing, and was evidence of negligence to go to the jury"; and the same was held in *Stapley v. London etc. Ry. Co.*, L. R. 1 Ex. 21, and in *Lunt v. London etc. Ry. Co.*, L. R. 1 Q. B. 277. In the last case, Lord Blackburn observed: "It could make no difference whether the gatekeeper expresses that the road is safe, by opening that gate, or by word or gestures." This is the view held in the following cases in this country: *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. Rep. 679, 36 L. ed. 485; *Dolan v. Delaware etc. Canal Co.*, 71 N. Y. 288; *Glushing v. Sharp*, 96 N. Y. 667; *Palmer*

v. New York Cent. R. R. Co., 112 N. Y. 234, 19 N. E. 678; Chicago etc. R. R. Co. v. Clough, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184; Rhode v. Chicago etc. R. R. Co., 86 Wis. 312, 56 N. W. 872; Evans v. Lake Shore etc. R. R. Co., 88 Mich. 442, 50 N. W. 386, 14 L. R. A. 223; Wilson v. New York etc. R. R. Co., 18 R. I. 491, 29 Atl. 258, and in many other cases which might be cited. In *Glushing v. Sharp*, 96 N. Y. 667, the court said: "The open gate was a substantial assurance of safety, just as significant as if the gateman had beckoned or invited him to come on, and that an ordinarily prudent man would not be influenced by it is against all human experience."

In *Stumpf's* case the injured party testified that he had looked and listened for trains as he approached the open gate and the railroad crossing. In the present case, by granting the defendant's fifth prayer as modified by it the court instructed the jury, "That the fact that the defendant had placed safety ⁴¹⁴ gates at the crossing in question and stationed a watchman there in charge of the same did not relieve the deceased of the duty of looking and listening for approaching trains as he approached and went over the crossing, and if the jury shall believe from the evidence that if the deceased had so looked and listened, he would have seen or heard defendant's engines in time, by the exercise of ordinary care, to avoid the injury, the plaintiff is not entitled to recover, and the verdict must be for the defendant, even though the jury shall find that the gates were open and the watchman made some motion which deceased may have interpreted as an invitation to continue across." The defendant thus had the benefit of an instruction to the jury that the presence of the gates and watchman did not relieve the deceased of the duty of using his own senses to discover the presence of danger as he approached and crossed the tracks.

The court further, by granting the defendant's sixth, seventh and eighth prayers, instructed the jury to find a verdict in its favor if they found from the evidence, either that the deceased, by his own want of ordinary care, contributed in any degree to the happening of his injury—or if while he was in a place of safety the gateman warned him, by voice or gesture, not to attempt to cross and that he in disregard of such warning kept on across the track and was in-

jured in doing so—or that he stopped his horse and cart on the tracks for the purpose of mending or rearranging the harness, and that he could have done this in a place of safety by driving or leading his horse forward off the tracks or backing him off of them, and that he failed to escape injury because of his so stopping on the track to care for the harness. The court also, by granting the defendant's ninth prayer after having modified it, instructed the jury that the testimony of witnesses that they did not hear the bell of the engine ring as it approached the crossing is not entitled to be regarded by the jury as of as great probative value as the positive affirmative evidence that it was so rung.

The defendant had asked the court by its rejected ninth prayer to charge the jury that testimony of witnesses that they ⁴¹⁵ did not hear the bell was not evidence that it was not rung, and must be entirely disregarded by them, and in their brief and argument the defendant's counsel relied upon *Baltimore etc. R. R. Co. v. Roming*, 96 Md. 67, 53 Atl. 72, as authority for their contention in that respect. That is pushing the doctrine of *Roming's* case further than it was intended by us to go. In that case the only evidence of any negligence on the part of the defendant was the testimony of two persons, who resided a short distance away from the station, that they heard at their residence no whistle or bell from the engine prior to the danger signal, which came almost at the same time with the crash of the collision, as over against the distinct and circumstantial evidence of the engineer and fireman and the operator in the block signal tower at the station that the customary signals of the approach of the train were exchanged between the engine by whistling and the tower by moving the block signal, and that the bell was rung from the engine as usual. Under all the circumstances of that case we did not think that the failure of the two persons, who were not immediately at the station where the accident occurred, to hear the signals was sufficient of itself to send the case to the jury. We do not regard the present case as a parallel one to *Roming's* case.

The defendant's first prayer asked the court to take the case from the jury for want of legally sufficient evidence of any negligence of the defendant or its agents which caused the injury complained of. Its second, third and fourth

prayers assert the proposition that by the uncontradicted evidence, that the deceased was guilty of contributory negligence, and therefore the verdict must be for the defendant.

We do not deem it necessary after what we have already said in reference to the evidence appearing in the record to discuss these four rejected prayers of the defendant at length. In view of the character of the evidence we do not think the court would have been justified in withholding the case from the jury. The prayers which were granted in sending it to them correctly presented the law of the case. The court committed no error in rejecting the prayers which it refused ⁴¹⁶ to grant, or in modifying as it did the defendant's fifth and ninth prayers before granting them.

The judgment appealed from must be affirmed.

Judgment affirmed with costs.

One Who Reaches a Railway Crossing in a city at which the railway company is required by ordinance to keep a flagman and maintain gates, and who finds the gates open and no flagman in sight, is justified in the belief that no trains are about to pass, and is not guilty of contributory negligence in attempting to travel upon the crossing: *Pennsylvania Co. v. Stegmeier*, 118 Ind. 305, 10 Am. Rep. 136. As to what degree of care is required of the traveler in such a case to ascertain whether or not a train is approaching, see the monographic note to *Baltimore etc. R. R. Co. v. Breinig*, 90 A. Dec. 65. Consult, also, the recent cases of *Day v. Boston etc. R. R.* 96 Me. 207, 90 Am. St. Rep. 335; *Mitchell v. Illinois Cent. R. R.* 110 La. 630, 98 Am. St. Rep. 472, and cases cited in the cross-reference note thereto.

ALLEGHANY COUNTY v. WARFIELD.

[100 Md. 516, 60 Atl. 599.]

STATUTES, Governor's Signature Inadvertently Attached to not an Approval.—If a governor signs a bill by inadvertence under a misapprehension as to what paper it is, and without having gone through the mental operation of approving it, and immediately thereafter, and before the bill leaves the executive chamber, he erases his signature, such bill does not thereby become a law, and the evidence of the governor is admissible to prove these facts. (p. 448.)

James W. Owens and Albert A. Doub, for the appellants.

⁵¹⁷ FOWLER, J. The county commissioners of Alleghany county filed a petition in the circuit court for Alleghany county against the governor of Maryland, asking that the

for a writ of mandamus to compel him to forward to the clerk of this court a certain statute which they allege was duly passed by both Houses of the General Assembly and approved by the governor by signing the same as required by the constitution. They also allege that this statute was duly signed by the president of the Senate and the speaker of the House of Delegates after the governor had duly signed and approved the same. The petition was answered by the defendant. No question arises upon the pleadings. The sole question presented is whether, when the governor of Maryland signs a bill by inadvertence and under a misapprehension as to what the paper is, and without having gone through the mental operation of approving a bill and having immediately thereafter erased his signature, can be said to have indicated and expressed his approval as required by section 30 of article 3 of the constitution of Maryland.

The section just referred to provides that "Every bill, when passed by the General Assembly and sealed with the great seal, shall be presented to the governor, who, if he approves it, shall sign the same in the presence of the presiding officers and chief clerks of the Senate and House of Delegates. Every law shall be recorded in the office of the clerk of the court of appeals, and in due time be printed, published and certified under the great seal, to the several courts, in the same manner as has been heretofore usual in this state."

The case was tried before the circuit court for Anne Arundel county without a jury. During the trial two exceptions were taken to the rulings of the court, one of them relating to the admissibility of testimony and the other to the rejection of the plaintiff's prayer. The result of these rulings was that the petition was dismissed with costs and the plaintiff has appealed.

First Exception: The plaintiff having offered testimony tending to show that the bill in question was duly passed by the General Assembly and presented to the governor, and that the governor signed the same on the twelfth day of April, 1904, in the presence of the presiding officers and chief clerks of the Senate and House of Delegates, the defendant offered to rebut this by the oral testimony of the governor "that he signed the bill which is the subject of this proceeding by inadvertence."

tence and under a misapprehension as to what the paper being signed was, and without ever having gone through the mental operation of approving said bill, and that he immediately thereafter erased his name from the bill."

It should be stated, in the first place, that this objection assumes that this is not a case in which the governor has intentionally signed a bill and thereafter changes his mind, but the objection of the plaintiff to this offer of the defendant is upon the theory that assuming that the intention to sign never existed, and that the governor, when he wrote his name upon ⁵¹⁹ that bill, did not intend to sign it, some other paper, still it is contended the testimony set forth in the offer is inadmissible.

In our opinion the testimony is clearly admissible not only to show the real intent with which the governor wrote the signature, but also to show as necessary result of his failure to approve that the bill in question had no legal existence.

What other or better testimony could have been offered than that of the governor himself to show the intent with which he signed his name? Certainly such testimony would be admissible in the ordinary transactions of life, and unless we are prepared to say that the signature alone is conclusive proof of approval, we must admit the testimony. For from the nature of the case, the governor, and he alone, could say whether he had gone through the mental process of approving the bill. But this testimony is admissible not only because it was the best evidence that could be offered of a want of approval, but also because it was not an offer of parol testimony to alter, change, vary or modify the language of a law. On the contrary, its effect was to show that the law never had any existence in the absence of the governor's approval.

Second Exception: At the close of the case the plaintiff offered a prayer asking the court to declare, as a matter of law, that if the bill in question had been duly passed by both Houses of the General Assembly, and was duly presented to the governor and signed by him in the presence of proper officers, such signature was conclusive, and the bill thereby became a law of the state of Maryland, in spite of the facts and conceding the facts, first, that the governor signed the bill by inadvertence, under a misapprehension as to what the paper being signed was, and without ever

having gone through the mental operation of approving said bill; second, that the governor erased his signature from said bill after having so signed the same, and before said bill left the executive chamber in which bills were being signed.

Of course there may be cases where a bill has been approved by mistake or misapprehension, and the point of time beyond ⁵²⁰ which such mistake may be corrected by the governor has passed. But this, as we have seen is not such a case. It is conceded here by the plaintiffs, under their contention in the first exception, that the governor erased his signature immediately after writing it, and under the second exception that the signature was erased before the bill left the executive chamber.

We are not able to agree with the contention of the plaintiff that the bill, under the testimony in this case, had ever passed beyond the control or out of the custody of the governor after he signed it. It was still in the executive chamber as set forth in the prayer, or as stated in the testimony, in the hands of the Secretary of State. Neither the constitution nor the law provides for or contemplates any possession of a bill after it is signed by the governor other than this, until he causes it to be sent to the clerk of the court of appeals for record, as provided by section 30, article 3 of the constitution.

We therefore have no difficulty whatever, under the facts of this case in holding that the governor never did approve the bill as contemplated by the constitution, and that the placing of his signature to the bill was absolutely null and void, in so far as it affords any evidence of his approval thereof.

This is as far as we need go in order to dispose of this case, and it follows that the order appealed from will be affirmed.

Order affirmed, with costs to the appellee.

The Approval of an Act is an essential prerequisite to the enactment of a law, and such approval is performed by the governor in a legislative capacity as part of the law-making power, and not as the law-executing power: *State v. Deal*, 24 Fla. 293, 12 Am. St. Rep. 204; *Leis v. Ashley*, 59 Neb. 494, 80 Am. St. Rep. 704.

AGED MEN'S HOME v. PIERCE.

[100 Md. 520, 60 Atl. 277.]

CONTRACT to Assign All Property to be Afterward Acquired When Void as Against Public Policy.—A Contract by Which a Person is Admitted to an Aged Men's Home to the effect that he will assign to the corporation all property which he may thereafter in any manner acquire is against public policy, and hence not enforceable. (p. 456.)

A. W. Machem, Jr., for the appellant.

J. Bannister Hall, Jr., for the appellee.

523 **BOYD, J.** The appellant sued Elisha Pierce and also Casper W. Ereke, administrator of George W. Pierce, who was a surety on the contract sued on. Demurrers to both declarations were sustained by the court below and judgments entered for the respective defendants. From those judgments appeals were taken and, as the two cases involve for the most part the same questions, they were argued together in this court.

Elisha Pierce was an inmate of the Aged Men's Home belonging to the appellant, and whilst there his son, George W. Pierce, died intestate without leaving any descendants or widow. Under the statute of this state Elisha, as the father of the intestate, is entitled to the surplus of the personal property, after the payment of all debts and expenses, which amounts to three thousand five hundred and two dollars and seventy-four cents, according to the allegations in the declarations. The suits are for breach of contract for not turning over said sum to the appellant, the latter claiming that Elisha for himself, and George W., as one of his sureties, agreed as part of the consideration for admitting the former into the institution, to transfer to the corporation all property which Elisha thereafter received. The contract sued on is the same that was before us in the case of this appellant v. George W. Pierce, reported in 99 Md. 352, 58 Atl. 26, and is in two separate parts. By the rules the applicant for admission into the home and two responsible persons on his behalf are required to sign the first part, in which they covenant that the applicant will obey the rules, etc., of the corporation, and that they will remove him for certain causes therein set forth. That was signed and sealed by Elisha Pierce, the applicant, and George W. Pierce and H. M. Brewer, the sureties. The

ther part of the contract was not signed by Elisha Pierce, but was signed and sealed by George W. Pierce and H. M. Brewer. The first paragraph of that is as follows: "We, the undersigned, hereby covenant and declare that Elisha (X) Pierce about to be admitted into the Aged Men's ⁵²⁴ Home of the above-named corporation hath not now any property, and is not the recipient of any income from any source whatever, and so also covenant that should he, by any devise, legacy or otherwise, become the owner of any property whatever, we will have the same with any now owned, conveyed and transferred to the said corporation, in obedience to this covenant; and by this instrument he grants to said corporation above named all his right and title to any and all property of which he is now seised and possessed or to which he hath any right or title."

It will be observed that this paragraph is very peculiarly expressed, and when we examine the rest of the instrument we find it is even more so. There is nothing in it indicating that the applicant had agreed to transfer all property he might afterward acquire to the appellant, excepting what is contained in the covenant. It might well be questioned whether that language could apply to the applicant at all, whether it is not intended merely as a covenant of the parties—"should . . . become the owner of any property whatever, we will have the same, with any now owned, conveyed and transferred"—but it is certain that as the contract was executed it does not apply to him. It reads, "We, the undersigned, hereby covenant," and only George W. Pierce and H. M. Brewer signed it. They therefore, and not Elisha Pierce, made such covenants as are contained in it, and he is not liable in this action by virtue of that written contract. The difference in the language used in referring to the property that may be afterward acquired from that used in granting that already owned suggests a grave doubt as to the meaning of the former. In the latter case the applicant grants "all his right and title to any and all property of which he is now seised and possessed, or to which he hath any right or title," to the corporation, while the covenantors simply covenant that they will have that to be acquired conveyed and transferred to the corporation. That might well mean to be held in trust for the applicant during his life, and not necessarily that he should surrender all his right and title to it. The property ⁵²⁵ thus referred to is such as he may

become owner of "by any devise, legacy, or otherwise," the two methods particularly specified being by "devise" or "legacy." It can scarcely be imagined that anyone would devise or bequeath property to an inmate of that institution if he knew it must be at once transferred to the corporation and that the intended beneficiary would have no interest in it. If a testator desired such results, he would leave it directly to the corporation; he might then prescribe such terms as the inmate might profit by. Such a construction of the clause might in some instances prevent the corporation itself from ultimately profiting by a bequest. If an inmate could have the benefit for his life, a testator might leave money or property to him, which he could leave to the institution. But under the construction contended for these unfortunate people, whose circumstances require them, in order to obtain admission to the institution, to comply with its rules and regulations, would be barred from obtaining relief from their friends, who after their admission became sufficiently prosperous to be willing to help them, for it is idle to say that anyone could be expected to give them property or money, if it must be at once turned over to the appellant, unless it happened to be some one who wanted to help the appellant, and it is not likely he would do so in that roundabout way.

The next paragraph of this instrument reflects some light on the question. That is, "This done in consideration of such admission, and the applicant hereby constitutes the treasurer thereof, for the time being, at his death, executor of this instrument, which is to operate as a last will, and devises said institution his entire estate, real and personal, by the presents, of whatever kind and wheresoever situate." It then has quite a lengthy attestation clause. If the "covenant" was intended to have the effect urged by the appellant, it is not probable that this "testamentary clause," as we will call it for brevity's sake, would have been inserted. It could do no good unless possibly to pass some naked legal title, for many cases in this state, from *Hamilton v. Rogers*, 8 Md. 301, *First Nat. Bank v. Linderstruth*, 79 Md. 136, 47 Am. S. Rep. 366, 28 Atl. 807, recognize the equitable rights that one may have in after-acquired property. Yet we find that nearly one-half of this part of the contract is taken up with an attempt to make a testamentary disposition of the inmate's entire estate, real and personal. As Elisha Pierpont did not even sign it, it is unnecessary to say that this paper

ould not, under our law, have such an effect, but it reflects upon the meaning of the other clause of which we have been speaking. These and other suggestions that might be made make it at least doubtful whether the contract was intended to mean what the appellant claims.

But without further consideration of those and other minor matters, we are of the opinion that it would be contrary to the public good to lend the aid of the courts to enforce such a contract as this, if it must be construed according to the appellant's contention. We are not unmindful of the fact that the court should not lightly strike down a contract on the ground that it is contrary to what is called public policy. That is an uncertain, indefinite term, and when judges come to apply the doctrine, they must take care that they do not trespass upon the right to make contracts as parties see proper, so long as they do not violate some principle or policy of law. The learned chief judge of this court said in *Casualty Insurance Company's Case*, 82 Md. 574, 34 Atl. 785: "No exact definition of public policy has ever been given or can be found. Speaking generally, the principle which holds that no one can lawfully do that which has a tendency to be injurious to the public, or against the public good, may be termed the policy of the law, or public policy in relation to the administration of the law," and we would add we do not now propose to attempt to define this subject more accurately. But when dealing with a delicate subject of this character, it gives us confidence in our conclusion when eight judges, after due deliberation, conclude, as we do, that the public good forbids the use of the process of the courts of this state to enforce a contract such as this is claimed to be. It is proper that we should say at this point that we have no doubt that the appellant is a most useful institution, and is managed by those who would not intentionally ⁵²⁷ wrong anyone, and there are other equally deserving institutions in the state. But to give the latitude to this contract that is contended for, it might not only result in great wrong to unfortunate people, but establish a precedent that might lead to dangerous consequences. As we said in the equity case, the contract "is not only not signed by the appellant, but does not profess to impose upon it any obligation for its execution." In the first part of the contract the applicant and those applying for him not only covenant that he will "at all times yield due submission to the discipline, rules and regu-

lations of the said corporation, of said home, or its superintendent," which is perfectly proper to require, but that "should said applicant in the judgment of the board of managers thereof fail to do so, they being the sole and exclusive judges thereof, or should he be afflicted with ungovernable insanity, we will at once remove said applicant from said institution and release the institution from his support." If then, there happen to be a board of managers who thought determined that an inmate did not at all times yield due submission to such discipline, rules and regulations, they could require his removal, without any appeal from their decision unless perhaps fraud was proven, and that would be difficult if not impossible, or if the unfortunate should be afflicted with ungovernable insanity he must be removed and the institution released from all obligation to support him. If a applicant had surrendered all he had when he entered, it would be bad enough to hold by such an uncertain tenure but when he does that he knows what he is doing. He knows what he had, what he is giving up, and for what. That was sustained in *German Aged People's Home v. Hammerback*, 64 Md. 595, 54 Atl. 782, 3 Atl. 378, and although we too on occasion to speak of such institutions with the praise that they deserve, we said on the question now under consideration: "As to its power, by bond or otherwise, to enforce the conveyance to it of any *future acquisition* of property, it is not necessary for us to express any opinion, as that question does not arise in this case; the whole property now in dispute being owned by Zolles at the time of his application⁵²⁸ for admission. *We may say that some different principles might govern the case of future acquisitions.*"

Although this question was not then decided, the expression which we have italicized indicated very strongly how the court then felt about it. We have shown above the effect that such a provision, if valid, might in our opinion have on the inmates, and on the institution itself, and we would repeat that it could not be expected that the friends of an inmate would give or leave by will, money or property to him if it must at once become vested in the corporation, and thereby deprive him of its beneficial use—intended to give him comfort and possibly some luxuries of life in his old age. The effect of that would be to practically deprive all of the inmates of the institution from acquiring any property from

the time they enter it, unless it be by mere accident. But that is not all. No human being can know, or remotely conjecture, how much, if anything, any of them may inherit, or in some unexpected way receive. It was doubtless far from the thoughts of this old father, the son and everyone else acquainted with them that this old man would survive his son and take his entire personal estate. If it had been thirty-five thousand dollars instead of three thousand five hundred, it would have been the same thing—without any limitation. Every dollar of it would be diverted from the channels in which it would naturally go to an institution that had undertaken to keep the father for an agreed price—small, it is true, but agreed upon. If he had died the day after he entered, it would have had that compensation and took those chances. It may be that such cases as this are rare, as they doubtless are, but are they not likely to be more so if the relatives of those in such institutions know the consequences of dying intestate, if some corporation and not their relatives must take their estate.

Judge Miller, in speaking of a contract for the sale of a specified quantity of goods or a certain number of shares of stock to be delivered in the future not being invalidated by the circumstance that at the time of the contract the vendor neither had the goods nor had contracted to buy them, nor had any reasonable expectation of becoming possessed of them by the time of the delivery, otherwise than by purchasing them after making the contract, said: "The courts have established this law in the supposed interest of trade and for commercial convenience, notwithstanding the admitted fact that such contracts partake of the nature of gambling transactions": *Wilson v. Wilson*, 37 Md. 15, 11 Am. Rep. 518. If such "contracts partake of the nature of gambling transactions," what is to be said of an obligation which undertakes to bind one to deliver any and all the property whatever which he may, "by any devise, legacy or otherwise, become the owner of"? Assignments have been sustained in some cases which were made by heirs of their interests in an ancestor's estate, but it was the interest in a definite, fixed estate, and similar agreements have been upheld, the court, of course, being satisfied there was no fraud and no over-reaching. But we have not been referred to a case which goes to the extent we are asked to go in this. The old common-law barriers supposed to have been erected for the good of the

public have, in the march of progress, been completely removed, or greatly reduced, in suits involving assignments choses in action, dealings with after-acquired property and similar matters. Equity has lent her hand to help litigants over some of the places too well fixed at common law to overcome without such aid, but thus far we have not departed from the common law far enough to sustain a suit for an alleged breach of such a contract as this.

It may be that the appellant and other similar institutions can make provisions by which those who receive the benefit of their beneficence can be required to compensate them by some fixed, definite compensation, in case they acquire property after being admitted into the institution. It is manifest that some changes can be advantageously made in the form of the contract, and in doing so they could probably validly so contract as to require each one admitted to agree that, in the event he subsequently receives the means, he will pay, in addition to the amount paid when he enters, a certain sum per annum while he remains there, or so much as such means will⁵³⁰ enable him to pay. As the charter, by-laws, etc., are not before us, we do not speak more definitely, but believing the institution to be a worthy one, we thus suggest what may possibly avoid in the future the loss of what would seem to be only just for it to recover, if it so contracts with those admitted. In these cases, however, the appellant cannot recover, as we are of the opinion that the contract before us is of such a character as to call upon the court to deny the right to do so. So without further discussion of that or other questions in the case, we will affirm both judgments.

Judgment affirmed in each case, the appellant to pay the costs.

The Transfer or Assignment of expectant interests is discussed in the monographic note to McCall v. Hampton, 56 Am. St. Rep. 333, 361. Contingent interests and expectancies, and things having no present existence, but resting only in possibility, may, by contract bona fide made and for a sufficient consideration, be assigned so as to be binding in equity: Hudnall v. Ham, 183 Ill. 486, 75 Am. St. Rep. 128. See, too, Kornegay v. Miller, 137 N. C. 659, 107 Am. St. Rep. 489; Hale v. Hollon, 90 Tex. 427, 59 Am. St. Rep. 819. Such transactions, however, must be founded upon a valuable consideration: Lennig's Estate, 182 Pa. St. 485, 61 Am. St. Rep. 725.

CASES

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

YOUNG v. SMALL.

[188 Mass. 4, 73 N. E. 1019.]

NEGLIGENCE—Parent and Child.—A Girl Nine Years of Age of sufficient maturity to be allowed to use the public ways to go to and from school without negligence being imputed to her parents, and she must exercise the degree of care reasonably to be expected of a child of her years. (p. 458.)

NEGLIGENCE of Child Which Will Bar Its Recovery.—If a child, nine years of age, playing a game in a public street, runs across the street without thinking of teams which may be thereon, and is struck and knocked down by a horse attached to a wagon, she, by the ordinary standard of care used by children of her age, must be deemed to have been negligent, and cannot recover for her injury. (p. 458.)

Fault for personal injuries. The plaintiff, when nine years of age, was going to and from school with other children and was playing with them a game called "chase." In so doing, she ran across a street "without thinking anything about a team," and was struck by a horse attached to the defendant's division wagon and knocked down, and one of the wheels of the wagon ran over her leg. The trial judge directed a verdict for the defendant, and the plaintiff alleged exceptions.

J. J. Feely and R. Clapp, for the plaintiff.

S. H. Tyng and J. W. McAnarney, for the defendants.

MR. JUSTICE BRALEY, J. The plaintiff, a girl nine years of age, was returning from school with a companion, and they with other children were engaged in playing in the street, through which at the same time the defendants' team was passing in charge of their servant. Her testimony showed that she was not giving any attention to the use of the street by others, but was entirely absorbed in play, when without looking to see

if there were passing teams, or if it was free from obstructions, she deliberately ran across the street, and was struck by the horse and knocked down.

It may be conceded that she had reached an age of sufficient maturity to be allowed to use the public ways to go to and from school without negligence being imputed to her parents, yet she was required to exercise such a degree of care as reasonably was to be expected of a child of her years: *McDermott v. Boston Elevated Ry. Co.*, 184 Mass. 128, 100 Am. St. Rep. 548, 68 N. E. 34.

But if the plaintiff was lawfully upon the highway, her heedlessness in crossing a public street although under momentary excitement, without the least regard to its use at the time by other travelers, exhibits a spirit of carelessness and a willingness to take chances that prevents her recovery for it is apparent that if she had looked, the team could have been avoided. Such conduct, judged by the ordinary standard of care shown by children of her age, must be deemed to have been negligent, and precludes her recovery: *Messenger v. Dennie*, 137 Mass. 197, 50 Am. Rep. 29; *Mullen v. Springfield St. Ry.*, 164 Mass. 450, 41 N. E. 66; *Morey v. Gloucester St. Ry. Co.*, 171 Mass. 164, 50 N. E. 53; *Sewell v. New York etc. R. R. Co.*, 171 Mass. 302, 50 N. E. 541; *Murphy v. Boston Elevated Ry. Co.*, 188 Mass. 8, N. E. 1018.

No consideration of the due care of the defendants' servants is required, as this negligence on her part is sufficient to sustain the ruling under which a verdict was ordered for the defendants.

Exceptions overruled.

The Case of *Murphy v. Boston Elevated Ry. Co.*, 188 Mass. 8, N. E. 1018, was an action of tort for causing the death of the plaintiff's intestate, a boy five years and four months of age, who was run over by a car of the defendant on Center street, in the city of Boston. He had traveled on the street-cars and knew the street on which he was injured, and that there were two railway tracks there on over which the cars ran frequently in both directions. He was sent on an errand requiring him to cross Center street. In crossing it, there was nothing to obstruct his view of a car which was approaching on the downgrade at a speed estimated at from twelve to twenty miles an hour. The court held that the danger of being run over by an electric car in crossing the street was one which the decedent was presumed to know, and which he ought to have had in mind, and that he could not be rightfully found to have been in the

exercise of due care, unless it could reasonably be found from the evidence that he exercised some degree of care and forethought to avoid the danger, and that, as there was nothing in the evidence to show that he could not have seen and avoided the approaching car, there was nothing to warrant the finding that he exercised any care whatever for his own safety, and therefore that the direction of the trial court of a verdict for the defendant should be sustained.

Negligence in Dealing with Children is the subject of a monographic note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 406-433. A child is held to the exercise of such a degree of care and discretion only as is reasonably to be expected from children of his age: see *Buechner v. New Orleans*, 112 La. 599, 104 Am. St. Rep. 455, and cases cited in the cross-reference note thereto. As to the contributory negligence of children in running in front of an approaching car or team in the public street, see *McDermott v. Boston etc. Ry.*, 184 Mass. 126, 100 Am. St. Rep. 548; *Gleason v. Smith*, 180 Mass. 91 Am. St. Rep. 261.

HELLEN v. CITY OF MEDFORD.

[188 Mass. 42, 73 N. E. 1070.]

EMINENT DOMAIN—Constitutional Law, Right to Damages, when Absolute.—When by the authority of a statute and proceedings the exercise of the power of eminent domain land is taken without possibility of its reverting to its former owner, a statute subsequently enacted providing that the lands and rights taken may be applied in reduction of damages in any suit on account of such taking, is unconstitutional, because it violates a right vested in the owner and holder of the property to have the damages assessed and paid in money. (p. 463.)

CONSTITUTIONAL LAW—Waiver of Right.—If a constitutional provision is designed for the protection of the property rights of a person, he may waive the protection and consent to such action would be invalid against him if taken against his will. Hence, if a person acquires the right to have damages assessed and paid for taking of property in the exercise of the power of eminent domain, and a statute is subsequently enacted depriving him of that right on the abandonment of proceedings, and that the property shall vest in him, he may waive his right to urge the unconstitutionality of the statute by agreeing to the abandonment and that the damages to be assessed shall be small. (p. 463.)

Petition filed October 15, 1900, for the assessment of damages for the taking of land for a park. Cutter, a lessee, was made a party, and the cause was, at the request of the petitioners, referred to the supreme court for its decision.

S. H. Tyng and M. L. Sanborn, for the petitioners.

J. M. Hallowell and H. H. Kimball, for the respondent.

⁴³ HAMMOND, J. Under the authority of Statutes 1882, chapter 154, section 3, the park commissioners of Massachusetts took certain land, and on November 29, 1899, filed a certificate as required by the fourth section. No entry ever was made upon the land. The taking was simply on paper. In virtue of the proceedings, however, the respondent became the owner in fee of the land and was bound to pay to the owner whose estate had been taken the damages respectively suffered by them: Stats. 1882, c. 154, secs. 3, 6; *Hay v. Commonwealth*, 183 Mass. 294, 67 N. E. 334. At the time of the taking the land was owned by the petitioner Hellen in fee subject to an outstanding leasehold estate for years owned by one Cutter. It does not appear that the damages ever were estimated or determined by the commission. Several months after the taking and while the parties were trying to come to some agreement as to the damages, and before any agreement had been reached or any proceedings had been taken in court, Statutes of 1900, chapter 196, was enacted. It provided that any part of the land or rights in land taken and described in the certificate of November 29, 1899, might, in the manner set forth in the statute be abandoned, that such abandonment should "revest the title to such lands or rights as if they had never been taken, in the persons, their heirs and assigns, in whom it was vested at the time of taking," and also that the abandonment might "be pleaded in reduction of damages in any suit on account of said takings." As the land was duly abandoned in accordance with the terms of the statute, and to this petition that fact was pleaded in reduction of damages. The lessee, Cutter, upon a citation from the petitioner appeared in the suit and claimed damages for the loss of his leasehold estate. At the trial the judge refused to rule, as requested by the petitioners, that Statutes of 1900, chapter 196, was unconstitutional, and submitted certain questions to the jury, who found in substance that the fair market value of the land at the time of the taking was thirteen thousand dollars; that the damage to Hellen by reason of ⁴⁴ the taking and abandonment was one thousand dollars; that the damage to Cutter by the taking was one thousand dollars, but, as reduced by the abandonment, nothing; and also that Hellen, by his agent, agreed that if the property was abandoned by the respondent for his benefit his damages would be very small. The judge thereupon ordered a verdict for the petitioner Hellen for one thousand

ollars and interest, and at the request of the petitioners the case was reported to this court.

The first question is whether Statutes of 1900, chapter 196, is constitutional. In considering this question certain well-established rules must be borne in mind. Speaking generally, the power to take land for public use by right of eminent domain is limited, not only as to quantity, but as to the nature of the interest taken, by the public necessity. It is said that the right being based upon necessity cannot be any broader than the necessity": Cooley's Constitutional Limitations, 7th ed., 808. It therefore generally happens that in cases of land taken under the exercise of this right only an easement is taken, the fee remaining in the owner. A familiar example of this is to be found in the case of land taken for a highway. In such a case, where the easement is lawfully abandoned or discontinued as no longer necessary, the fee is in the owner, free from the easement; but, as stated by Shaw, C. J., in *Arrington v. County Commrs.*, 22 Pick. 263, 267, 33 Am. Dec. 741, "the enlarged enjoyment which the owner has thereby is not derived from the public, but is incident to the ownership, which has always subsisted from the laying out of the highway." And in the case of such a lawful abandonment or discontinuance before the assessment of damages, there can be no doubt that the fact of such an ending of the easement can be put in evidence on the question of damages. But the ground of the admissibility of this fact is not that the thing once taken from the owner has been restored to him, but that the evidence tends to show the nature and extent of the thing taken. The thing taken is the use of the land for a highway so long as the public necessity requires, and the sum to which the owner is entitled is the damage by reason of such taking. And that is the rule of damage all the way through, as well at the time of the trial as at the time of the taking. The evidence of a lawful ending of the easement before the trial, whether by discontinuance or otherwise, is admissible, therefore, to make more certain the nature of the easement ⁴⁵ taken, but not to show that the right to damages has been changed. It is manifest that the lawful ending of such an easement by the public authorities impairs no right of the land owner as to damages. It tends only to define this right as it at first existed.

It is pretty generally conceded, however, in the various state courts that in some cases it is competent for the state to take for public use the land in fee, so that not even a possibility

of reverter is left in the former owner. The idea seems to be that in some cases "the public purposes cannot be fully accomplished without appropriating the complete title; and where this is so in the opinion of the legislature, the same reasons which support the legislature in their right to decide absolutely and finally upon the necessity of the taking will also support their decision as to the estate to be taken." *Cooley's Constitutional Limitations*, 7th ed., 809, and cases cited in the notes. This principle is thus stated by Field, C. J., in *Burnett v. Commonwealth*, 169 Mass. 417, 48 N. E. 758: "When land is taken for a public use, it is ordinarily within the discretion of the legislature to determine whether it shall be taken in fee, so that when the public use is determined the title will remain in the body taking it, or whether it shall be taken only to the extent necessary for the public use, and so long as that use continues."

As hereinbefore stated, in the case before us the fee was taken, leaving not even the possibility of a reverter in the former owner: Stats. 1882, c. 154, secs. 3, 4, 6. For other instances of a taking of a fee, see *Dingley v. Boston*, 100 Mass. 544; *Page v. O'Toole*, 144 Mass. 303, 10 N. E. 851; *Titus v. Boston*, 161 Mass. 209, 36 N. E. 793. At the time Statute of 1900, chapter 196, was enacted, the fee having passed to the respondent, the petitioners were entitled, under the constitution and the statutes then in existence, to have their damages paid in money. This was a vested right. It is urged by the respondent that this vested right consisted of a constitutional right to reasonable compensation and of the statutory right to have it assessed and paid in money; and that while the constitutional right could not be impaired by the legislature the statutory right might be changed at will, provided always that the constitutional right to reasonable compensation was not impaired. And it is urged that the statutory right did not become vested ⁴⁶ until it has been fully pursued and damages assessed: See *Harrington v. County Commrs.*, 161 Pick. 263, 33 Am. Dec. 741.

While it is true that every state has complete control over the remedies it offers to suitors; while it may abolish one class of courts and create another, may abolish old remedies and substitute new, or may abolish even without substitution if a reasonable remedy remains (*Cooley's Constitutional Limitations*, 7th ed., 515, 516, and cases cited in the notes thereto) and while, as stated by Parker, C. J., in *Springfield v. County Commrs.*, 6 Pick. 501, 508, "there is no such thing as a vest-

right to a particular remedy," yet a substantive vested right cannot be impaired under the guise of a change in the remedy.

The statute in question did not undertake to define the nature of the thing originally taken, but to change the right to damages. Before the passage of the statute the petitioners were entitled to have their damages assessed and paid in money. This was a substantive right. After the statute they were deprived of this right and were obliged to take land instead of money. This was a change not only in the remedy but in the thing that the petitioners were entitled to have. It is of no consequence whether the substantive right vests in virtue of a provision in the constitution or in a statute, provided it is vested. The remedy may be changed, but the right to money cannot be changed. As to that, no matter how the remedy be changed, the result reached must be in substance the same. This conclusion is not inconsistent with the decision in *Harrington v. County Commrs.*, 22 Pick. 263, 10 Am. Dec. 741, upon which the petitioners rely. We are of opinion, therefore, that the statute is unconstitutional as applicable to this case.

The next question is whether the petitioner Hellen is in a position to avail himself of that point. The jury have found that he agreed that if the property was abandoned by the respondent for his benefit his damages would be very small, if any, and that one thousand dollars would be a reasonable sum payable to him under that agreement. It is not contended that the abandonment was not warranted by the evidence; and the fair inference is that the abandonment was made under that agreement. Under these circumstances the case is within the well-known principle that, where a constitutional provision is designed for the protection of property rights ⁴⁷ of a person, it is competent for him to waive the protection and to consent to such action as would be invalid if taken against him (Cooley's Constitutional Limitations, 7th ed., 250, 251, and the cases cited in the notes); and he must be held to have waived his right to insist upon the unconstitutionality of the statute. It does not appear, however, that Cutter waived his rights.

The result is that as to Hellen there should be judgment for the verdict, and as to Cutter, judgment for one thousand dollars with interest; and it is so ordered.

Under the Power of Eminent Domain the taking of the fee or any less estate, may be authorized by legislature in its discretion. *Currie v. New York Transit Co.*, 66 N. J. Eq. 313, 105 Am. St. R. 647.

Over Mere Remedial Procedure the power of the legislature is absolute, and laws regulating it involve so much of the consideration of public convenience and welfare that individuals cannot be conceived to have vested rights therein: *Oshkosh Waterworks Co. v. Oshkosh*, 109 Vt. 208, 95 Am. St. Rep. 870, and cases cited in the cross-reference note thereto; *Miners' etc. Bank v. Snyder*, 100 Md. 57, ante, p. 383. A law which, even though intended simply to change the remedial procedure, is void if it in fact impairs vested rights: *Gladney v. Snider*, 172 Mo. 318, 95 Am. St. Rep. 517, and cases cited in the cross-reference note thereto; *Welch v. Cross*, 146 Cal. 621, 106 Am. St. Rep. 63.

COMMONWEALTH v. BOYD.

[188 Mass. 79, 74 N. E. 255.]

AUTOMOBILES, Regulation of.—The legislature may, in the exercise of the police power, regulate the driving of automobiles and motorcycles on the public streets. (pp. 464, 465.)

AUTOMOBILES, Registration of, and License Fee.—A statute requiring the registration of automobiles, the payment of a registration fee of two dollars, and the marking of a registered number in Arabic numerals not less than four inches in length, is constitutional. The sum thus required to be paid is not a tax, but a license fee. (pp. 464, 465.)

A. R. Shrigley, for the defendant.

F. H. Chase, second assistant district attorney, for the commonwealth.

79 LORING, J. This case is before us on exceptions taken at the trial in the superior court of a complaint originally made to the municipal court. At the trial in the superior court facts were agreed to which showed that the defendant was guilty. The complaint charges the defendant with having operated a duly registered automobile "without having then and there plainly displayed thereon, in Arabic numerals not less than four inches long, the registered number and mark of said automobile."

The defendant made six requests for rulings, which took up two printed pages, but which were in effect that Statute of 1903, chapter 473, is unconstitutional.

There can be no question of the right of the legislature in the exercise of the police power to regulate the driving of automobiles.

mobiles and motorcycles on the public ways of the commonwealth. They are capable of being driven, and are apt to be driven, at such a high rate of speed, and when not properly driven are so dangerous, as to make some regulation necessary for the safety of other persons on the public ways. In this connection, see *Commonwealth v. Stodder*, 2 Cush. 562, 570, 48 Am. Dec. 679.

Nothing in the act has been called to our attention which is not a proper exercise of this power. This act being passed by the general court, it is not necessary to consider whether a somewhat similar act can be passed by a city, as to which see a decision in a county court of Illinois, *Chicago v. Banker*, 112 Ill. App. 94—the case that seems to have inspired the defendant's argument here.

⁸⁰ The registration fee of two dollars, required to be paid by section 1, is plainly a license fee and not a tax, as the fees were held to be which were imposed by the city ordinances in question in *Chicago v. Collins*, 175 Ill. 445, 67 Am. St. Rep. 224, 51 N. E. 907, 49 L. R. A. 408, *St. Louis v. Grone*, 46 Mo. 574, and *Livingston v. Paducah*, 80 Ky. 656.

Exceptions overruled.

The Principal Case is cited in the monographic note to *Christy v. Elliott*, *ante*, p. 196, on the law of automobiles.

ROCHFORD v. ROCHFORD.

[188 Mass. 108, 74 N. E. 299.]

MECHANIC'S LIEN Under Contract With Persons Who Subsequently Acquired Title.—If one negotiating for the purchase of land contracts for the erection of a building thereon, he, on acquiring title and consenting to the continuance of the work, ratifies what was done preceding his acquisition of the title, and as against him the lien is enforceable for the whole amount of the contract remaining unpaid. (pp. 466, 467.)

MECHANIC'S LIEN, Conflict Between and Mortgages.—As against a mortgagee no lien attaches unless the contract out of which it springs was made after the mortgagor became the owner, for the legal title fixed by his ownership is the terminus from which encumbrancers must reckon their rank to liens on the land. (p. 467.)

MECHANIC'S LIENS, Conflict Between and Purchase Money Mortgages.—If one contracts for the erection of a house on land of which he is not then the owner, and afterward and during the prog-

ness of the work acquires title to the land and contemporaneously executes a mortgage to his vendor, the lien of the mortgage is subordinate to the lien of the contractor who erected the building (pp. 467, 468.)

Action to enforce a lien brought by James A. Rochford against his son Thomas and the latter's mortgagees, Winsor Gleason and Martha M. Atkins. The building, on account of which the lien was claimed, was erected under a contract between the father and son made November 9, 1896, before the latter became the owner of the property. On November 16, 1896, the son acquired title to the property under a conveyance from Winsor Gleason, the owner, and simultaneously with the delivery of the deed to him he executed a mortgage to his vendor. The mortgage of Martha M. Atkins was executed February 10, 1897. The trial judge ruled that the lien was paramount to the mortgage to Gleason and he alleged exceptions.

E. A. Whitman, for the respondents.

D. Benshimol, for the petitioner.

¹¹⁰ BRALEY, J. If the mortgage given by Thomas Rochford to Winsor Gleason is entitled to priority over an entire contract for labor and materials made between the petitioner and the mortgagor, any lien arising out of the contract attached to the equity of redemption only, and not to an unencumbered fee.

At the date of the contract Gleason owned the land, and although ¹¹¹ negotiations were pending with Thomas Rochford for its purchase, it is found by the auditor that any work done before the title passed was performed without his consent as owner of the land, nor does it appear that any notice was given to him of an intention to claim a lien for materials. No lien, therefore, would have attached for labor already performed or furnished, or materials furnished, if any, before the negotiations, if they had not ripened into a sale: *French v. Hussey*, 159 Mass. 206, 34 M. E. 362.

It is not shown clearly how far the work had progressed at the date of the deed, but it may be inferred that the construction of the house from the date of the contract to its completion proceeded in the usual manner without substantial interruption.

If no rights in the property were involved except those arising between the petitioner and the respondent Rochford, then, as owner of the land when the house was finished, he could be found by his consent to the continuation of the work after the conveyance to have ratified what had preceded, and as the lien attached from day to day as the work was done or materials were furnished, his ratification would relate back to the beginning and embrace the whole amount: *Courtemanche v. Blackstone Valley St. Ry. Co.*, 170 Mass. 50, 53, 64 Am. St. Rep. 275, 48 N. E. 937; *Anderson v. Berg*, 174 Mass. 404, 54 N. E. 877. But against the mortgagee no lien attaches in such a case unless the contract out of which it springs is made after the mortgagor has become owner, for the legal title fixed by his ownership is the terminus from which encumbrancers, whether by way of a mortgage duly recorded or of a lien duly created, must reckon their rank to claims on the land: *Courtemanche v. Blackstone Valley St. Ry. Co.*, 170 Mass. 50, 53, 64 Am. St. Rep. 275, 48 N. E. 937; *McDowell v. Rockwood*, 182 Mass. 150, 154, 65 N. E. 65.

Before November 16, 1896, and until the delivery of the deed on that day the petitioner had no lien, or a contract which could result in a lien, for work or materials against Gleason the owner of the land. By the transaction, when the title passed, Thomas J. Rochford is found to have gained only a momentary seisin of an unencumbered estate, which was immediately transformed into an equity¹¹² of redemption by his mortgage made to the grantor presumably to secure a part of the purchase money. And as he made no contract with the petitioner after he became owner and before the mortgage was recorded, it retained priority over any lien that could grow out of their original agreement: *Webster v. Campbell*, 1 Allen, 313; *Ettridge v. Bassett*, 136 Mass. 314; *Saunders v. Bennett*, 160 Mass. 48, 39 Am. St. Rep. 456, 35 N. E. 111; *Sprague v. Brown*, 178 Mass. 220, 224, 59 N. E. 631.

It is urged, however, by the petitioner that the decision made in *Dixon v. Hyndman*, 177 Mass. 506, 59 N. E. 73, supports his right as paramount.

The contract under which the lien was claimed in that case was made with the owners after they had received the title deed, and given a mortgage back, but before either had been

recorded. Both the deed and mortgage were signed and acknowledged on April 29, 1897, again acknowledged on July 10, 1897, and recorded on July 12, 1897. There was evidence that the occasion of the delay was that another mortgage given to raise money for purposes of construction should have priority over the original mortgage, but it was found by the referee who heard the case on the evidence that the title deed had been delivered on April 29, 1897, and the grantees were the owners of the land on which the lien was claimed on and after that date. The mortgage, though it had been delivered, was not recorded until after the date of the contract, and while it also was found that the petitioner knew of its existence before he furnished the materials for which he claimed a lien, it was held that actual notice was insufficient under the statute, and the lien was ranked the unrecorded mortgage.

In the present case no contract was made after the respondent Rochford became the owner, within the time elapsing between the delivery and recording of the mortgage, and none is implied against the mortgagee from the subsequent adoption of the work and ratification of the original contract: *Courtemanche v. Blackstone Valley St. Ry. Co.*, 118 Mass. 50, 64 Am. St. Rep. 275, 48 N. E. 937, and *McDow v. Rockwood*, 182 Mass. 150, 65 N. E. 65.

Exceptions sustained.

For Authorities bearing upon the principal case, see *Birmingham Bldg. etc. Assn. v. Boggs*, 116 Ala. 587, 67 Am. St. Rep. 147; *Russ v. Grant*, 122 Mo. 161, 43 Am. St. Rep. 563; *Wilson v. Lubke*, 176 Mo. 210, 98 Am. St. Rep. 503; *Saunders v. Bennett*, 160 Mass. 48, 39 Am. St. Rep. 456; *Ortonville v. Geer*, 93 Minn. 501, 106 Am. St. Rep. 4

PHELAN v. FITZPATRICK.

[188 Mass. 237, 74 N. E. 326.]

LANDLORD AND TENANT, Liability to Children.—A child whose parents occupy a leased tenement and who is injured by defects therein cannot recover if its parents could not have recovered if injured under the same circumstances. (p. 469.)

LANDLORD AND TENANT—What Parts Must be Regarded as Portions of the Leased Premises.—If a leased tenement is situated in the same yard with others, a platform inclosed by a railing and connected by stairs going from one platform to another must be regarded as a portion of the leased premises, where such platform is used by the occupants of the tenement with which it is connected, and one of the lessees injured on such platform by a defect therein is deemed injured by a defect in the leased premises. (p. 470.)

LANDLORD AND TENANT.—The Rule of Caveat Emptor Applies in hiring a tenement, and extends to all parts and appurtenances thereof. (p. 470.)

LANDLORD AND TENANT.—A Lessee Takes a Tenement in the Condition in which it is when leased to him, and the landlord is under no obligation to subsequently make repairs. (p. 470.)

LANDLORD AND TENANT.—The fact that a landlord, after leasing, voluntarily undertook on one occasion, at the request of a lessee, to repair a defective railing does not constitute an admission of liability on his part, nor render him liable when the railing afterward gives way and injures a member of the lessee's family. (p. 470.)

J. J. Feely and R. Clapp, for the plaintiff.

S. R. Jones, for the defendant.

238 MORTON, J. This is an action of tort to recover for injuries sustained by the plaintiff in consequence of a fall from a platform in the third story of a building belonging to the defendant. The fall was caused by the breaking of the railing while the plaintiff was taking in clothes from a line attached to the railing. The plaintiff lived with her parents who occupied a tenement on the third floor of the building. The judge ordered a verdict for the defendant and the case is here on the plaintiff's exceptions to that ruling.

The plaintiff stands in no better position than her parents would have stood in if either one of them had been injured under like circumstances. She was in under their rights as tenants: *Wilcox v. Zane*, 167 Mass. 302, 45 N. E. 923. And it is plain it seems to us that that portion of the platform inclosed by the railing constituted a part of the tene-

ment which was hired by them from the defendant. It is true that stairs connecting the various tenements with the yard went from one platform to the other. But the common use of the platforms was confined to so much of the area as was occupied by the stairs and was reasonably incidental thereto. The rest of the platforms was used by those occupying the tenements with which they were severally connected. The platform connected with the tenement occupied by the plaintiff and her parents was used by them to store wood and coal on and for other private purposes. The water-closet belonging to the tenement was situated there, and the clothes line, whoever put it there, as to which there was some dispute, was not a line for common use but for the use of the occupants of the tenement. In hiring the tenements the rule of caveat emptor applied, therefore, to the platform and the railing as well as to the rest of the tenement. The plaintiff's parents took the tenement in the condition in which it was, and the defendant was under no obligation to repair the railing if it needed repair or to make subsequent repairs: ²³⁹ Booth v. Merriam, 155 Mass. 53, 30 N. E. 85; Bowe v. Hunking, 135 Mass. 380, 46 Am. Rep. 471; McLean v. Fiske Wharf etc. Co., 158 Mass. 472, 33 N. E. 499; Szathmary v. Adams, 166 Mass. 145, 44 N. E. 12; Galvin v. Beals, 187 Mass. 250, 72 N. E. 969. The fact that the defendant voluntarily undertook on one occasion at the request of the plaintiff's mother to repair the railing with a hammer and nails which she furnished him would not constitute an admission of liability on his part or render him liable if the railing afterward gave way. It was a gratuitous act on his part which imposed no liability upon him. McLean v. Fiske Wharf etc. Co., 158 Mass. 472, 33 N. E. 499; McKeon v. Cutter, 156 Mass. 296, 31 N. E. 389; Ketrines v. Cullen, 183 Mass. 298, 67 N. E. 243.

Exceptions overruled.

The Liability of a Lessor of real estate to third persons is discussed in the monographic note to Griffin v. Jackson Light etc. Co., 92 Am. St. Rep. 499-559. His liability to children of the lessee for injuries sustained from the dangerous condition of the premises is discussed in the recent cases of Brady v. Klein, 133 Mich. 422, 103 Am. St. Rep. 455; Davis v. Smith, 26 R. I. 129, 106 Am. St. Rep. 691. As to the application of the rule of caveat emptor as between landlord and tenant, see Clifton v. Montague, 40 W. Va. 207, 52 Am. St. Rep. 87; Whitmore v. Orono Pulp etc. Co., 91 Me. 297, 64 Am. St. Rep. 22; Willcox v. Hines, 100 Tenn. 538, 66 Am. St. Rep. 770.

BARNES v. HUNTLEY.

[188 Mass. 274, 74 N. E. 318.]

RES JUDICATA—Seeking to Maintain New Suit on Different Grounds.—A decree dismissing a bill in equity in a suit to enforce an oral trust and for an accounting for moneys claimed by the complainant to have been put into the hands of the defendant to be invested and reinvested for her benefit, is conclusive as a bar to a second suit for the same purpose, though it is sought to be made on grounds different from those mentioned in the former bill. The complainant is bound to bring forth all his grounds of attack at once. (p. 473.)

T. H. Talbot and G. H. Ross, for the plaintiff.

T. J. Boynton, for the defendant.

²⁷⁴ LATHROP, J. This is a bill in equity, filed in the superior court on March 3, 1902, against the administrator of the estate of Nelson H. Bush, to enforce an oral trust alleged to have been made on February 1, 1881, by the terms of which the plaintiff delivered to Bush five hundred and fifty dollars, to be invested and reinvested, under an agreement to pay over to the plaintiff from time to time, as her wants should lead her to request, any income from such investment, and the whole amount thereof, with all accumulations, on her demand.

The bill contained numerous other allegations showing breaches of the trust and payments to her of certain sums on demand. The prayer of the bill was for an account, and that the defendant be required to pay over to the plaintiff any money and any other property belonging to the plaintiff.

The defendant pleaded a former adjudication upon a bill in equity filed in the superior court on April 27, 1900, by the same plaintiff against the same defendant, for the same cause of action, which, after a full hearing on its merits, was dismissed by the superior court on July 1, 1901; and a final decree was entered.

²⁷⁵ On issue joined on this plea a commissioner was appointed to take the evidence, and a full report of the evidence was made. Upon all the evidence the judge of the superior court found that the plaintiff's bill in the case at bar was for the recovery of the same rights, claims and causes of action as were set forth in the former suit, sus-

tained the plea in bar, and entered a final decree dismissing the bill with costs. The case is before us on an appeal by the plaintiff from this decree.

It appears in the record before us that in order to avoid encumbering the record with a mass of evidence, the parties agreed that the parties in this suit are the same persons who were parties in the former suit; that the defendant is sued in this cause in the same capacity and as administrator of the same estate as in the former suit; and that the sum of five hundred and fifty dollars specified in the plaintiff's bill in this suit is the same as that specified in the former bill.

A comparison of the two bills shows that, while the present bill is somewhat longer than the original bill, the cause of action is the same. The "petitory conclusions" of the two bills are the same—namely, an accounting and paying over of what may be found due.

It seems to us plain that the plaintiff was bound to bring forth all her grounds of attack at once; and that she cannot in this bill seek to maintain it on grounds different from those mentioned in the former bill. She has had her day in court, and a full trial of her case, and a decree against her, from which she took no appeal. The matter is *res judicata*: *Hoseason v. Keegen*, 178 Mass. 247, 59 N. E. 627, and cases cited.

Decree affirmed.

A Judgment on the merits constitutes a bar to a subsequent action founded upon the same claim or demand, concluding the parties and their privies, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which might have been offered for that purpose: Slater v. Skirving, 51 Neb. 108, 66 Am. St. Rep. 444; Garden City v. Merchants' etc. Bank, 65 Kan. 345, 93 Am. St. Rep. 284; Gross v. People, 193 Ill. 260, 86 Am. St. Rep. 322. See, too, Brack v. Boyd, 211 Ill. 290, 103 Am. St. Rep. 200.

MOYNIHAN v. TODD.

[188 Mass. 301, 74 N. E. 367.]

PUBLIC OFFICERS, Personal Liability of.—A Highway Surveyor is not liable at the common law to an action for negligently omitting to perform the duties of his office or for performing them in such a negligent manner as to fail to give the public the benefits which they ought to receive in the enjoyment of good roads. His only liability for this kind of negligence is statutory. (p. 474.)

MUNICIPAL OFFICERS, Liability of.—Unless under some special statutory provision, a public officer can have no greater exemption from liability than is granted to a city or town which neglects to perform the public duties imposed upon it. (p. 475.)

PUBLIC OFFICERS, Nonliability of.—A public officer while performing duties imposed solely for the benefit of the public is not liable for the mere failure to do that which is required by statute. Negligence that is nothing more than omission or nonfeasance creates no liability. (p. 475.)

PUBLIC OFFICER, Liability of for Misfeasance.—For a personal act of misfeasance a public officer is liable to one injured by it, though engaged in the performance of a public duty; he is not liable for acts of misfeasance of his servant or agent, except when the work is not entirely public, but is in part for profit or when some element of pecuniary advantage enters into it. (p. 477.)

MUNICIPAL OFFICERS, Liability of.—If the superintendent of streets of a town is personally negligent in causing rock to be blasted without taking proper precautions for the safety of persons rightfully in the vicinity, he is answerable to persons injured thereby, but is not liable if the negligence was that of his servants or agents. (pp. 478, 479.)

H. I. Bartlett and R. E. Burke, for the plaintiffs.

G. B. Blodgette and H. P. Moulton, for the defendant.

³⁰² KNOWLTON, C. J. These three actions are founded upon the alleged negligence of the defendant in carelessly blasting a rock in a highway, whereby the plaintiffs, Toomey and Abbie M. Moynihan, were struck by pieces of rock and injured, and the plaintiff, Timothy Moynihan, husband of Abbie, was put to expense on account of his wife's injury. It was admitted that the injured plaintiffs were in the exercise of due care.

The defendant was the superintendent of streets for the town of Rowley, and at the time of the accident he was repairing a street, with others working under his direction and subject to his control. He directed that a boulder be removed by blasting, and just before the explosion he went away a short distance from it, to be beyond the reach of the

broken rock that might be thrown out by the blast. The evidence would have warranted a finding that, if there was negligence in blasting the rock, he was legally responsible for the consequences of it, unless he was relieved from liability by the fact that he was acting as a public officer. The jury might have found that he was personally negligent, and it is plain from the testimony that he had the management and control of the repairs then in progress on the highway, and that the men who were employed by him on the different parts of the work acted under his direction: *Elder v. Bemis*, 2 Met. 599, 605; *Bickford v. Richards*, 154 Mass. 163, 26 Am. St. Rep. 224, 27 N. E. 1014; *Delory v. Blodgett*, 185 Mass. 126, 102 Am. St. Rep. 328, 69 N. E. 1078, 64 L. R. A. 114, and cases cited.

We come now to the question whether he was exempted from liability by the rules of law applicable to public officers. Under the statute which authorizes the appointment of a superintendent of streets in a town, he was to "have the same powers and be subject to the same duties, liabilities and penalties which have been imposed upon surveyors of highways and road commissioners": Stats. 1889, c. 98; Stats. 1893, c. 423, secs. 25, 26; Stats. 1894, c. 17; Rev. Laws, c. 25, secs. 85, 86. These statutes, however, do not make this officer liable to a fine for nonacceptance of his appointment to office by the selectmen, as highway surveyors ³⁰³ and some other town officers are for a neglect to take the oath of office after an election in town meeting: See Rev. Laws, c. 25, sec. 97. Although the language of some of the decisions suggests a distinction between the performance of public duties voluntarily undertaken and the performance of them under the compulsion of a statute, we shall assume in favor of the defendant, for the purposes of this decision, that the difference is immaterial, and shall treat the defendant as if he were a highway surveyor: See *Nowell v. Wright*, 3 Allen, 166, 80 Am. Dec. 62; *Tindley v. Salem*, 137 Mass. 171, 175, 50 Am. Rep. 289. A highway surveyor is not liable to an action at common law in Massachusetts for negligently omitting to perform the duties of his office, or for performing them in such a negligent manner as to fail to give the public the benefits which they ought to receive in the enjoyment of good roads. His only liability for this kind of negligence is statutory: Rev. Laws, c. 25, sec. 82; *Callender v. Marsh*, 1 Pick. 418; *Elder v. Bemis*,

2 Met. 599; Benjamin v. Wheeler, 15 Gray, 486; White v. Phillipston, 10 Met. 108; Bartlett v. Crozier, 17 Johns. 439, 8 Am. Dec. 428.

The principal ground on which public officers find exemption from liability for negligence in the performance of their official duties in certain cases is the same as that which relieves cities and towns and other agencies of the government from a liability to individuals for a failure to perform similar duties. Unless under some special statutory provision, a public officer can have no greater exemption from such a liability than is granted to a city or town which neglects to perform the public duties imposed upon it: Hill v. Boston, 122 Mass. 344, 361, 23 Am. Rep. 332.

The subject of the liability of officers and agencies of government for negligence in the performance of public duties was considered at great length in Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332, with an elaborate review of the cases, both English and American. The rule adopted in that case is the same as previously had existed in England, and was understood to be then in force there. Following this rule, it always has been held in the American courts that an agency of government or a public officer, while performing a duty imposed solely for the benefit of the public, is not liable for a mere failure to do that which is required by the statute. Negligence that is nothing more than an omission or nonfeasance creates no liability: Russell v. Men³⁰⁴ of Devon, 2 Term Rep. 667; Young v. Davis, 7 Hurl. & N. 760; Cowley v. Newmarket Local Board, [1892] App. Cas. 345; Municipal Council of Sydney v. Bourke, [1895] App. Cas. 433; Tindley v. Salem, 137 Mass. 171, 50 Am. Rep. 289; Mahoney v. Boston, 171 Mass. 427, 50 N. E. 939; Sampson v. Boston, 161 Mass. 288, 37 N. E. 177; Maxmilian v. Mayor of New York, 62 N. Y. 160, 20 Am. Rep. 468; Eastman v. Meredith, 36 N. H. 284, 72 Am. Dec. 302; Brown v. Vinalhaven, 65 Me. 402, 20 Am. Rep. 709; Colwell v. Waterbury, 74 Conn. 568, 51 Atl. 530, 57 L. R. A. 218; Condict v. Mayor of Jersey City, 46 N. J. L. 157; Nicholson v. Detroit, 129 Mich. 246, 38 N. W. 695, 56 L. R. A. 601; Kuehn v. Milwaukee, 92 Wis. 263, 65 N. W. 1030; Ogg v. Lansing, 35 Iowa, 495, 14 Am. Rep. 499; Bryant v. St. Paul, 33 Minn. 289, 53 Am. Rep. 31, 23 N. W. 220; Summers v. Commissioners of Daviess County, 103 Ind. 262, 53 Am. Rep. 512, 2 N. E. 725; Love v. Atlanta, 95 Ga. 129, 51 Am. St. Rep.

64, 22 S. E. 29; *Sievers v. San Francisco*, 115 Cal. 648, 56 Am. St. Rep. 153, 47 Pac. 687; *Galveston v. Posnainsky*, 62 Tex. 118, 129, 131, 50 Am. Rep. 517; *Conelly v. Nashville*, 100 Tenn. 262, 46 S. W. 565. Prior to the decisions in *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93, and *Foreman v. Mayor of Canterbury*, L. R. 6 Q. B. 214, which overruled the case of *Holliday v. St. Leonard's*, 11 Conn. B., N. S., 192, it was held in England that for negligent acts of misfeasance by the servants or agents of a municipality or a public officer performing duties strictly public, there was no liability upon the employer, on the ground that the doctrine *respondet superior* does not apply to the servants of one who is acting only as a representative of the government, for the benefit of the public: *Holliday v. St. Leonard's*, 11 Com. B., N. S., 192; *Duncan v. Findlater*, 6 Clark & F. 894, 903; *Hall v. Smith*, 2 Bing. 156, 159. This is the rule generally in the American courts: *Sampson v. Boston*, 161 Mass. 288, 37 N. E. 117; *Curran v. Boston*, 151 Mass. 505, 21 Am. St. Rep. 465, 24 N. E. 781, 8 L. R. A. 243; *Mahoney v. Boston*, 171 Mass. 427, 50 N. E. 939; *Kelley v. Boston*, 186 Mass. 165, 71 N. E. 299, 66 L. R. A. 429. See, also, cases above cited. But now the law in England seems to hold agencies of the government liable for injuries from acts of misfeasance committed by servants or agents engaged in a public work: See *Foreman v. Mayor of Canterbury*, L. R. 6 Q. B. 214.

In this commonwealth, in the course of years, the application of the law in regard to the liability of municipalities and public officers for negligence has produced a variety of statements, and perhaps some conflict of decision. While we never have adopted the present English rule establishing a general liability of the master for the misfeasance of his servants in this class of cases, and sometimes have stated rather broadly a general exemption ³⁰⁵ from liability for negligence while performing public work, it repeatedly has been intimated that a liability for individual and personal acts of misfeasance exists in these cases as well as others. This was expressly stated in *Howard v. Worcester*, 153 Mass. 426, 428, 25 Am. St. Rep. 651, 27 N. E. 11, 12 L. R. A. 160; and the reasons given for the decision in *McKenna v. Kimball*, 145 Mass. 555, 14 N. E. 789, lead to a similar result. In *Walcott v. Swampscott*, 1 Allen, 101, *Barney v. Lowell*, 98 Mass. 570, and *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196, which were suits against the town and the

cities for work done by a public officer, it was held that the doctrine *respondeat superior* does not apply. In *Butterfield v. Boston*, 148 Mass. 544, 546, 20 N. E. 113, 2 L. R. A. 447, the injury was caused by a negligent act of a gateman or a draw tender, and Chief Justice Morton, in the opinion of the court, which held that an action could not be maintained against the city, said that these persons might be liable individually. In *Nowell v. Wright*, 3 Allen, 166, 80 Am. Dec. 62, the action was against the tender of a drawbridge, an officer appointed by the governor of the commonwealth much as superintendents of streets are appointed by the selectmen of towns; and the injury having been caused by his personal negligence in a positive act, which thus became a misfeasance, he was held liable: See, also, *Young v. Davis*, 7 Hurl. & N. 760, 771; *Foreman v. Mayor of Canterbury*, L. R. 6 Q. B. 214; *Duncan v. Findlater*, 6 Clark & F. 894, 903; *Municipality of Pietou v. Geldert*, [1893] App. Cas. 524, 531; *O'Leary v. Board of Fire Commrs.*, 79 Mich. 281, 286, 19 Am. St. Rep. 169, 44 N. W. 608, 7 L. R. A. 170; *Nicholson v. Detroit*, 129 Mich. 246, 258, 88 N. W. 695, 56 L. R. A. 601. We are of opinion that the principle which underlies the rule that public officers and other agencies of government are not liable for negligence in the performance of public duties goes no further than to relieve them from liability for nonfeasance, and for the misfeasances of their servants or agents. For a personal act of misfeasance, we are of opinion that a party should be held liable to one injured by it, as well when in the performance of a public duty as when otherwise engaged. We think that the general course of decision in this commonwealth is not in conflict with this view. But for acts of misfeasance of a servant or agent in such cases, there is no liability. This is because the rule *respondeat superior* does not apply.

There is an exception to the last branch of the rule. Whenever the work is not entirely public, but is in part for profit, or ³⁰⁸ when any element of pecuniary advantage enters into it, there is a liability for the negligent acts of servants. On this ground it was long ago held that a city or town might be liable for negligent acts of misfeasance done by its servants in the construction or repair of a common sewer: *Coan v. Marlborough*, 164 Mass. 206, 208, 41 N. E. 238; *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289; *Lynch v. Springfield*, 174 Mass. 430, 54 N. E. 871; *Norton v.*

New Bedford, 166 Mass. 48, 43 N. E. 1034; *Child v. Boston*, 4 Allen, 41, 81 Am. Dec. 380; *Allen v. Boston*, 159 Mass. 324, 38 Am. St. Rep. 423, 34 N. E. 519; *Curran v. Boston*, 151 Mass. 505, 508, 21 Am. St. Rep. 465, 24 N. E. 781, 8 L. R. A. 243. Another and different class of cases in which there is a liability for the misfeasance of servants or agents is referred to by Chief Justice Gray in *Hill v. Boston*, 122 Mass. 344, 358, 23 Am. Rep. 332, as follows: "If a city or town negligently constructs or maintains the bridges or culverts in a highway across a navigable river, or a natural watercourse, so as to cause the water to flow back upon and injure the land of another, it is liable to an action of tort, to the same extent that any corporation or individual would be liable for doing similar acts: *Anthony v. Adams*, 1 Met. 284, 285; *Lawrence v. Fairhaven*, 5 Gray, 110; *Perry v. Worcester*, 6 Gray, 544, 66 Am. Dec. 431; *Parker v. Lowell*, 11 Gray, 353; *Wheeler v. Worcester*, 10 Allen, 591. So if a city, by its agents, without authority of law, makes or empties a common sewer upon the property of another to his injury, it is liable to him in an action of tort: *Proprietors of Locks and Canals v. Lowell*, 7 Gray, 223; *Hildreth v. Lowell*, 11 Gray, 345; *Haskell v. New Bedford*, 108 Mass. 208. But in such cases, the cause of action is not neglect in the performance of a corporate duty, rendering a public work unfit for the purposes for which it is intended, but it is the doing of a wrongful act, causing a direct injury to the property of another, outside of the limits of the public work." This doctrine was reaffirmed in *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289. And it has been applied in many cases. Its exact limits have not been very clearly defined. Perhaps it includes *Elder v. Bemis*, 2 Met. 599, and *Hawks v. Charlemont*, 107 Mass. 414, in which the reasons for the decisions were not very plainly stated, but in each of which the negligent act was a trespass causing a direct injury to the plaintiff's property outside of the limits of the highway: See, also, *Miles v. Worcester*, 154 Mass. 511, 26 Am. St. Rep. 264, 28 N. E. 676, 13 L. R. A. 841; *Edgerly v. Concord*, 62 N. H. 8, 19, 13 Am. St. Rep. 533; *Eastman v. Meredith*, 36 N. H. 284, 296, 72 Am. Dec. 302; *Colwell v. Waterbury*, 307 74 Conn. 568, 573, 51 Atl. 530, 57 L. R. A. 218; *Mayor of New York v. Bailey*, 2 Denio, 433.

The result is that if the jury in the present case find that the defendant was personally negligent in causing the rock to be blasted without taking proper precaution for the safety

of persons rightfully in the vicinity, a verdict should be rendered against him; but if there was no negligence in blasting the rock, or if the only negligence was that of the defendant's servants, or agents, he is not liable.

Exceptions sustained.

The Principal Case was Relied upon as controlling in *Rome v. City of Worcester*, 188 Mass. 307, 74 N. E. 370. This was an action of tort for injury to a brick building alleged to have been caused by the negligent blasting of rock by the defendant in the construction of a sewer. At the trial the plaintiff offered to show that the method adopted of blasting with heavy charges in solid rock was not necessary to the performance of the work, and was excessive and unreasonable. The judge excluded the evidence and ordered a verdict for the defendant. The plaintiff alleged exceptions, but they were overruled by the supreme judicial court, on the ground that the alleged negligence of which the plaintiff complained was in the performance of public duties imposed on the defendant city, and such being the case, that it was not liable for any omission or nonfeasance or for any misfeasance of its servants or agents.

A Public Officer in charge of a public work is not liable, according to *Bowden v. Derby*, 97 Me. 536, 94 Am. St. Rep. 516, for the negligence of persons working under him, though he selects and may discharge them; they are not his servants, and the rule of respondeat superior does not apply.

OLD DOMINION COPPER MINING AND SMELTING COMPANY v. BIGELOW.

[188 Mass. 315, 74 N. E. 653.]

PRACTICE.—A Demurrer to a Whole Bill, in so far as it seeks a rescission, is in effect an assignment of causes of demurrer to the whole bill, and will be so treated. (p. 484.)

CORPORATIONS.—A Promoter of a Corporation Stands in a Fiduciary relation to it. (p. 484.)

CORPORATIONS.—Promoters, When Entitled to the Benefit of Purchases.—If property is bought and paid for with a view to subsequently forming a corporation to which it shall be sold, such corporation, when formed, has no right to the benefit of the purchase, and the purchasers, though they become promoters and stockholders in the corporation, may sell to whosoever they please. (pp. 485, 486.)

CORPORATIONS.—Promoters of a Corporation seeking to sell property to it must disclose all the facts known to them material to the property and its purchase and see that the corporation has adequate independent advice. (p. 486.)

CORPORATIONS.—Promoter's Acquiescence Which does not Bar Right to Proceed Against.—The right of a corporation to proceed

by suit in equity against promoters who sell its property without a full disclosure of material facts is not lost, because all the stockholders at the time of the sale have full knowledge of the facts and acquiesce in it, if such stockholders consist only of such promoters and their agents and attorneys, and it was part of the scheme at the time of the sale and purchase, afterward carried out, that large issues of stock should be subsequently made in payment of the property, which stock should be sold to the public without any disclosure to the persons who should subscribe for and purchase it. (p. 491.)

CORPORATIONS—Promoters, Suit Against Where They Will Participate in the Benefits of a Recovery.—A suit against promoters of a corporation to rescind a sale of property made by them to it without the disclosure of material facts may be sustained, although they, as stockholders, consent to and acquiesce in the sale and will become entitled to their share of the purchase price recovered. (pp. 491, 492.)

CORPORATIONS—Promoters, Bill, When may be Sustained Against One Without Joining the Executor of the Other.—Where lands stand in the name of one of two promoters of a corporation, and a sale is made by them to it without disclosing material facts, and stock of the corporation is issued in payment, a bill may subsequently be maintained against the one of such promoters who did not hold the legal title to the property for the tortious violation of a duty which they owed to the corporation, because they stood in a fiduciary relation to it, and the defendant may be held liable in solido for the shares received by both promoters. (p. 493.)

EQUITY, Jurisdiction of.—Where money has been received in violation of a fiduciary duty, equity has jurisdiction to compel its restoration. (p. 493.)

EQUITY PRACTICE—Bill, When not Multifarious.—Where no relief is sought in respect to certain allegations in a bill, it is not made multifarious by them. (p. 494.)

EQUITY PRACTICE—Prayers of Bill, When not Inconsistent. In a suit against one acting in a fiduciary relation to the complainant, there is nothing inconsistent between the prayer for the rescission of the contract and the prayer for damages. (p. 494.)

L. D. Brandeis and W. H. Dunbar, for the plaintiff.

A. Hemenway and J. W. Farley, for the defendant.

³¹⁶ LORING, J. This cause came on to be heard on two demurrers. The defendant filed a demurrer to the whole bill, and what purported to be a demurrer to so much of the bill "as seeks to have the sale of certain parcels of real estate conveyed to the plaintiff by Leonard Lewisohn rescinded, and to have the defendant ordered to return to the plaintiff the consideration paid by the plaintiff for said conveyance." On the plaintiff's stipulating that in case the demurrers, or either of them, should be sustained on the merits, the bill, or so much thereof as the demurrers apply to, should be dismissed, the cause was reserved for the consideration of the full court.

The case stated in the bill, so far as material here, is in effect as follows: The defendant and one Lewisohn, at some time before March, 1895, formed the plan of buying the property of the Old Dominion Copper Company of the city of Baltimore (hereinafter spoken of as the Baltimore company), and four certain mining claims and a millsite standing in the name of one Keyser (hereinafter spoken of as the real estate here in question), with a view to reselling them at a profit to a corporation to be organized by them for that purpose. Their scheme was first to buy all the stock of the Baltimore company. Having got control of that company through their ownership of all of its capital stock, they were to organize a new company, and before the stock of the new company was issued, and while it was entirely in their control as the organizers of it, they were ³¹⁷ to sell to it the property of the Baltimore company and the real estate here in question for a specified number of shares of the new company, the balance of shares in the capital stock of the new company being sold to the public to provide working capital and to build additions. All this was done. The plaintiff was the new corporation. The defendant and Lewisohn got the money with which to buy all shares in the capital stock of the Baltimore company from a syndicate (hereinafter called the Dominion Syndicate) which they organized for the purpose and to which they agreed to pay two dollars for every dollar paid into the syndicate treasury in case the scheme was a success, with a privilege given to the syndicate members of taking shares at par in the new corporation in place of money. Five-sevenths of the stock of the Baltimore company were bought of the executors of one Simpson for a sum not more than \$613,137.39; and the other two-sevenths, together with the real estate here in question, of one Keyser and "other persons to the plaintiff unknown," for a sum not exceeding \$175,182.11; and thereupon the real estate here in question was conveyed to Lewisohn. These transactions were carried through on July 8, 1895. On the same eighth day of July, 1895, the plaintiff corporation was organized by seven persons employed by the defendant and Lewisohn for the purpose, apparently with a capital stock of \$1,000, divided into forty shares of \$25 each, which were issued to the incorporators but were in fact paid for by the defendant and Lewisohn. On July 9, 1895, the incorporators met, chose themselves directors, and increased the authorized capital stock from \$1,000 to \$3,750,000, composed of one hun-

dred and fifty thousand shares of \$25 each. At a meeting of the directors held on July 11, 1895, pursuant to instructions from the defendant, five directors resigned, and the defendant and Lewisohn, together with three members of the Dominion Syndicate, were appointed in their places. Thereupon the defendant and Lewisohn took their seats on the board. The other three new directors were not present. After these changes in the directorate, the directors present at the meeting were the defendant, Lewisohn, one Evarts, "the attorney employed by said defendant and said Leonard Lewisohn to attend to the incorporation of the plaintiff corporation and to carry out their said plan and conspiracy," and one Buffam, a person "selected" ³¹⁸ and "employed" by the defendant and Lewisohn "to act as director and assist them in carrying out said plan and conspiracy." Thereupon the defendant through said Evarts presented to the board an offer to sell to the plaintiff corporation the property of the Baltimore company for one hundred thousand shares in its capital stock, and Lewisohn offered to sell to the plaintiff corporation the real estate here in question for thirty thousand shares in its capital stock. These offers were accepted and the stock was in fact subsequently issued in accordance therewith. Of the thirty thousand shares issued for the real estate here in question the defendant received sixteen thousand four hundred and ten, and Lewisohn thirteen thousand five hundred and ninety. Of the one hundred thousand shares issued for the property of the Baltimore company, eighty thousand were issued to the syndicate, and the other twenty thousand were issued to the defendant and Lewisohn for their expenses and services. Of this twenty thousand the defendant received ten thousand nine hundred and forty, and Lewisohn nine thousand and sixty. It is alleged that at this time the fair market value of the shares in the capital stock of the plaintiff corporation was par, and "continued for a long time thereafter to be of such or greater value."

The bill goes on to allege that no disclosure was made of the profit made by the issue of the thirty thousand shares for the real estate here in question to the persons who subscribed for the twenty thousand shares issued for working capital, or to the members of the syndicate to which the eighty thousand shares were issued (except to the defendant and Lewisohn, members thereof). It is alleged, also, that from July 11, 1895, to July 4, 1902, the plaintiff corporation was in effect in con-

trol of the defendant and Lewisohn. Thereafter investigations were begun which resulted in the filing of this bill on October 7, 1902. It is alleged further that Lewisohn died on March 5, 1902, and at the time of his death was a resident and citizen of the city of New York; that the executors of his will are also residents and citizens of the city of New York; that no executors or legal representatives have been appointed or are within this commonwealth; that there is no property within the commonwealth belonging to said estate; and that it is impossible to get service within ³¹⁹ this commonwealth on the executors of the will of Lewisohn. It is also alleged that the real estate here in question, at the time of the sale to the plaintiff, was "of substantially no value, to wit, of a value not exceeding five thousand (5,000) dollars, and . . . [was] . . . known by said Lewisohn and by the defendant when" they acquired the same and when they offered to sell the same to the plaintiff, "to be of substantially no value"; and that said "property has since said conveyance remained undeveloped and is now in substantially the same condition that it was in at the time of the conveyance" to the plaintiff.

The plaintiff alleges that it "desires to rescind the sale" of said real estate, "and has offered to convey" it "to the defendant, or to such person as he may request, upon receiving from said defendant" said thirty thousand shares, "or if and in so far as said shares have been disposed of, upon said defendant's duly accounting therefor; but said defendant refused to make any such restitution or accounting." After alleging a continued readiness to convey, the bill concludes with a prayer that the court will declare the sale of the mining claims and of the millsite rescinded, and will direct the defendant to return the thirty thousand shares, or, if and in so far as said shares are no longer in his control, to account to the plaintiff therefor, or, in the alternative, in case it is held that the sale is not rescinded and that the plaintiff is not entitled to rescind that sale, for damages. There is also a prayer for general relief.

It was stated at the bar that another bill had been brought for relief in respect of the issue of the one hundred thousand shares, and that the only relief here sought was in respect of the thirty thousand shares issued in payment for the real estate here in question.

The result of these transactions was that for the property for which the defendant and Lewisohn had paid not more

than \$788,319.50, the plaintiff corporation issued one hundred and thirty thousand shares of its capital stock having a market value of at least \$3,250,000, a profit of at least \$2,460,000. Of these one hundred and thirty thousand shares, eighty thousand (which were worth at least \$2,000,000) went to the syndicate; twenty thousand (worth at least \$500,000) went to the defendant and Lewisohn for services and expenses; and thirty thousand (worth ^{\$20} at least \$750,000) went to the defendant and Lewisohn for the real estate here in question; and the balance, twenty thousand, to the public (apparently with the exception of the original forty shares issued to the incorporators and paid for by the defendant and Lewisohn).

The only question now before us is whether the plaintiff is entitled to any relief on these facts. If it is, it is not necessary to determine what that relief is. An attempt has been made to force a decision on the nature of the relief at this time by demurring "to so much of said bill as seeks to have the sale of certain parcels of real estate conveyed to the plaintiff by Leonard Lewisohn rescinded, and to have the defendant ordered to return to the plaintiff the consideration paid by the plaintiff for said conveyance." But there is no part of the bill which seeks rescission. This demurrer is not a demurrer to a part of the bill; it is to the whole bill so far as it seeks rescission. This so-called demurrer to a part is in fact an assignment of causes of demurrer to the whole bill, and will be so treated.

The defendant has contended that on the facts stated in the bill no case is made out for relief in respect of thirty thousand shares issued for the four mining claims and the millsite.

It will be useful to get a clear conception of what is and what is not alleged in the bill, and of the rights of the parties in such a transaction as that here set forth.

It was settled by the recent case of *Hayward v. Leeson*, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725, that a promoter of a corporation stands in a fiduciary relation to the corporation of which he is a promoter. It is clear that on the facts stated the defendant was a promoter of the plaintiff corporation.

It is not alleged here that the defendant made any misrepresentation as to the price paid by himself and Lewisohn for the property resold to the plaintiff at an advance, as was the case in *Gluckstein v. Barnes*, [1900] App. Cas. 240; *S. C. below*, sub nomine *In re Olympia*, [1898] 2 Ch. 153; *Hichens v. Congreve*, 4 Sim. 420. Where one standing in a fiduciary

relation makes such a misrepresentation it may well be that the purchaser can keep ³²¹ the property and force the vendor to make good the representation by paying to him, the purchaser, the difference between what was in fact paid by the vendor and what he represented that he paid for it.

Further, the defendant is not liable here on the ground that the plaintiff corporation is entitled to the benefit of the original purchase of the real estate here in question, as a beneficiary is entitled where a person standing to him in a fiduciary capacity buys for himself and resells to him, the beneficiary, at a profit when he ought originally to have bought for the beneficiary. In such a case the purchaser can keep the property and charge the defendant with the difference in price: *Parker v. Nickerson*, 137 Mass. 487, 497.

When the defendant and Lewisohn bought this real estate they were under no obligation to make the purchase of it for the plaintiff corporation, which was not then in existence. Having bought the property at that time and paid for it with what as between them and the plaintiff corporation was their own money, they could have kept it or resold it to the plaintiff corporation or to anybody else, as they saw fit. The fact that the property was bought with a view to reselling it to a corporation to be organized for the purpose, and that that purpose was ultimately carried into effect, does not give to the corporation subsequently organized in execution of the original purpose a right to the benefit of the purchase. That was considered in *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. D. 73, 118, 119; and at still greater length in that case on appeal, *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218, by Lord Hatherley, at page 1242, Lord O'Hagan, at page 1255, and Lord Blackburn, at pages 1267 and 1268. It is enough to say that we agree with what is there said. For a case where no relief was given because it was not made out that the company was entitled to the benefit of the original purchase, see *Ladywell Min. Co. v. Brookes*, 35 Ch. D. 400.

The situation then was this: The defendant and Lewisohn were, so far as this case goes, the absolute owners of the four mining claims and the millsite. We say the absolute owners so far as this case is concerned, because the rights of the Dominion Syndicate in this real estate, if any, are not here in question, and ³²² therefore, so far as this case is concerned, their rights, if any, may be disregarded. Being the absolute

owners of it, the defendant and Lewisohn could do with that property as they pleased—let it lie idle, work it, or sell it, as they thought best, and if they determined to sell it they could sell it to anyone they might choose. If they chose to sell it to a stranger they could make the sale at arm's length, they could ask any price they pleased, and were under no legal obligation to state what it had cost them. On the other hand, if they elected to make a sale of it to one standing to them in a fiduciary relation, they were under an obligation to make a full disclosure to the beneficiary of all the facts known to them material to the property and the purchase, or see to it that the fiduciary had adequate independent advice. That is an obligation resting upon every fiduciary who makes a sale of his own property to his beneficiary, no matter whether it is a case of trustee and cestui que trust, guardian and ward, solicitor and client, or promoter of a corporation and the corporation itself.

There is no pretense that in the transaction in question the plaintiff corporation was represented by an independent board.

The defendant has sought in the first place to distinguish the case at bar from *Hayward v. Leeson*, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725, on the ground that in the prospectus in that case there was the false statement that the capital stock represented actual value, without inflation, while a substantial part of it had been issued to the defendants and their associates for nominal services. But that fact was not spoken of in the opinion as the ground of the decision. The opinion went on the broad ground mentioned above. This false representation was spoken of in connection with a contention on the part of those defendants that they were not liable because of a finding made by the superior court that the defendants did not conceal the transaction from the knowledge of future stockholders. The case of *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. D. 73, S. C. on appeal, *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218, is on all-fours with the case at bar in this respect. In that case there was no misrepresentation.

In the second place, the defendant contends that the corporation cannot complain because the facts were known to the four directors who took part in the purchase and to the holders of all ³²³ shares of capital stock of the corporation outstanding when the contract of purchase here in question

was made, and because the purchase was acquiesced in by them. Their contention is that this result follows because one buying shares from a shareholder who acquiesces is bound by the acquiescence of his vendor. The four directors present at the directors' meeting when the real estate in question was sold by the defendant and Lewisohn to the plaintiff corporation for thirty thousand shares were the defendant and Lewisohn, their attorney, and one Buffam, "a person selected by them and employed by them to act as director and assist them in carrying out said plan and conspiracy." On the allegations of the bill the defendant and Lewisohn are to be treated as the owners of all the shares then outstanding, and therefore the transaction is to be taken to have been known to and acquiesced in by all the then stockholders.

It is proper to pause here and see just what this contention means. When this contract was made on July 11, 1895, the authorized capital stock had just been increased from forty shares to one hundred and fifty thousand shares of \$25 each—that is to say, from \$1,000 to \$3,750,000. Of the authorized capital stock, only forty shares, or \$1,000 had then been issued. As we have said, these forty shares are to be treated on the allegations of the bill as the property of the defendant and Lewisohn. The scheme of the defendant and Lewisohn as to this capital stock of \$3,750,000, divided into one hundred and fifty thousand shares, was to issue eighty thousand shares (or \$2,000,000) to the syndicate, or sell them to the public for cash to provide \$2,000,000 to be paid to the syndicate; twenty thousand shares (or \$500,000) to themselves for their services and expenses as promoters; twenty thousand shares (or \$500,000) to the public for cash for working capital; and the balance, thirty thousand shares (or \$750,000), to themselves for the real estate here in question. And this scheme was carried out. In carrying it out no disclosure was made to the persons who took the syndicate's eighty thousand shares (except those of the eighty thousand issued to the defendant and Lewisohn as members of the syndicate), nor to those who took the twenty thousand shares sold to the public for cash for working capital. Of the eighty thousand issued to or for the syndicate it is alleged that ³²⁴ the defendant received four thousand. It is not alleged that any of this eighty thousand were issued to Lewisohn. The contention is that inasmuch as the defendant and Lewisohn owned all the forty shares of the corporation, amounting to \$1,000, outstanding

when the sale here in question was made by them to the corporation, the corporation is barred from complaining that a full disclosure of the material facts was not made by them to it.

Since the argument was made in the case now before us it has been decided by the circuit court of the United States for the second circuit in *Old Dominion Copper Min. Co. v. Lewisohn*, 136 Fed. 915, that this contention is correct. In that case a demurrer was sustained to a bill against the executors of Lewisohn, which is the counterpart of the bill now before us, on the ground that the point was concluded by two earlier cases, one in that court (*Foster v. Seymour*, 23 Fed. 65), and the other in the court of appeals in that circuit (*McCracken v. Robison*, 57 Fed. 375, 6 C. C. A. 400).

Foster v. Seymour, 23 Fed. 65, was a case where the owners of a mine conveyed it to a corporation organized by themselves in payment for all its capital stock, to the par value of \$10,000,000. The owners of the mine were the trustees of the corporation when the exchange was made. Afterward this stock was sold on the market. The thing complained of in *Foster v. Seymour*, 23 Fed. 65, was that the mine was in fact worth only \$100,000. A stockholders' bill was brought in behalf of the corporation to make the trustees "account to the corporation for a fraudulent disposition of its capital stock." The statute under which the corporation was organized provided that stock could be paid for in property. It is to be observed of this case that the bill did not seek to set aside the purchase for a failure to disclose a material fact in selling the property of the company. The thing complained of was not that the property had been bought for \$100,000 and sold for \$10,000,000. It was that the mine in payment for which the whole capital stock of the corporation was issued was in fact worth only \$100,000.

The other case on the authority of which *Old Dominion Copper Min. Co. v. Lewisohn*, 136 Fed. 915, was decided (*McCracken v. Robison*, 57 Fed. 375, 6 C. C. A. 400) is a case where four men, including the defendant in error, Robison, by the expenditure of their own ³²⁵ moneys organized a corporation to build a specified railroad, subscribing for the proportion of stock required as a preliminary by the laws of Michigan, procured the right of way and local aid in the form of donations of land and money to the enterprise, and with such assistance and with their own moneys undertook to

furnish the roadbed and cross-ties for the whole road ready for laying the track and completing the superstructure. They then caused the corporation to agree with the plaintiffs in error in consideration of their (the plaintiffs in error) agreeing to complete the road, to issue to them (the plaintiffs in error) all the capital stock and bonds of the corporation, the plaintiffs in error agreeing to pay the defendant in error individually one-half the profit, afterward commuted by agreement to \$150,000. For this \$150,000 this action was brought, and the plaintiffs in error set up in defense that the contract sued on was an illegal contract on which no action could be maintained in a court of law. Here the capital stock and bonds were issued to the plaintiffs in error for laying the track and completing the superstructure of a road of which the right of way, the roadbed, grading and cross-ties had been paid for by the defendants in error and by the donations and not by the corporation or the plaintiffs in error. So long as the corporation did not complain of the transaction, there would seem to be no reason why an agreement by which the incorporators were to be reimbursed for money expended by them in building the road was not valid.

In both *Foster v. Seymour*, 23 Fed. 65, and *McCracken v. Robison*, 57 Fed. 375, 6 C. C. A. 400 (in addition to what has been pointed out above) all the capital stock was issued to the directors and promoters who made the sale to the corporation complained of in payment for the property so sold. In such a case the transaction complained of is acquiesced in not only by all those interested, but by all who it is contemplated shall be interested in the corporation except as third persons should acquire the interest of some one or more of those persons. Such third persons are bound by the acquiescence of their vendors, and such a corporation is bound by the acquiescence of all its stockholders: See *In re Ambrose Lake Tin etc. Min. Co.*, 14 Ch. D. 390. See, also, *In re Postage Stamp Automatic Delivery Co.*, [1892] 3 Ch. 566.

It is hardly necessary to point out the difference between such a case, where the scheme of the corporate organization does not contemplate there being any stockholders other than those who buy the stock issued in the transaction complained of, and a case like that now before us, where ninety-six thousand out of one hundred and fifty thousand shares are to be issued to persons to whom no disclosure was made.

Again, the case stated in the bill now before us does not come within the decision in *Re British Seamless Paper Box Co.*, 17 Ch. D. 467, where all persons acquiesced who were to have an interest so far as the scheme went which the parties then had, and where there was a subsequent change made in the scheme in good faith by which other persons were brought in.

The case submitted to us for decision here by the defendant's demurrer to this bill is a case where (disregarding the forty shares subscribed for to organize the corporation) the whole capital stock was one hundred and fifty thousand shares, of which fifty-four thousand shares were to be issued to the promoters for services and for the sale of the land here in question, and the remaining ninety-six thousand were to be issued to persons to whom the facts of this sale were not disclosed.

The question arises whether in such a case the rule enforced in *Hayward v. Leeson*, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725, applies.

In *Hayward v. Leeson*, it was held by this court that a corporation was not barred in the recovery of secret profits made by promoters by the fact that the promoters owned all the stock of the corporation when the agreement was made to pay them the profits recovered in that case. The secret profits agreed upon, paid and recovered in that case were paid-up shares of capital stock of the par value of \$700,000 for services as promoters out of a capital of \$3,000,000, the rest of which was subscribed to and paid for by the public in cash. To the cases cited in *Hayward v. Leeson* on this point, 176 Mass. 320, 57 N. E. 660, 49 L. R. A. 725, should be added *Gluckstein v. Barnes*, [1900] App. Cas. 240, the decision of the house of lords on appeal from *In re Olympia*, [1898] 2 Ch. 153, made after the opinion in *Hayward v. Leeson* was written.

The question which we have to decide here is whether the difference in the way in which this transaction was carried through leads to the opposite result. If in the case at bar the ninety-six thousand shares not issued to the promoters had been ³²⁷ offered to the public for cash to be used in buying the property of the old Baltimore company and for working capital, and had been taken by them, the case at bar would have come directly within the decision in *Hayward v. Leeson*.

We see no reason why the rule enforced in *Hayward v. Leeson* does not apply to the case stated in the bill now before us.

The defendant has insisted that the corporation is barred in this case because if it (the corporation) is allowed to recover in such a suit the purchasers of the fifty-four thousand shares issued to the defendant and Lewisohn would get their share of the sum recovered, and to that extent the purchasers of these shares would not be bound by the acquiescence of their vendors. That is true. That was true in *Hayward v. Leeson*. In that case the purchasers of the seven hundred and fifty thousand shares would have got their share of the sums recovered by the receiver in behalf of the corporation if there was any part of those sums left after the debts were paid. The argument is an old one, and was disposed of by Lord Justice James in *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. D. 73, 118, 119. A corporation is not precluded from recovering for a fraud on it (the corporation) because the party committing the fraud is a stockholder.

Again, the corporation is not barred because when the agreement was made it acquiesced in the trade and it was then, from a legal point of view, fully born. That was equally true in *Hayward v. Leeson* and the cases cited in that case. The answer to that suggestion is that from a business point of view the agreement was not made to bind the corporation with a capital of \$1,000 which was the corporation then in fact in existence, but to bind the corporation with a capital of \$3,750,000. It was to that corporation with a capital of \$3,750,000 that a full disclosure ought to have been made, and to that corporation no disclosure ever was made.

On the case stated in this bill the defendant was a promoter of the plaintiff corporation; being a promoter he stood in a fiduciary relation to it; on selling to the plaintiff the real estate here in question he was bound to disclose all facts known to him material in the sale since it was not independently represented; the price at which the property recently had been bought with a view to reselling it to the plaintiff corporation was at any rate a ³²⁸ material fact which he was bound to disclose; the knowledge of the defendant and Lewisohn was not equivalent to a disclosure to the plaintiff corporation, although they owned all the stock

of the plaintiff corporation outstanding at the time the sale was made, and although fifty-six thousand out of one hundred and fifty thousand shares of the capital stock ultimately issued were issued to them; the defendant violated the duty which he owed the plaintiff in not disclosing that fact, and for this reason the contract here in question was not binding on the plaintiff.

On the facts stated the property sold having remained unchanged, the contract came to an end on the plaintiff's electing to rescind and tendering a reconveyance of it back to the defendant.

The only question of importance left is whether this bill can be maintained in the absence of the executors of the will of Lewisohn, who has since died.

The fact that the legal title to the real estate here in question stood in Lewisohn's name is not fatal to the plaintiff's maintaining this bill. Had the defendant been the sole owner, the fact that the title stood in the name of a man of straw and the contract had been made with the man of straw would not have made any difference in the result that the contract was ended. The fact that Lewisohn, also a promoter, had about a half interest in the contract does not affect the result unless his death and the fact that his executors reside in New York and that no legal representatives of his estate have been appointed or can be appointed in Massachusetts make a difference.

We are of opinion that these facts do not make a difference in the right of the plaintiff to maintain this bill.

On the contract thus coming to an end by the offer to restore the property which had remained unchanged, the defendant and Lewisohn were bound as matter of contract to return the consideration received by them under this contract. But in our opinion that is not the only remedy open to the plaintiff. The thirty thousand shares were obtained from the plaintiff by the defendant and Lewisohn in violation of the duty owed to it by them by reason of the fiduciary relation in which they stood to the plaintiff. The fact that on the rescission of the contract the plaintiff corporation could have sued to recover back from the ³²⁹ parties to the contract the consideration received by them under it does not preclude the plaintiff from charging the defendant directly with the violation of this fiduciary duty and compelling him to make restitution of what was so acquired by

them. The plaintiff can waive its remedy founded on the implied contract to return the consideration on the contract's being rescinded, and sue for the tortious violation of the duty owed by them to it because they stood to it in a fiduciary relation. In a suit founded on such an equitable tort, Lewisohn's executors are not necessary parties. Such a bill may be brought against either.

Although the allegation made in the bill as to the real estate here in question remaining undeveloped and unchanged makes a decision on the point unnecessary, it is proper to point out that it has been laid down in this commonwealth that in some cases a party to a contract who has a right to rescind is entitled to some remedy where the article sold has been consumed or altered before he has become aware of the facts which give him that right: *Parker v. Nickerson*, 137 Mass. 487. As to what the law is in England on this point, see *Ladywell Min. Co. v. Brookes*, 35 Ch. D. 400; *In re Cape Breton Co.*, 29 Ch. D. 795; S. C. on appeal, sub nomine *Bentinck v. Fenn*, 12 App. Cas. 652. See, also, *In re Ambrose Lake Tin etc. Min. Co.*, 14 Ch. D. 390, 394.

It is hard to see why the defendant is not liable in solido for the whole thirty thousand shares, including those received by Lewisohn: See *Hayward v. Leeson*, 176 Mass. 310, 324, 57 N. E. 656, 49 L. R. A. 725, and cases there cited, to which should be added *Gluckstein v. Barnes*, [1900] App. Cas. 240; *Trull v. Trull*, 13 Allen, 407. But it is not necessary to express a final opinion on this point.

If the defendant does in fact restore the whole consideration, he will be subrogated to the real estate here in question, on the same principle on which a trustee making restitution of money improperly invested is subrogated to the improper investment.

A few technical objections remain to be disposed of, namely:

1. That the plaintiff has a complete and adequate remedy at law. There is a remedy in equity to compel restitution of money taken in violation of the duty owed by a fiduciary. *Hayward v. Leeson*, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725, is an example. See, also, *Warren v. Para Rubber Shoe Co.*, 166 Mass. 97, 104, 44 N. E. 112. This court now has

full equity jurisdiction: *Niles v. Graham*, 181 Mass. 41, 62 N. E. 986.

2. The defendant contends that the allegations as to the purchase of the property of the Baltimore company either are surplusage and are to be disregarded, or they make the bill multifarious. As no relief in respect to those allegations is sought here, the bill is not made multifarious by them. So far as necessary to tell the story of the sale here complained of, it was proper to describe the sale of the Baltimore company's property, and those allegations, to that extent, are not surplusage.

3. We see nothing inconsistent in the prayer for a rescission of the contract and in the prayer for damages by which (although inaptly put) we suppose the plaintiff intended what we have held it is entitled to.

The entry must be, that the so-called demurrer as to part of the bill shall stand as an assignment of a cause of a demurrer; demurrer overruled.

The Promoter of a Corporation occupies a fiduciary relation toward it; and while he may lawfully deal with his company, the transaction must be open and fair in all its parts: *Yale etc. Stove Co. v. Wilcox*, 64 Conn. 101, 42 Am. St. Rep. 159; *Bosher v. Richmond etc. Land Co.*, 89 Va. 455, 37 Am. St. Rep. 879. See, also, *Pietsch v. Milbrath*, 123 Wis. 647, 107 Am. St. Rep. 1017. He cannot take any advantage over the members of the corporation, and he is accountable to it for any profits realized from a violation of his duty in this respect: *Fountain Spring Park Co. v. Roberts*, 92 Wis. 345, 53 Am. St. Rep. 917. See, also, the note to *Pittsburg Min. Co. v. Spooner*, 17 Am. St. Rep. 161-168; *Scott v. Farmers' etc. Bank*, 97 Tex. 31, 104 Am. St. Rep. 835.

COMMONWEALTH v. BOSTON ADVERTISING CO.

[188 Mass. 348, 74 N. E. 601.]

CONSTITUTIONAL LAW—Business Signs, Prohibiting Maintenance of, When a Taking of Property.—A rule of park commissioners forbidding the maintenance of business signs so near the parkway as to be plainly visible to the naked eye of persons therein amounts to a taking of property, and cannot be held valid unless compensation is provided. (p. 498.)

Prosecution in the police court of Chelsea against the defendant corporation for violation of a rule of the Metropolitan Park Commission. The defendant requested the trial court to rule, first, that the regulation of the park commis-

sion was not authorized by the provisions of the Statutes of 1903, chapter 158, and was therefore void; second, that such regulation was unreasonable and without effect; third, that the regulation was unconstitutional and void; fourth, that the sign in question could not, as a matter of law, be said to be near to the parkway; and fifth, that on all the agreed facts the defendant must be found not guilty. The judge refused all the requests of the defendant, a verdict of guilty was taken, and the case, at the request both of the prosecution and the defendant, reported for the determination of the supreme court.

M. J. Sughrue, first assistant district attorney, for the commonwealth.

J. H. Soliday, for the defendant.

³⁴⁹ BARKER, J. The complaint upon which the defendant was found guilty was for a violation of the rules and regulations made by the metropolitan park commission under Statutes of 1903, chapter 158. The act charged was maintaining a business sign on land near enough to the Revere Beach parkway to render the words of the sign plainly visible to the naked eye of persons in the parkway.

It appears that the sign was an advertisement of a household ³⁵⁰ utensil. The sign board was forty feet in width and seven and one-half feet high, with black letters on an orange ground. The capital letters were three feet three and one-half inches high and two feet ten inches wide. It is not contended that the sign was indecent or immoral, or of a nature to frighten man or beast, or in any way to cause bodily injury by falling or being blown against persons or vehicles using the way.

The defendant is in the advertising business. It had purchased from the owner of the land the right to maintain the sign until October 1, 1905, and had been paid to keep up the advertisement until December 30, 1904. Its contract with the owner of the land began on October 29, 1903, and its contract to maintain the sign was made in September, 1903.

The parkway was established in 1899. The rule or regulation charged to have been broken by maintaining the sign was established on August 20, 1903. The same sign had been in the same location before the establishment of the parkway, and ever since. The rule or regulation forbids

the erection, maintaining or display upon any land, or the outside of any building, of any commercial or business sign, poster or advertisement, within such distance of any public park or parkway in care of the commission as shall render the words, figures or devices of the sign, poster or advertisement plainly visible to the naked eye within the park or parkway, without the written permission of the commission; save that the rule is not to be construed to prevent the owner or occupant of land, building or tenement from displaying or maintaining thereon one sign or advertisement for business or commercial purposes, in size not larger than fifteen inches by twenty feet, and relating exclusively to the property on which it may be placed, or to the business thereon conducted, or to the person conducting the same.

The statute provides that the commission, and also the officers having charge of public parks and parkways, "may make such reasonable rules and regulations respecting the display of signs, posters or advertisements in or near to, and visible from, public parks and parkways intrusted to their care, as they may deem necessary for preserving the objects for which such parks and parkways are established and maintained": Stats. 1903, c. 158, sec. 1.

³⁵¹ The counsel for the prosecution asserts that public parks and parkways are created and maintained to contribute to the health and pleasure of the community. It has been said that they "are established for the use and enjoyment of the people while seeking pleasure and recreation, as well as at other times." No doubt the principal and controlling object for which public parks and parkways are established is that of pleasure. They are distinctively and chiefly pleasure grounds. So far as they incidentally serve to promote health by affording the means of being in the open air and the sunlight, or of taking healthful exercise, the presence or absence of signs upon neighboring lands is immaterial.

We think, therefore, that the well-being of the ordinary person who uses a public park or parkway never can be so far affected by the visibility of signs, posters or advertisements placed on other ground as to injure his health. No doubt their presence there may hide from him fine views, or may turn into a disagreeable ensemble what otherwise would be a pleasing outlook, or the sign or poster or adver-

tisement may be itself ugly, or, if not so, may be displeasing because of incongruity. At most, the presence of signs, posters and advertisements upon lands or buildings near a public park or parkway is an offense against good taste, and in that way alone detracts from the pleasure only of the frequenters of such places.

We agree that the promotion of the pleasure of the people is a public purpose for which public money may be used and taxes laid, even if the pleasure is secured merely by delighting one of the senses: *Higginson v. Nahant*, 11 Allen, 530; *Hubbard v. Taunton*, 140 Mass. 467, 5 N. E. 157; *Attorney General v. Williams*, 174 Mass. 476, 479, 480, 55 N. E. 77. The question here is not of the power of the state to expend money or to pay taxes to promote esthetic ends, or to regulate the use of property with a view to promote such ends. It is of the right of the state by such regulations to deprive the owner of property of a natural use of that property without giving compensation for the resulting loss to the owner.

Probably no one would care at present to deny that without compensation "the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the ³⁵² governing authority of the country essential to the safety, health, peace, good order, and morals of the community": *Field, J., in Crowley v. Christensen*, 137 U. S. 86, 89, 11 Sup. Ct. Rep. 13, 34 L. ed. 620. Beyond the purposes named there are many others of a public nature the promotion of which may involve the taking or damaging of the property of individuals, and as to which there well may be differences of opinion as to whether the state must afford compensation if such loss or damage is inflicted.

One of them is the education of youth. Probably all will agree that judged by any fair standard the promotion of education stands upon a higher plane than the promotion of esthetic culture or enjoyment, and would the better justify the imposition of a burden without compensation. But no one would contend that the state could authorize the taking of land for a schoolhouse without providing compensation for the owner. In a very recent case this court, in dealing with a statute requiring street railway companies to transport school children at reduced rates of fare, has held that if it appeared that the enforcement of the act would cause expense which the carrier must bear or put upon other pa-

trons, we should be obliged to hold that there was a taking of property without due process of law: *Commonwealth v. Interstate Consolidated St. Ry.*, 187 Mass. 436, 73 N. E. 530. If the police power technically so called will not justify a taking of property without compensation to promote the education of youth, it cannot justify such a taking for the promotion of merely esthetic purposes.

Therefore, if the rules of the commission amount to a taking of property, as no compensation is provided they cannot be held valid. The plain and intended purpose of the rule is to prohibit the use of land near public parks and parkways for advertising. This has come to be an ordinary and remunerative use of lands near largely traveled streets, parkways, public parks, railroads and other places frequented in numbers by the public. It is as natural a use of such lands as is the use of store fronts and show windows for the display of goods kept for sale, or for other modes of advertising. It resembles the placing of advertising pages on each side of the literary portion of a periodical or the placing in street cars or railway stations of advertisements disconnected with the business of transportation. All these at ³⁵³ present are usual, common and profitable uses of property, of which everyone sees daily numerous instances.

In the opinion of a majority of the court the rules or regulations established by the commission so interfere with the use of property as to amount to a taking of property for public use, and, as no compensation is provided for, the rules are void, because obnoxious to the provisions of our constitution: Declaration of Rights, art. 10. They are not reasonable within the meaning of Statutes of 1903, chapter 158, section 1.

We do not hold that no valid rules as to signs, posters or advertisements on land near to public parks or parkways can be made under Statutes of 1903, chapter 158.

Rules intended to prohibit advertisements of indecent or immoral tendencies, or signs dangerous to the physical safety of the public, no doubt would be reasonable within the meaning of the statute and valid.

We think the case of *Rochester v. West*, 164 N. Y. 510, 58 N. E. 673, was decided and can rest only on this ground: See *Gunning System v. Buffalo*, 75 App. Div. 31, 77 N. Y.

Supp. 987; *People v. Green*, 85 App. Div. 400, 83 N. Y. Supp. 460.

Verdict set aside; judgment to be entered for the defendant.

Municipal Corporations may adopt regulations concerning the putting up of sign boards, but such regulations, in order to be valid must be reasonable: *Crawford v. Topeka*, 51 Kan. 756, 37 Am. St. Rep. 323; *Rochester v. West*, 164 N. Y. 510, 79 Am. St. Rep. 659.

BERRY v. DONOVAN.

[188 Mass. 353, 74 N. E. 603.]

CONSTITUTIONAL LAW—Right to Labor and to Contract for Employment.—The right to dispose of one's labor and to have the benefit of one's labor contract is incident to the freedom of the individual. Such a right can lawfully be interfered with only by one who is acting in the exercise of some equal or superior right. (p. 501.)

LABOR, Interference with Right of.—An intentional interference with one's right to labor and to contract for his labor, without lawful justification, is malicious in law, even if it is through good motives and without express malice. (p. 502.)

CONTRACT Interfering with Right to Labor, When does not Justify Action Under It.—A contract between an employer and a union of employes that he will not retain any person in his employment after receiving notice from such union that such person is objectionable to it from any cause does not justify the interference of an agent and member of such union to bring about the discharge of an employe solely because he does not belong to the union. (pp. 502, 508.)

LABOR, Interference with Which is Against Public Policy.—An attempt to force all employes to combine in unions is against the policy of the law, because it amounts to a monopoly. (p. 505.)

CONTRACT for Employment Terminable at Employer's Will, Unlawful Interference with.—The fact that a contract of employment is terminable at the will of the employer does not affect the employe's right to recover for an unlawful interference with it by a third person, but only affects the amount of damages. (p. 505.)

H. F. Hurlburt and J. J. Ryan, for the defendant.

J. J. Winn, for the plaintiff.

³⁵⁴ **KNOWLTON, C. J.** This is an action of tort brought to recover damages sustained by reason of the defendant's malicious interference with the plaintiff's contract of employment. The plaintiff was a shoemaker, employed by the

firm of Hazen B. Goodrich and Company, at Haverhill, Massachusetts, under a contract terminable at will. At the time of the interference complained of he had been so employed nearly four years. The defendant was the representative at Haverhill of a national organization of shoe workers, called the Boot and Shoe Workers' Union, of which he was also a member. The evidence showed that he induced Goodrich and Company to discharge the plaintiff, greatly to his damage. A few days before the plaintiff's discharge, a contract was entered into between the Boot and Shoe Workers' Union and the firm of Goodrich and Company, which was signed by the defendant for the union, the second clause of which was as follows: "In consideration of the foregoing valuable privileges, the employer agrees to hire as shoe workers only members of the Boot and Shoe Workers' Union, in good standing, and further agrees not to retain any shoe worker in his employment after receiving notice from the union that such shoe worker is objectionable to the union, either on account of being in arrears for dues, or disobedience of union rules or laws, or from any other cause." The contract contained various other provisions in regard to the employment of members of the union by the firm, and the rights of the firm and of the union in reference to the services of these employés, and the use of the union's stamp upon goods to be manufactured.

The plaintiff was not a member of this union. Soon after the execution of this contract, the defendant demanded of Goodrich and Company that the plaintiff be discharged, and the evidence tended to show that the sole ground for the demand was that the plaintiff was not a member of the union, and that he persistently declined to join it, after repeated suggestions that he should do so.

³⁵⁵ At the close of the evidence the defendant asked for the following instructions which the judge declined to give:

"1. Upon all the evidence in the case, the plaintiff is not entitled to recover.

"2. Upon all the evidence in the case, the defendant was acting as the legal representative of the Boot and Shoe Workers' Union, and not in his personal capacity, and therefore the plaintiff cannot recover.

"3. The contract between the Boot and Shoe Workers' Union and Hazen B. Goodrich and Company was a valid contract, and the defendant, as the legal representative of

the Boot and Shoe Workers' Union, had a right to call the attention of Hazen B. Goodrich and Company, or any member of the firm, to the fact that they were violating the terms of the contract in keeping the plaintiff in their employment after the contract was signed, and insisting upon an observance of the terms of the contract, even if the defendant knew that the observance of the terms of the contract would result in the discharge of the plaintiff from their employment.

"4. The contract referred to was a legal contract, and a justification of the acts of the defendant, as shown by the evidence in this case."

"6. The defendant cannot be held responsible in this action, unless it appears that the defendant used threats, or some act of intimidation, or some slanderous statements, or some unlawful coercion to or against the employers of the plaintiff, to thereby cause the plaintiff's discharge; and upon all the evidence in the case there is no such evidence, and the plaintiff cannot recover."

The defendant excepted to the refusal, and to the portions of the charge which were inconsistent with the instructions requested. The jury returned a verdict of fifteen hundred dollars for the plaintiff. These exceptions present the only questions which were argued before us by the defendant.

The primary right of the plaintiff to have the benefit of his contract and to remain undisturbed in the performance of it is universally recognized. The right to dispose of one's labor as he will, and to have the benefit of one's lawful contract, is incident to the freedom of the individual, which lies at the foundation of the government in all countries that maintain the ³⁵⁶ principles of civil liberty. Such a right can lawfully be interfered with only by one who is acting in the exercise of an equal or superior right which comes in conflict with the other. An intentional interference with such a right, without lawful justification, is malicious in law, even if it is from good motives and without express malice: *Walker v. Cronin*, 107 Mass. 555, 562; *Plant v. Woods*, 176 Mass. 492, 498, 79 Am. St. Rep. 330, 57 N. E. 1011, 51 L. R. A. 339; *Allen v. Flood*, [1898] App. Cas. 1, 18; *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598, 613; *Read v. Friendly Society of Operative Stonemasons*, [1902] 2 K. B. 88, 96; *Giblan v. National Amalgamated Laborers' Union*, [1903] 2 K. B. 600, 617.

In the present case the judge submitted to the jury, first, the question whether the defendant interfered with the plaintiff's rights under his contract with Goodrich and Company, and secondly, the question whether, if he did, the interference was without justifiable cause. The jury were instructed that, unless the defendant's interference directly caused the termination of the plaintiff's employment, there could be no recovery. The substance of the defendant's contention was, that if he acted under the contract between the Boot and Shoe Workers' Union and the employer in procuring the plaintiff's discharge, his interference was lawful.

This contention brings us to an examination of the contract. That part which relates to the persons to be employed contains, first, a provision that the employer will hire only members of the union. This has no application to the plaintiff's case, for it is an agreement only for the future, and the plaintiff had been hired a long time before. The next provision is, that the employer will not retain in his employment a worker, after receiving notice that he is objectionable to the union, "either on account of being in arrears for dues or disobedience of union rules or laws, or from any other cause." The first two possible causes for objection could not be applied to persons in the situation of the plaintiff, who were not members of the union or amenable to its laws. As to such persons, the only provision applicable was that the firm would not retain a worker who was objectionable to the union from any cause, however arbitrary the objection or unreasonable the cause might be. This provision purported to authorize the union to interfere and deprive ³⁵⁷ any workman of his employment for no reason whatever, in the arbitrary exercise of its power. . . . Whatever the contracting parties may do if no one but themselves is concerned, it is evident that, as against the workman, a contract of this kind does not of itself justify interference with his employment by a third person who made the contract with his employer: *Curran v. Galen*, 152 N. Y. 33, 57 Am. St. Rep. 496, 46 N. E. 297, 37 L. R. A. 802. No one can legally interfere with the employment of another, unless in the exercise of some right of his own, which the law respects. His will so to interfere for his own gratification is not such a right.

The judge rightly left to the jury the question whether, in view of all the circumstances, the interference was or was not for a justifiable cause. If the plaintiff's habits, or conduct, or character had been such as to render him an unfit associate in the shop for ordinary workmen of good character, that would have been a sufficient reason for interference in behalf of his shopmates. We can conceive of other good reasons. But the evidence tended to show that the only reason for procuring his discharge was his refusal to join the union. The question, therefore, is whether the jury might find that such an interference was unlawful.

The only argument that we have heard in support of interference by labor unions in cases of this kind is that it is justifiable as a kind of competition. It is true that fair competition in business brings persons into rivalry, and often justifies action for one's self, which interferes with proper action of another. Such action, on both sides, is the exercise by competing persons of equal conflicting rights. The principle appealed to would justify a member of the union, who was seeking employment for himself, in making an offer to serve on such terms as would result, and as he knew would result, in the discharge of the plaintiff by his employer, to make a place for the newcomer. Such an offer, for such a purpose, would be unobjectionable. It would be merely the exercise of a personal right, equal in importance to the plaintiff's right. But an interference by a combination of persons, to obtain the discharge of a workman because he refuses to comply with their wishes, for their advantage, in some matter in which he has a right to act independently, is not competition. In such a case the action taken by ³⁵⁸ the combination is not in the regular course of their business as employés, either in the service in which they are engaged or in an effort to obtain employment in other service. The result which they seek to obtain cannot come directly from anything that they do within the regular line of their business as workers competing in the labor market. It can come only from action outside of the province of workingmen, intended directly to injure another, for the purpose of compelling him to submit to their dictation.

It is difficult to see how the object to be gained can come within the field of fair competition. If we consider it in reference to the right of employés to compete with one another, inducing a person to join a union has no tendency to aid

them in such competition. Indeed, the object of organizations of this kind is not to make competition of employes with one another more easy or successful. It is rather, by association, to prevent such competition, to bring all to equality, and to make them act together in a common interest. Plainly then, interference with one working under a contract, with a view to compel him to join a union, cannot be justified as a part of the competition of workmen with one another.

We understand that the attempted justification rests entirely upon another kind of so-called competition, namely, competition between employers and the employed, in the attempt of each class to obtain as large a share as possible of the income from their combined efforts in the industrial field. In a strict sense, this is hardly competition. It is a struggle or contention of interests of different kinds, which are in opposition, so far as the division of profits is concerned. In a broad sense, perhaps the contending forces may be called competitors. At all events, we may assume that, as between themselves, the principle which warrants competition permits also reasonable efforts, of a proper kind, which have a direct tendency to benefit one party in his business at the expense of the other. It is no legal objection to action whose direct effect is helpful to one of the parties in the struggle that it is also directly detrimental to the other. But when action is directed against the other, primarily for the purpose of doing him harm and thus compelling him to yield to the demand of the actor, and this action does not directly affect the ³⁵⁹ property, or business, or status of the actor, the case is different, even if the actor expects to derive a remote or indirect benefit from the act.

The gain which a labor union may expect to derive from inducing others to join it is not an improvement to be obtained directly in the conditions under which the men are working, but only added strength for such contests with employers as may arise in the future. An object of this kind is too remote to be considered a benefit in business, such as to justify the infliction of intentional injury upon a third person for the purpose of obtaining it. If such an object were treated as legitimate, and allowed to be pursued to its complete accomplishment, every employé would be forced into membership in a union, and the unions, by a combination of those in different trades and occupations, would have

complete and absolute control of all the industries of the country. Employers would be forced to yield to all their demands, or give up business. The attainment of such an object in the struggle with employers would not be competition, but monopoly. A monopoly, controlling anything which the world must have, is fatal to prosperity and progress. In matters of this kind the law does not tolerate monopolies. The attempt to force all laborers to combine in unions is against the policy of the law, because it aims at monopoly. It therefore does not justify causing the discharge, by his employer, of an individual laborer working under a contract. It is easy to see that, for different reasons, an act which might be done in legitimate competition by one, or two, or three persons, each proceeding independently, might take on an entirely different character, both in its nature and its purpose, if done by hundreds in combination.

We have no desire to put obstacles in the way of employés who are seeking by combination to obtain better conditions for themselves and their families. We have no doubt that laboring men have derived and may hereafter derive advantages from organization. We only say that, under correct rules of law, and with a proper regard for the rights of individuals, labor unions cannot be permitted to drive men out of employment because they choose to work independently. If disagreements between those who furnish the capital and those who perform the labor ³⁶⁰ employed in industrial enterprises are to be settled only by industrial wars, it would give a great advantage to combinations of employés, if they could be permitted, by force, to obtain a monopoly of the labor market. But we are hopeful that this kind of warfare soon will give way to industrial peace, and that rational methods of settling such controversies will be adopted universally.

The fact that the plaintiff's contract was terminable at will, instead of ending at a stated time, does not affect his right to recover. It only affects the amount that he is to receive as damages: *Moran v. Dunphy*, 177 Mass. 485, 487, 83 Am. St. Rep. 289, 59 N. E. 125, 52 L. R. A. 115; *Perkins v. Pendleton*, 90 Me. 166, 176, 60 Am. St. Rep. 252, 38 Atl. 96; *Lucke v. Clothing Cutters' etc. Assembly*, 77 Md. 396, 39 Am. St. Rep. 421, 26 Atl. 505, 19 L. R. A. 408; *London*

Guarantee etc. Co. v. Horn, 101 Ill. App. 355; 206 Ill. 493, 99 Am. St. Rep. 185, 69 N. E. 526.

The conclusion which we have reached is well supported by authority. The principle invoked is precisely the same as that which lies at the foundation of the decision in *Plant v. Woods*, 176 Mass. 492, 79 Am. St. Rep. 330, 57 N. E. 1011, 51 L. R. A. 339. In that case, although the power that lies in combination and the methods often adopted by labor unions in the exercise of it were stated with great clearness and ability, the turning point of the decision is found in this statement on page 502 (176 Mass.): "The necessity that the plaintiffs should join this association is not so great, nor is its relation to the rights of the defendants, as compared with the right of the plaintiffs to be free from molestation, such as to bring the acts of the defendants under the shelter of the principles of trade competition": *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 289. *Walker v. Cronin*, 107 Mass. 555, and the other cases cited in *Plant v. Woods*, 176 Mass. 492, 79 Am. St. Rep. 330, 57 N. E. 1011, 51 L. R. A. 339, as well as the later case of *Martell v. White*, 185 Mass. 255, 102 Am. St. Rep. 341, 69 N. E. 1085, 64 L. R. A. 260, all tend to support us in our decision.

We long have had a statute forbidding the coercion or compulsion by any person of any other "person into a written or verbal agreement not to join or become a member of a labor organization as a condition of his securing employment or continuing in the employment of such person": Rev. Laws, c. 106, sec. 12. The same principle would justify a prohibition of the coercion or compulsion of a person into a written or verbal agreement to join such an organization, as a condition of his securing employment, or continuing in the employment of another person.

³⁶¹ The latest English cases, which explain and modify *Allen v. Flood*, [1898] App. Cas. 1, seem in harmony with our conclusion: *Giblan v. National Amalgamated Laborers' Union*, [1903] 2 K. B. 600; *Quinn v. Leathem*, [1901] App. Cas. 495. In the first of these it was held that a labor union could not use its power to deprive one of employment, in order to compel him to pay a debt in which the union was interested. The case of *Curran v. Galen*, 152 N. Y. 33, 57 Am. St. Rep. 496, 46 N. E. 297, 37 L. R. A. 802, in the decision of which the judges of the court of appeals were unanimous, fully covers the present case. The principle involved

in each of the two cases is the same, and the language of the opinion in that case, in its application to this, is decisive. From the decision of *National Protective Assn. v. Cumming*, 170 N. Y. 315, 88 Am. St. Rep. 648, 63 N. E. 369, 58 L. R. A. 135, three of the seven judges dissented, and the result is to leave the law of New York in some uncertainty. The majority distinguished that case from *Curran v. Galen*, just referred to, and held that their decision was not inconsistent with it. They seem to have treated the arrangement to exclude persons not belonging to the union as entered into for legitimate purposes, having reference to actual or probable conditions in the employment; while the minority treated it as similar to the arrangement that appears in *Curran v. Galen*: See, also, *Jacobs v. Cohen*, 90 N. Y. Supp. 854; *Mills v. United States Printing Co.*, 99 App. Div. 605, 91 N. Y. Supp. 184.

The law of Illinois is in accord with our conclusion. In *London Guarantee etc. Co. v. Horn*, 101 Ill. App. 355, 206 Ill. 493, 99 Am. St. Rep. 185, 69 N. E. 526, it was held that a refusal of a workman to accede to the request of another in a matter affecting the pecuniary interest of the other would not justify the procurement of his discharge from the employment in which he was engaged, under a contract terminable at will: See, also, for kindred doctrines, *Doremus v. Hennessy*, 176 Ill. 608, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797; *Christensen v. People*, 114 Ill. App. 40; *Mathews v. People*, 202 Ill. 389, 95 Am. St. Rep. 241, 67 N. E. 28, 63 L. R. A. 73; *Erdman v. Mitchell*, 207 Pa. St. 79, 99 Am. St. Rep. 783, 56 Atl. 327, 66 L. R. A. 534; *Perkins v. Pendleton*, 90 Me. 166, 60 Am. St. Rep. 252, 38 Atl. 96. Other cases bearing more or less directly upon the general subject are *Lucke v. Clothing Cutters' etc. Assembly*, 77 Md. 396, 39 Am. St. Rep. 420, 26 Atl. 505, 19 L. R. A. 408; *Holder v. Cannon Mfg. Co.*, 135 N. C. 392, 47 S. E. 481, 65 L. R. A. 161; *Chiple v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367, 1 South. 934; *Blumenthal v. Shaw*, 77 Fed. 954, 23 C. C. A. 590; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 53 Atl. 230; *Crump v. Commonwealth*, 84 Va. 927, 10 Am. St. Rep. 839, 4 S. E. 721; *Old Dominion Steamship Co. v. McKenna*, 30 Fed. 48; *Brown v. Jacobs' Pharmacy Co.*, 115 Ga. 429, 90 Am. St. Rep. 126, 41 S. E. 553, 57 L. R. A. 549; *Bailey v. Master Plumbers*, 103 Tenn.

99, 52 S. W. 853, 46 L. R. A. 561; *Delz v. Winfree*, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111. It will be seen that in the different courts there is considerable variety and some conflict of opinion.

We hold that the defendant was not justified by the contract with Goodrich and Company, or by his relations to the plaintiff, in interfering with the plaintiff's employment under his contract. How far the principles which we adopt would apply, under different conceivable forms of contract, to an interference with a workman not engaged, but seeking employment, or to different methods of boycotting, we have no occasion in this case to decide.

The defendant contends that the judge erred in his instruction to the jury, in response to the defendant's special request at the close of the charge. The judge said, in substance, that if the defendant caused the firm to discharge the plaintiff, by giving the members to understand that unless they discharged him, they "would be visited with some punishment, under the contract or otherwise, then that interference would not be justifiable." This instruction, taken literally and alone, would be erroneous. Some grounds of interference would be justifiable while others would not. But considering the instruction in connection with that which immediately preceded it, and with other parts of the charge, it is evident that the judge was directing the attention of the jury to what would constitute an interference, not to what would justify an interference. He had just told them that, if all the defendant did was to call the attention of the firm to the provision of the contract, and the firm then, of their own motion, discharged the plaintiff, the defendant would not be liable. He then pursued the subject with some elaboration, and ended as stated above. Instead of saying, "then that interference would not be justifiable," he evidently meant to say, "then that would be interference which would create a liability, unless it was justifiable." Taking the charge as a whole, we think the jury were not misled by the inaccuracy of this statement.

Exceptions overruled.

The Decision in the Principal Case, in so far as it affirms the liability of members of labor unions and others for interfering with the employment, or occasioning the discharge of another as the result of a combination, not founded in actual malice, but having as its purpose the compelling of him to become a member of the union, or to

do some other act which he has a lawful right to refrain from doing is supported by the weight of authority: *Employing P. C. v. Bloper*, 122 Ga. 509, 106 Am. St. Rep. 137, 50 S. E. 353; *Doremus v. Hennessy*, 176 Ill. 608, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524, 4 L. R. A. 797; *Graham v. St. Charles etc. R. R. Co.*, 47 La. Ann. 214, 49 Am. St. Rep. 366, 16 South. 806, 27 L. R. A. 416; *Lucke v. Clothing Cutters*, 77 Md. 396, 39 Am. St. Rep. 421, 26 Atl. 505, 19 L. R. A. 408; *Martell v. White*, 185 Mass. 255, 102 Am. St. Rep. 341, 69 N. E. 1085, 65 L. R. A. 260; *Beck v. Railway etc. Union*, 118 Mich. 497, 74 Am. St. Rep. 421, 77 N. W. 13, 42 L. R. A. 407; *Mapstrick v. Ramage*, 9 Neb. 390, 31 Am. Rep. 415, 2 N. W. 739; *Olive v. Van Patten*, 7 Tex. Civ. App. 630, 25 S. W. 428; *Delz v. Winfree*, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111; *Boutwell v. Marr*, 71 Vt. 1, 76 Am. St. Rep. 746, 42 Atl. 607, 43 L. R. A. 803; *West Va. T. Co. v. Standard Oil Co.*, 50 W. Va. 611, 88 Am. St. Rep. 895, 40 S. E. 591, 56 L. R. A. 804; *Old Dominion S. S. Co. v. McKenna*, 30 Fed. 48; *Toledo etc. Ry. v. Pennsylvania Co.*, 54 Fed. 730, 19 L. R. A. 387; *Walters v. Green*, [1899] 2 Ch. 696; *Quinn v. Leatham*, [1901] App. Cas. 495; *Giblan v. National A. L. U.*, 72 L. J. K. B. 907, [1903] 2 K. B. 600, 89 L. T. 386. The following, apparently, are not in harmony with the principal case: *Clemitt v. Watson*, 14 Ind. App. 38, 43 N. E. 367; *Beechly v. Mulville*, 102 Iowa, 602, 63 Am. St. Rep. 479, 70 N. W. 107, 71 N. W. 428; *Bohn M. Co. v. Hollis*, 54 Minn. 223, 40 Am. St. Rep. 319, 55 N. W. 1119, 21 L. R. A. 337; *Gray v. Building Trades*, 91 Minn. 171, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 63 L. R. A. 753; *National Protective Assn. v. Cumming*, 170 N. Y. 315, 88 Am. St. Rep. 648, 63 N. E. 369, 58 L. R. A. 135; *Cote v. Murphy*, 159 Pa. St. 420, 39 Am. St. Rep. 686, 28 Atl. 190, 23 L. R. A. 135.

CASES
IN THE
SUPREME COURT
OF
MONTANA.

HICKEY v. PARROT SILVER AND COPPER COMPANY.

[32 Mont. 143, 79 Pac. 698.]

FINAL JUDGMENT, What is.—An order fixing the compensation of a receiver and allowing him counsel fees may be appealed from as a final judgment. (p. 516.)

RECEIVER, Effect of Reversal of Order Appointing—Compensation.—Where a receiver is legally appointed, he is entitled to compensation for services rendered by him, though the order of appointment is subsequently reversed. (p. 516.)

RECEIVER.—The Compensation of a Receiver is Taxable Costs, and while primarily chargeable to, and payable out of, the property or funds in his hands, is, nevertheless, in the absence of exceptional facts, ultimately taxable to the losing party whose wrong occasioned the appointment. (p. 516.)

RECEIVER, Fixing Compensation of.—The court, upon the discharge of a receiver before the conclusion of the action, may fix his compensation and adjudge payment thereof against the party at whose instance he was appointed. (pp. 516, 517.)

RECEIVER, Compensation of, When cannot be Paid Out of Funds in His Hands.—If a receiver obtains possession of money or property under an order which is afterward reversed, and he is required to restore the money to the person entitled thereto, he cannot claim compensation out of the funds in his hands, but must look therefor to the party who procured his appointment. (p. 517.)

RECEIVER.—On the Reversal of an Order Appointing a Receiver, his authority is gone, and it then becomes his duty immediately to render a final report and demand his formal discharge. (p. 517.)

A RECEIVER IS ENTITLED to the Benefit of Counsel, as a matter of right, when the nature of the trust requires it. (p. 517.)

RECEIVER—Compensation of Counsel for.—A receiver cannot make any contract of hiring or agreement for the compensation of his counsel which is binding on the court; for it is the function of the court to determine both the necessity of counsel and the amount of compensation to be allowed therefor. (p. 517.)

A RECEIVER IS ENTITLED to Compensation for the Services Rendered by Him, and the circumstances and environment of the

particular receivership are proper to be considered in determining the amount of the compensation. (p. 518.)

RECEIVER, Compensation, Amount of.—The compensation of a receiver should not be greater than would be his compensation for doing the same amount and character of work when employed by an individual. If required to give a bond, that should be taken into consideration. (p. 518.)

RECEIVERS.—In Fixing the Compensation of a Receiver, the considerations which should control are the value of the property in controversy; the particular benefit derived from the receiver's efforts and attention; time, labor, and skill required, and experience in the proper performance of the duties imposed; their fair value measured by common business standards; and the degree of integrity and dispatch with which the work of the receivership is conducted. (p. 519.)

RECEIVERS.—It is the Duty of a Receiver to Transact His Business in Such a Manner, and to keep his books and vouchers in such a shape, that they may be ready for examination at any time. (p. 520.)

RECEIVER—Costs Due to His Negligence.—If costs are caused by the negligence of a receiver, he cannot maintain a claim for his reimbursement out of the trust fund nor from the party who caused his wrongful appointment. (p. 520.)

RECEIVER—Attorney's Fees, Party Procuring Wrongful Appointment, When not Liable for.—If, after the reversal of an order appointing a receiver, the defendant and the receiver enter into a stipulation that the former's objections to the latter's accounts may be referred to and heard by a referee, the party procuring the wrongful appointment of such receiver, but who did not join in such stipulation and hearing, is not liable for the compensation of the receiver's attorneys thereat and in preparing therefor. (p. 520.)

RECEIVERS—Reversal of Order Appointing—Compensation After.—A receiver is not entitled to compensation or allowance for any new business transacted after the filing of a remittitur showing the reversal of the order appointing him. When the remittitur is filed, the expense of the receivership terminates in so far as it can be charged against the trust funds or against the party procuring the appointment of the receiver. (p. 520.)

RECEIVERS—Attorney's Fees After Reversal.—After the reversal of an order appointing him, a receiver has no authority to employ counsel whose compensation can be charged against the trust fund or against the party procuring the wrongful appointment of the receiver. (p. 521.)

RECEIVER—Fixing Compensation of and of His Attorney, When may be Made Without Evidence.—Evidence relative to the appointment of a receiver and the fees of his counsel may be admitted for the purpose of informing the court as to what is just and reasonable under the circumstances, but where the court has personal knowledge of all that has been done by the attorneys, it is not always necessary to hear evidence respecting the amount to be allowed them. The court is presumed to know the value of attorneys' services, and it is for its own enlightenment that such evidence is heard. (p. 521.)

Appeal by plaintiff Heinze from an order fixing the compensation of a receiver and allowing him a certain sum for his counsel fees. The receiver was appointed on his motion.

John J. McHatton and James M. Denny, for the appellant.

Kirk & Clinton and H. L. Maury, for the respondent.

¹⁴⁸ POORMAN, C. This is an appeal from a final judgment: State ex rel. Heinze v. District Court, 28 Mont. 227, 72 Pac. 613. It is alleged in the complaint filed in the principal action: That the owners of an undivided thirty-one thirty-sixths of the Nipper lode claim leased their interest to F. Augustus Heinze, who was also given an option to purchase the property. The lessee then sublet the premises to Arthur P. Heinze, who entered into the possession thereof, and at the time the action was commenced, in August, 1899, was working the same. That the Parrot Silver and Copper Mining Company entered the Nipper ground through underground workings, and was extracting and carrying away ores from beneath the surface of the Nipper claim. The complaint asks that the title to the property be quieted, and that the defendant Parrot company be enjoined from entering upon, mining or extracting any ore from, or breaking any rock within or on, the Nipper claim.

The Parrot company, in its answer, admitted that it was extracting ores from a vein beneath the surface of the Nipper ¹⁴⁹ claim, but alleged that such vein had its apex within the Little Mina lode claim, lying north of the Nipper claim, and which was owned by the defendant company. All of the owners of this thirty-one thirty-sixths undivided interest in the Nipper claim, together with the lessee, F. Augustus Heinze, and the sublessee, Arthur P. Heinze, were plaintiffs in this action.

Afterward, about March 3, 1900, the sublessee, Arthur P. Heinze, filed an application for the appointment of a receiver to take possession of and operate that portion of the Nipper claim in dispute; alleging himself to be especially aggrieved, for the reason that his lease thereon expired in July, 1901, and that he desired to have the property operated during the continuance of his lease. A receiver was appointed by order of the court dated May 16, 1900. By the order of appointment the receiver was "authorized to operate and mine said portion of the Nipper lode claim, and all veins and bodies of ore therein, together with all extralateral rights pertaining thereto; to take charge of all ores which may be extracted by him from said portion of the

Nipper mining claim; and to have the same removed, reduced, and smelted, so as to realize the most money therefrom," etc. The order of appointment also enjoins the parties, except the cotenants, from interfering with the said receiver in the performance of his duties, and from withholding in any manner the possession of said premises, or any portion thereof, or any of the underground workings thereon or therein, or upon any veins claimed to belong to or within said portion of the said Nipper claim.

The receiver so appointed, it appears, was required to give two bonds—one for \$10,000 and one for \$25,000. The receiver immediately entered into the possession of the property, and began active mining operations about the 1st of June, 1900. Practically all the mining supplies, machinery, tools, and apparatus of all kinds used by the receiver were purchased by him from the Montana Ore Purchasing Company, and all the ores mined were sold to this company. It appears that this company also advanced money to the receiver when needed to settle his monthly accounts.

¹⁵⁰ The defendant Parrot company in the meantime had appealed to the supreme court from the order appointing the receiver, and such order was reversed by the supreme court in March, 1901: *Hickey v. Parrot Silver etc. Co.*, 25 Mont. 164, 64 Pac. 330.

The receiver during his operation of the mine filed his regular monthly statements and reports for all the months except the months of February and March, 1901. To each of these monthly reports the Parrot company filed its objection and protest. The monthly reports of the receiver for the months of February and March, 1901, were not filed until in January, 1902. Objections and protests were filed to these reports by the Parrot company. The receiver had employed an attorney and counselor during his operation of the mine, and had been allowed therefor, but about the time the order appointing the receiver was reversed this counsel ceased to act; and the receiver, after the remittitur was filed, employed as his attorneys and counselors, H. L. Maury and Kirk & Clinton. The plaintiff, Arthur P. Heinze, had filed no objections to these monthly statements.

On May 26, 1902, a stipulation was entered into between the receiver and the Parrot company that the taking of the testimony with reference to his various monthly reports should be referred to a referee. This appellant was not a

party to this reference. The order of reference was made on that day, and a hearing was had before a referee, which it is claimed by the receiver occupied his time and attention and that of his attorneys for something over three months. Afterward, during the month of December, 1902, the receiver made his final report to the court, asking that he be allowed \$28,000 for his own salary, less \$4,569 which he had already received, and that he be allowed as expenses \$10,000 for his attorney, H. L. Maury, \$10,000 for his attorneys, Kirk & Clinton, and \$125 for his bookkeeper, J. B. McGinn.

There is a statement in the final report of the receiver that the referee to whom was referred the matter of taking testimony and making findings respecting the objections and protests ¹⁵¹ filed by defendant to the several monthly reports of the receiver had made and filed with the clerk "his findings of fact and conclusions of law, and has recommended that judgment be entered confirming, allowing, and settling as correct each and every of said reports." Reference is also made in the final report to all of the testimony, and to all of the exhibits filed by the referee, "as if all said testimony and exhibits were in this report set out at length and made a part hereof." However, the testimony taken by the referee does not appear in the record, unless it is the same as that given before the court. No separate action appears to have been taken on the report of the referee, and no question respecting the same is involved here, or with reference to the allowance or rejection of the several monthly accounts contained in the monthly reports of the receiver.

To this final report of the receiver objections were filed by all of the plaintiffs, acting jointly, except the sublessee, Arthur P. Heinze, who filed separate, specific objections thereto. Objections and protests were also filed by defendant Parrot company. The objections made to the final report of the receiver by the plaintiffs who filed objections jointly, and by plaintiff, Arthur P. Heinze, who appeared separately in filing objections, are practically the same, and relate to expenses incurred by the receiver for counsel fees and other expenses since the twenty-fifth day of March, 1901, at which date the remittitur from the supreme court was filed in the district court. Objections were also made to the compensation claimed by the receiver, and it is alleged that the sum of \$500 per month during the ten and one-half months

which intervened between the appointment of the receiver and the reversal of the order making such appointment is ample compensation for the receiver. The objections filed by the defendant Parrot company are much more extensive, and cover nearly every phase of the receivership, including practically the same objections made by the plaintiffs, and adding thereto specific objections, to wit, to the sale of property made by the receiver after the reversal of the order appointing him, and the filing of the remittitur in the ¹⁵² district court where the order was originally made. The report is further objected to on the ground that the receiver had not properly discharged the duties of his trust, had not fairly accounted for all ores mined, and had not received for such ores their market value when he had disposed of the same, and on many other grounds, making it necessary at the hearing to introduce evidence relating to almost every phase of the work performed during the period the property was in the hands of the receiver.

The hearing on this final report was had in January, 1903, and from the evidence then introduced it appears that after the order appointing the receiver had been reversed, and the remittitur in the case filed in the district court, the receiver had, without any order by the court therefor, sold certain furniture for the sum of \$95, and certain miners' tools and other implements and supplies, receiving therefor \$5,162.28, all of which he had set forth in his final report. It appeared further that his gross receipts during the period of his receivership were \$392,775.43, plus the amount which he had received from the sale of the furniture, mining machinery, and tools as above stated, after the filing of the remittitur; that his total disbursements for all purposes were \$408,280, leaving a deficit of \$10,342.29. The propriety of the action of the receiver in selling this furniture, mining implements, supplies, etc., is not questioned by the appellant on this appeal.

On January 17, 1903, the court signed an order overruling all objections to the final report of the receiver, and allowing him \$16,000 for all services performed by him as such; also allowing \$5,000 for legal services performed by H. L. Maury, \$5,000 for legal services performed by Kirk & Clinton, and \$125 for services as bookkeeper by J. B. McGinn. That none of these sums had been paid, except \$4,569 retained by the receiver on account. "That the said report,

as to all matters not herein specifically set forth, is adopted and approved by the court." Afterward the receiver filed a motion that an order be made requiring Arthur P. Heinze to pay to the receiver the amount found due, to wit, the sum of \$21,556. This ¹⁵³ motion was contested, but was sustained by the court, and on January 31, 1903, the order was entered from which this appeal is taken. It was determined on a former appeal of this case that this order is in effect a final judgment, and is appealable: *State v. District Court*, 28 Mont. 227, 72 Pac. 613.

The objections made by appellant are substantially that the court erred in taxing the expense of the receivership remaining unpaid against the plaintiff, Arthur P. Heinze; that the sums allowed were excessive; that no allowance should be made as compensation to the receiver, or for attorney's fees, or for any services performed after the reversal of the order appointing the receiver.

It will be noticed that the plaintiffs in the principal case did not ask that a receiver be appointed; that subsequent to the commencement of the action this appellant, who is one of the plaintiffs, filed his separate petition asking that a receiver be appointed; that the order of appointment was based upon this petition; that it was afterward determined that this appointment was wrongful.

Where a receiver is legally appointed, he is entitled to compensation for services actually rendered, though the order of appointment be vacated or reversed: *Beach on Receivers*, sec. 769. But to whom should this compensation and expense be assessed? "The compensation of a receiver is taxable costs: *Hutchinson v. Hampton*, 1 Mont. 39; *Ervin v. Collier*, 2 Mont. 605. The compensation of a legally appointed receiver, while primarily chargeable to and payable out of the property or funds in his hands, as was held in *Hutchinson v. Hampton*, 1 Mont. 39, is nevertheless (in absence of exceptional facts) ultimately taxable to the losing party, whose wrong occasioned the appointment, as was declared in *Ervin v. Collier*, 2 Mont. 605": *State ex rel. Cornue v. Lindsay*, 24 Mont. 352, 61 Pac. 883. "The fees of the receiver may be allowed as costs, and taxed against the losing party upon the entry of final judgment in the action [citing cases]. But this does not preclude the court, upon a discharge of the receiver before the conclusion of the action, as was the case here, from fixing his ¹⁵⁴ compensation, and adjudging pay-

ment thereof against the party at whose instance he was wrongfully appointed": State ex rel. Heinze v. District Court, 28 Mont. 227, 72 Pac. 613.

In *McAnrow v. Martin*, 183 Ill. 467, 56 N. E. 168, the court said: "When a receiver obtains possession of money or property under an order which is afterward reversed on appeal, and he is required to restore the money to the person entitled thereto, he cannot claim compensation out of the funds in his hands, but must look therefor to the party who secured his appointment: *Weston v. Watts*, 45 Hun, 219; *French v. Gifford*, 31 Iowa, 428; *Verplanck v. Mercantile Ins. Co.*, 2 Paige, 438; *Radford v. Folsom*, 55 Iowa, 276, 7 N. W. 604." The same doctrine is announced in *Beach on Receivers*, par. 119; *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. Rep. 788, 30 L. ed. 864; *People v. Jones*, 33 Mich. 303; *Welch v. Renshaw*, 14 Colo. App. 526, 59 Pac. 967. As was said in *Ogden City v. Bear Lake etc. Irr. Co.*, 18 Utah, 279, 55 Pac. 385: "The expenses incurred by the receiver that would have been necessary for the appellant to incur, had it remained in the possession of its property, and in the control of its business, were properly paid out of the fund, but such as it would not have been necessary for it to incur should be charged to the party procuring the order. Such expenses should be regarded as incurred in consequence of an error at his instance: *Weston v. Watts*, 45 Hun, 219; *City of St. Louis v. Gaslight Co.*, 11 Mo. App. 237; *Pittsfield Nat. Bank v. Bayne*, 140 N. Y. 321, 35 N. E. 630; *Moyers v. Coiner*, 22 Fla. 422; *French v. Gifford*, 31 Iowa, 428." See, also, *Cassidy v. Harrelson*, 1 Colo. App. 458, 29 Pac. 525.

The order appointing a receiver is the authority under which he acts. Whenever this is reversed his authority is gone, and it then becomes his duty immediately to render his final report and demand his formal discharge.

The receiver is entitled as a matter of right to the benefit of counsel, when the nature of the trust requires it; and, while he usually selects his own counsel, he cannot make any contract of hiring or agreement for compensation that is binding upon the court, for it is the function of the court to determine both ¹⁵⁵ the necessity for counsel, and the compensation to be allowed therefor.

The receiver is entitled to compensation for services performed by him, and the circumstances and environments of the particular receivership are proper to be considered in

determining the amount of this compensation: See, generally, *Forrester v. Boston etc. Cent. etc. Min. Co.*, 30 Mont. 181, 76 Pac. 2, and cases cited; *McLane v. Placerville etc. R. Co.*, 66 Cal. 606, 6 Pac. 748.

The receiver in this case was in effect a general superintendent, vested with plenary powers, subordinate only to the will of his master, governed by the rules of law and equity; but the employment came from the court, instead of from the mine owner. Reports were made to the court, not to the owner. The court, not the owner, was the master. The duties and labor performed in such case, whether under an appointment by the court as a receiver or under an employment by the owner as a superintendent, are the same. The party is required by law in both cases to be loyal to his trust, to exercise the diligence and care of a reasonable person, and to use the skill possessed by him in the conduct of the business with which he is intrusted. If he does all this he has complied with all that is required of him, and he is not personally liable for any resultant loss or damage. The receiver was required to give bonds, but his bondsmen are not liable if he is not. The law does not compel one to accept from the court employment as a receiver, any more than it compels him to accept employment from the owner as a superintendent. If he jeopardizes other interests by accepting the receivership, he does it voluntarily, and is not entitled to be recompensed therefor.

It is well established that the compensation allowed a receiver must be reasonable, but why compensation must be greater, in order to be reasonable, for doing certain work, when the hiring is done by the court, than it would be for the same duties if the hiring were done by an individual, is not apparent. Where extra duties are enjoined, as giving a bond or otherwise, that are not compensated for in some other manner, additional ¹⁵⁶ pay may be allowed; otherwise there is no reason why it should not be the same. And these remarks apply equally to allowances for counsel fees.

The considerations that should be controlling with the court in fixing compensation are the value of the property in controversy; the practical benefits derived from the receiver's efforts and attention; time, labor, and skill needed or expended in the proper performance of the duties imposed, and their fair value, measured by the common business standards; and the degree of activity, integrity, and dispatch

with which the work of the receivership is conducted. The percentage basis is not always the equitable method. As was said in *Grant v. Bryant*, 101 Mass. 570, "the court does not regulate the compensation of its officers upon the basis of a fixed commission upon the amount of money passing through their hands, but allows them such an amount as would be reasonable for the services required of and rendered by a person of ordinary ability and competent for such duties and services": See, also, the following cases: *Schwartz v. Keystone Oil Co.*, 153 Pa. St. 283, 25 Atl. 1018; *Boston Safe Deposit Co. v. Chamberlain*, 66 Fed. 847, 14 C. C. A. 363; *French v. Gifford*, 31 Iowa, 428; *Jones v. Keen*, 115 Mass. 170; *Martin v. Martin*, 14 Or. 165, 12 Pac. 234; *United States v. Church etc.*, 6 Utah, 43, 21 Pac. 516; *Sherley v. Mattingly*, 21 Ky. Law Rep. 289, 51 S. W. 189; *Union Nat. Bank v. Mills*, 103 Wis. 39, 79 N. W. 20.

The order of appointment required the receiver to file his monthly reports on or about the twenty-first day of each month. Notwithstanding this order, and although the receivership was ended by the reversal of the order of appointment, the receiver delayed filing his reports for the last two months of his operations for more than ten months after the remittitur had been filed, and his final report was not filed for some twenty-one months after that date. No reason is given for this extraordinary delay. Objections were made to each monthly report when filed, and no hearing was had. During all this time an attorney was employed, who was paid monthly for his services. More than one year after the termination of the receivership ¹⁵⁷ the receiver and the defendant, without regard to the appellant, entered into a stipulation as follows: "It is hereby stipulated and agreed by and between the attorneys for the defendant (the said defendant being the only party to this suit, objecting to any of the receiver's reports), and the attorneys for the receiver, Tom McLaughlin, that the hearing of the objections to each and all of the receiver's reports heretofore filed in this cause may be referred by the court to William E. Carrol, Esq., with power in the said William E. Carrol to hear testimony thereon and to report to the court, findings of fact, conclusions of law, and a judgment on each and every of the said reports, the objections thereto," etc. This stipulation is signed by the attorneys of the defendant and by the attorneys for the receiver. The order of reference was made in

accordance with the terms of this stipulation, and a hearing had, this appellant not participating. It is claimed by the receiver that it took him some two or three months to prepare for this hearing. It is the duty of a receiver to transact his business in such a manner, and to keep his books and vouchers in such shape, that they may be ready for examination at any time. If evidence dehors the receiver's books and vouchers is necessary to sustain his reports, that evidence certainly would be more easily obtained at the time than after many months of delay. At this hearing the objections made to these reports were not sustained, but the receiver's reports were sustained by the referee.

Where costs have been caused by the negligence of the receiver, he cannot, in equity, maintain a claim for reimbursement either out of the trust fund, or from the party who caused his wrongful appointment.

Whether the defendant in this case is liable for the attorney's fees for this hearing before the referee on the ground that the objections were not sustained, or whether the receiver should bear the expense of his own counsel, are questions not involved here, the only question being, Is this appellant liable for these attorney's fees? And the answer, under the facts presented here, is that he is not.

The receiver is not entitled either to compensation or allowances ¹⁵⁸ for any new business transacted after the filing of the remittitur, for the receivership had been terminated. After that date the receiver had no authority to employ counsel whose compensation could be charged against the trust fund or against this appellant, and neither could the court direct or approve such employment or sanction such payment. When the remittitur was filed the expense of this receivership terminated, so far as the same could be a charge against the trust fund or against this appellant.

The allowance of one hundred and twenty-five dollars was "for the services of J. B. McGinn as bookkeeper in the last month, preparing the last two reports, settling up of the accounts, and straightening up the books, and finally closing out the business and accounts." We think this item of expense should be allowed.

The judgment of the court fixing the receiver's compensation and allowing attorney's fees is general; but, from the evidence, it is apparent that it extended this compensation so as to cover time subsequent to the termination of the re-

ceivership; that it also allowed attorney's fees for the hearing before the referee on the monthly accounts which should have been settled prior to the order of reversal. This was error, for which the case should be reversed. Evidence relative to the compensation of the receiver and the allowance for counsel fees may be admitted for the purpose of informing the court as to what is just and reasonable under the circumstances; but where the court has personal knowledge of all that has been done by the attorneys, it is not always necessary that it should hear evidence respecting the amount which it should allow, for a court is presumed to know the value of attorney's services, and it is for its own enlightenment that such evidence is heard.

We think this judgment should be reversed.

Per CURIAM. For the reasons stated in the foregoing opinion, the judgment is reversed and the cause remanded.

The Compensation of a Receiver should correspond with the degree of business capacity, integrity, and responsibility required in the management of the affairs intrusted to him. A reasonable and fair compensation should be allowed, according to all the circumstances of each case: *Heffron v. Rice*, 149 Ill. 216, 41 Am. St. Rep. 271. See, too, *Cutter v. Pollock*, 4 N. Dak. 205, 50 Am. St. Rep. 644. It has been held that a surviving partner, appointed receiver of the firm affairs at his own instance, is not entitled to compensation as receiver: *Barry v. Jones*, 11 Heisk. 206, 27 Am. Rep. 742. As to the effect of an agreement to serve as receiver without compensation, see *Polk v. Johnson*, 160 Ind. 292, 98 Am. St. Rep. 274.

On the Right of a Receiver to Employ Counsel, see *Barber v. International Co.*, 74 Conn. 652, 92 Am. St. Rep. 246.

TRERISE v. BOTTEGO.

[32 Mont. 244, 79 Pac. 1057.]

DEEDS, Acknowledgment of.—A mortgage signed by a husband and wife, the certificate of the acknowledgment of which declares that personally before the notary public appeared Mary H. Bottego and John H. Bottego, her husband, "known to him to be the person described in and who executed the foregoing instrument, and who severally acknowledged to him that he executed the same," is acknowledged substantially in accordance with the provisions of the statute, and entitled to record. (p. 525.)

Action to foreclose a mortgage alleged to have been executed by Mary H. Bottego and her husband. Judgment for

the plaintiff, and the defendant Hodgins moved for a new trial, and from the order denying his motion, appealed.

McBride & McBride, for the appellant.

J. L. Wines, O. J. Saville and Mrs. Ella K. Haskell, for the respondent.

²⁴⁷ BLAKE, C. This is an appeal by Thomas M. Hodgins from a judgment and order overruling his motion for a new trial. There is no controversy about the facts, and only one question is presented for decision.

Mary H. Bottego owned real property in the county of Silver Bow, and made a mortgage thereon, January 24, 1898, to J. H. Trerise, to secure the payment of a promissory note and interest. Her husband, John B. Bottego, signed the note and mortgage. The mortgage is in the usual form, and the acknowledgment is as follows:

"State of Montana,
County of Silver Bow,—ss.

"On this Twenty-fifth day of January, 1898, before me I. C. Bachelor, a Notary Public in and for the County of Silver Bow, State of Montana, personally appeared Mary H. Bottego and John B. Bottego (Her Husband), known to me to be the persons described in, and who executed the foregoing instrument, and who severally acknowledged to me that—he—executed the same. In Testimony Whereof, I have hereunto subscribed my hand and affixed my Notarial Seal on the day and year in this certificate above written.

[Seal]

"I. C. BACHELOR,

"Notary Public in and for Silver Bow County, Montana."

The above word "he" is printed in the blank that was used by the officer taking the acknowledgment, and there is a sufficient ²⁴⁸ space for letters to be written before and after it. The mortgage was filed for record January 26, 1898, in the office of the county recorder of said county, and Trerise assigned the note and mortgage February 1, 1900, to the plaintiff. The property was transferred May 15, 1900, to defendants John J. Ferrell and Fred M. Ferrell, who conveyed the same April 15, 1901, to Hodgins, and his deed was recorded April 24, 1901. This action was commenced April 28, 1902, to foreclose the mortgage, and Hodgins answered for himself alone. The other defendants made no defense.

A decree was made and entered for the foreclosure of the mortgage according to its terms, and Hodgens appealed.

It is the contention of the appellant that the certificate of the acknowledgment does not comply with the statute, and is a nullity; that the county recorder had no authority to record the mortgage; and that the property was purchased without notice of the encumbrance.

The law applicable to constructive notice is defined in the following provisions of the codes: "Every conveyance of real property, acknowledged or proved, and certified and recorded as prescribed by law, from the time it is filed with the county clerk for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees": Civ. Code, sec. 1640. "Every conveyance of real property other than a lease for a term not exceeding one year is void as against any subsequent purchaser or encumbrancer, including an assignee of a mortgage, lease, or other conditional estate, of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded": Civ. Code, sec. 1641. One section appears in two codes: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself, in all cases in which, by prosecuting such inquiry, he might have learned such facts": Civ. Code, sec. 4667; Code Civ. Proc., sec. 3465. This section embodies an ²⁴⁰ old rule of chancery. Another section has been incorporated in two codes: "Notice is: 1. Actual—which consists in express information of a fact; 2. Constructive—which is imputed by law": Civ. Code, sec. 4666; Code Civ. Proc., sec. 3464. These provisions with respect to notice must be construed together.

Did the omission in the certificate of the acknowledgment render the instrument void as to appellant? This subject is discussed in *McCardia v. Billings*, 10 N. Dak. 373, 88 Am. St. Rep. 729, 87 N. W. 1008. A mortgage was given upon land by Mrs. McCardia and her husband, and the acknowledgment is as follows:

"Territory of Dakota,
County of Pembina,—ss.

"On this 10th day of October, in the year one thousand eight hundred and eighty-four, before me, John V. McIntire, a notary public in and for said county and territory, personally appeared William McCardia and Margaret McCardia,

known to me to be the person who are described in and who executed the within and foregoing instrument, and acknowledged to me that he executed the same.

[Notarial Seal]

“JOHN V. McINTIRE,

“Notary Public, Dakota Territory.”

On the trial the introduction of the mortgage in evidence was objected to on the ground that the acknowledgment did not comply with the statute, and that the instrument was not entitled to be recorded. The court said: “It must be conceded that, if the acknowledgment of the mortgage was so defective that it would not have entitled the mortgage to be recorded in the office of the register of deeds, then the certificate of the acknowledgment alone would not be any evidence of the execution of the mortgage. . . . It is also true that the certificate of acknowledgment must contain a substantial compliance with the statute pertaining to acknowledgments; that is, that the certificate must contain a statement of every fact that ²⁵⁰ the statute prescribes shall be incorporated therein. . . . It is also true, as a matter of law, that obvious errors or omissions, clearly appearing upon the face of the certificate to be clerical in their nature, will not invalidate the acknowledgment, and, before the certificate will be held fatally deficient, there must be an absence of some essential fact of a substantial character. . . . Courts, however, will construe the language of certificates of acknowledgment liberally, and hold them valid if that can be done by a fair and reasonable construction of the language used. Turning now to the acknowledgment of the mortgage in question, we find that it unequivocally appears that William McCardia and Margaret McCardia personally appeared before the notary. The words immediately following their names in the certificate, to wit, ‘known to me to be the person,’ considered in connection with the words ‘who are described in,’ show beyond question that the word ‘person’ refers to William McCardia and Margaret McCardia. If it does not refer to these two grantors, then the verb ‘are’ obviously would not have been used. The omission of the letter ‘s’ from the word ‘person’ was obviously a clerical omission. The pronoun ‘he’ refers to the word ‘person’ preceding it in the same sentence. It would render the whole sentence useless and meaningless, so far as Margaret McCardia is concerned, to place upon it the construction that she appeared before the notary, and acknowledged that her

husband acknowledged the execution of the mortgage. Either that construction must be placed upon it, or we must hold that the word 'he' was not changed to 'they' through a clerical oversight." The court cites *Montgomery v. Hornberger*, 16 Tex. Civ. App. 28, 40 S. W. 628, in which it is decided that a certificate of joint acknowledgment by a married woman and her husband is not vitiated by stating that "he," instead of "they," executed the deed.

In *Carpenter v. Dexter*, 8 Wall. 513, 19 L. ed. 426, involving the effect of a certificate of acknowledgment of a deed, Mr. ²⁵¹Justice Field, for the court, said: "In aid of the certificate, reference may be had to the instrument itself, or to any part of it. It is the policy of the law to uphold certificates when substance is found, and not to suffer conveyances, or the proof of them, to be defeated by technical or unsubstantial objections."

We are therefore of the opinion that the mortgage was acknowledged substantially in accordance with the provisions of the statutes, *supra*, and that the record thereof imparted constructive notice of its contents to Hodgens.

We recommend that the judgment and order appealed from be affirmed.

Per CURIAM. For the reasons stated in the foregoing opinion, the judgment and order are affirmed.

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I. Scope of Note.

In this note we shall consider only such questions as relate to what should be shown by the certificate of acknowledgment, considered by itself or in connection with the instrument to which it is attached. Hence we shall exclude such matters as relate to the effect of the registration of imperfectly acknowledged instruments, or the qualifications of the officer before whom the acknowledgment was taken, where his disqualification is not apparent on the face of the certificate itself, or matters relating to the proof of the execution or acknowledgment of the instrument by the subscribing witnesses, or matters relating to acknowledgments made in open court.

II. General Nature and Purposes of Certificates of Acknowledgment.

Formerly, acknowledgments were taken only in open court and entered on the records of the court in proceedings which were enumerated with many formalities: *Merritt v. Yates*, 71 Ill. 636, 23 Am. Rep. 128. The modern statutes respecting the subject of acknowledgments have been very much simplified, and though not uniform among the various states, are sufficiently so to make the decisions on the subject of value in determining the validity of any particular certificate. Perhaps the most difficulty arises over the construction of certificates of acknowledgments of married women. The law has always been very zealous in its efforts to protect married women from any improper influence on the part of their husbands tending to influence them toward the making of conveyances.

Hence those statutes providing for the privy examination and separate acknowledgments of married women are merely substitutes for the ancient method of conveyance by means of fine and recovery: *Wamble v. Foote*, 2 Dak. Ter. 1, 2 N. W. 239; *Kidd v. Venable*, 111 N. C. 535, 16 S. E. 317; *Paine v. Baker*, 15 B. L. 100, 23 Atl.

141; Mount v. Kesterson, 6 Cold. 452; Langton v. Marshall, 59 Tex. 296.

The certificate of acknowledgment is not ordinarily regarded as a part of the instrument to which it is attached: *Livingston v. Jones*, Harr. (Mich.) 165; *Wood v. Cochrane*, 39 Vt. 544. The question whether the act of taking and certifying to the acknowledgment is a ministerial or judicial act, a question which is sometimes deemed of importance in deciding the sufficiency of the certificate, is not yet settled by the courts. Some of them hold the act to be of a strictly ministerial character: *Biscoe v. Byrd*, 15 Ark. 655; *Banbury v. Arnold*, 91 Cal. 606, 27 Pac. 934; *Bank of Woodland v. Oberhaus*, 125 Cal. 320, 57 Pac. 1070; *Stevenson v. Brasher*, 90 Ky. 23, 13 S. W. 242; *Lewis' Lessee v. Waters*, 3 Har. & McH. 430; *Learned v. Riley*, 14 Allen, 109; *Horbach v. Tyrell*, 48 Neb. 514, 67 N. W. 485, 37 L. R. A. 434; *Odiorne v. Mason*, 9 N. H. 24; *Lynch v. Livingston*, 6 N. Y. 422; *Read v. Toledo Loan Co.*, 68 Ohio St. 280, 96 Am. St. Rep. 663, 67 N. E. 729, 62 L. R. A. 790. While other courts have held the act of the officer in taking the privy examination of a married woman to be in the nature of a judicial act: *Kerr v. Russell*, 69 Ill. 666, 18 Am. Rep. 634; *Harmon v. Magee*, 57 Miss. 410; *Long v. Crews*, 113 N. C. 256, 18 S. E. 499; *Withers v. Baird*, 7 Watts, 227, 32 Am. Dec. 754; *Pickens v. Knisely*, 29 W. Va. 1, 6 Am. St. Rep. 622, 11 S. E. 932.

The purpose of a certificate of acknowledgment is to entitle the instrument to be recorded and to be admitted in evidence without further proof of its execution: *Fogarty v. Finlay*, 10 Cal. 239, 70 Am. Dec. 714; *Robinson v. Robinson*, 116 Ill. 250, 5 N. E. 118; *Brinton v. Seever*, 12 Iowa, 389; *Bennett v. Knowles*, 66 Minn. 4, 68 N. W. 111; *Burbank v. Ellis*, 7 Neb. 156. In *Tavener v. Barrett*, 21 W. Va. 656, it was said: "The want of a proper acknowledgment does not however, invalidate the deed [of one *sui juris*], but only goes to the effect of the record. If not acknowledged or proved, its record is not provided for by law, and the fact that it may be copied upon the book of records will not operate as constructive notice to subsequent purchasers: *Dussaume v. Burnett*, 5 Iowa, 95; *Lessee of Shults v. Moore*, 1 McLean, 520; *Barney v. Sutton*, 2 Watts, 31; *Hastings v. Vaughn*, 5 Cal. 315; *Price v. McDonald*, 1 Md. 403, 54 Am. Dec. 657; *Johns v. Scott*, 5 Md. 81. The deed, however, is good as between the parties (being *sui juris*), and should prevail against subsequent deeds to those who had actual notice of its existence: *Dussaume v. Burnett*, 5 Iowa, 95; *Caldwell v. Head*, 17 Mo. 561; *Cooley v. Rankin*, 11 Mo. 642."

Hence the courts hold that a defectively acknowledged instrument is good as between the parties: *Hastings v. Vaughn*, 5 Cal. 315; *Stewart v. Stewart*, 19 Fla. 864; *Tidd v. Rines*, 26 Minn. 201, 2 N. W. 497; *Dalton v. Bank of St. Louis*, 54 Mo. 105; *Fryer v. Rockefeller*, 63 N. Y. 268; *Manaudas v. Mann*, 14 Or. 450, 13 Pac. 449;

unless one of the grantors is a married woman, in which case an acknowledgment is usually regarded as essential in order to pass the title to her separate estate or otherwise affect her interest in the property: *Mason v. Brock*, 12 Ill. 273, 52 Am. Dec. 490; *Greene v. Muse*, 2 Har. & J. 62; *Harmon v. Magee*, 57 Miss. 410; *Marsh v. Mitchell*, 26 N. J. Eq. 497; *Sims v. Ray*, 96 N. C. 87, 2 S. E. 443; *Henderson v. Rice*, 1 Cold. 223; *Coal Creek Min. Co. v. Heck*, 83 Tenn. 497; *Parker v. Chancellor*, 73 Tex. 475, 11 S. W. 503; *Pickens v. Knisely*, 29 W. Va. 1, 6 Am. St. Rep. 622, 11 S. E. 932.

Under some of the earlier statutes, the act of acknowledging an instrument was done in open court, and thus became a matter of record for the clerk to certify to, which certificate was much of the same order as the general certificate of acknowledgment still in vogue: *Phillips v. Ruble*, 16 Ky. 221; *Beckwith v. Lamb*, 13 Ired. 400; *Love's Lessee v. Shields*, 3 Yerg. 405; *Estell v. Miller's Lessee*, 10 Yerg. 480. But under the act of 1891, notaries public may now take acknowledgments in North Carolina: *McNeal Pipe etc. Co. v. Waltman*, 114 N. C. 178, 19 S. E. 109.

III. General Rule of Construction Applicable.

Inasmuch as certificates of acknowledgment are frequently made by illiterate or inexperienced officials, their validity is not determined by the use of very critical or technical rules: *Russ v. Wingate*, 30 Miss. 440. Hence the rule that courts will construe the language employed in such certificates liberally with a view to sustaining the certificate: *Touchard v. Crow*, 20 Cal. 150, 81 Am. Dec. 108; *Gregory's Heirs v. Ford*, 5 B. Mon. 471; *McCardia v. Billings*, 10 N. Dak. 373, 88 Am. St. Rep. 729, 87 N. W. 1008. And in aid of the certificate, the court will look to the whole instrument to which the certificate is attached: *Bradford v. Dawson*, 2 Ala. 203; *Frederick v. Wilcox*, 119 Ala. 355, 72 Am. St. Rep. 925, 24 South. 582; *Middleton v. Findla*, 25 Cal. 76; *Summer v. Mitchell*, 29 Fla. 179, 30 Am. St. Rep. 106, 10 South. 562, 14 L. R. A. 815; *Lyon v. Kain*, 36 Ill. 362; *Paxton v. Ross*, 89 Iowa, 661, 57 N. W. 428; *Kelly v. Rosenstock*, 45 Md. 389; *Frostburg Mut. Bldg. Assn. v. Brace*, 51 Md. 508; *Brunswick-Balke-Collender Co. v. Brackett*, 37 Minn. 58, 33 N. W. 214; *City of Kansas v. Hannibal etc. R. Co.*, 77 Mo. 180; *Owen v. Baker*, 101 Mo. 407, 20 Am. St. Rep. 618, 14 S. W. 175; *Hughes v. Morris*, 110 Mo. 306, 19 S. W. 481; *Smith v. Boyd*, 101 N. Y. 472, 5 N. E. 319; *Beckel v. Pettierew*, 6 Ohio St. 247; *Broussard v. Dull*, 3 Tex. Civ. App. 59, 21 S. W. 937; *Brooks v. Chaplin*, 3 Vt. 281, 23 Am. Dec. 209; *Hiles v. La Flesch*, 59 Wis. 465, 18 N. W. 435; *Bird v. McClelland etc. Co.*, 45 Fed. 458; *Carpenter v. Dexter*, 8 Wall. 513, 19 L. ed. 426. And where there are two certificates to a conveyance, as in the case of the certificates of acknowledgment of a husband and wife, they may be read in connection with each other as well as in connection with the conveyance: *Frederick v. Wilcox*, 119 Ala. 355, 72 Am. St. Rep. 925, 24

South. 582. But the statutory requirement of an express statement of fact in a certificate of acknowledgment cannot be supplied by a mere presumption of such fact: *Summer v. Mitchell*, 29 Fla. 179, 30 Am. St. Rep. 106, 10 South. 562, 14 L. R. A. 815. The officer must state all the facts necessary to show a valid official act on his part: *Wetmore v. Laird*, 5 Biss. 160; *McCardia v. Billings*, 10 N. Dak. 373, 88 Am. St. Rep. 729, 87 N. W. 1008. Thus it has been held that where the certificate fails to state that the grantor acknowledged the instrument, that lapse of time will not raise any presumption of acknowledgment: *Heintz v. O'Donnell*, 17 Tex. Civ. App. 21, 42 S. W. 797.

But the authorities are not entirely harmonious on this proposition, and cases may be found in which the courts sustained defective certificates by indulging in various presumptions. Thus it has been held that the presumptions which exist in favor of the regularity of the acts of public officers apply to the taking of acknowledgments: *Hourtienne v. Schnoor*, 33 Mich. 274; *Addis v. Graham*, 88 Mo. 197. And it has also been said that every reasonable intendment should be made in support of the certificate: *Basshor v. Stewart*, 54 Md. 376.

IV. General Rule Respecting the Requirements of the Certificate.

Though the requirements of what should be shown by the certificate of acknowledgment are generally set forth by the statute, still it may be said, in a general way, that there are two essential elements to a valid certificate of acknowledgment, namely, the identity of the party executing the instrument and the fact that he acknowledged that he executed it: *Bennett v. Knowles*, 66 Minn. 4, 68 N. W. 111; *Larson v. Elsner*, 93 Minn. 303, 101 N. W. 307.

The general rule applicable to all certificates of acknowledgment is that if the language of the certificate substantially shows a compliance with the requirements of the statute respecting acknowledgment, the certificate is deemed sufficient: *Leech v. Karthaus*, 141 Ala. 509, 37 South. 696; *Frederick v. Wilcox*, 119 Ala. 355, 72 Am. St. Rep. 925, 124 South. 582; *Jacoway v. Gault*, 20 Ark. 190, 73 Am. Dec. 494; *Little v. Dodge*, 32 Ark. 453; *Henderson v. Grewell*, 8 Cal. 581; *Muir v. Galloway*, 61 Cal. 498; *Chapin v. Whitsett*, 3 Colo. 315; *Einstein v. Shonse*, 24 Fla. 490, 5 South. 380; *Northwestern etc. Bank v. Rauch*, 5 Idaho, 752, 51 Pac. 764; *Christensen v. Hollingsworth*, 6 Idaho, 87, 96 Am. St. Rep. 256, 53 Pac. 211; *Wilson v. Wilson*, 6 Idaho, 597, 57 Pac. 708; *Hughes v. Lane*, 11 Ill. 123, 50 Am. Dec. 436; *Edwards v. Schoeneman*, 104 Ill. 278; *Owen v. Morris*, 5 Black, 479; *Tiffany v. Glover*, 3 G. Greene, 387; *King v. Merritt*, 67 Mich. 194, 34 N. W. 689; *Pickett v. Doe*, 5 Smedes & M. 470, 43 Am. Dec. 523; *Bernard v. Elder*, 50 Miss. 336; *Alexander v. Merry*, 9 Mo. 514; *Bray v. Marshall*, 75 Mo. 327; *Johnson v. Badger M. & M. Co.*, 13 Nev. 351; *Torrey v. Thayer*, 37 N. J. L. 339; *Sheldon v. Stryker*, 27 How. Pr. 387; *Meriam v. Harsen*, 2 Barb. Ch.

232; *Dennis v. Tarpenny*, 20 Barb. 371; *Deugenhart v. Cracraft*, 36 Ohio St. 549; *Garton v. Hudson-Kimberly Pub. Co.*, 8 Okla. 631, 58 Pac. 946; *Mosier v. Momsen*, 13 Okla. 41, 74 Pac. 905; *McIntyre's Lessee v. Ward*, 5 Binn. 296, 6 Am. Dec. 417; *Spencer v. Reese*, 165 Pa. St. 158, 30 Atl. 722; *In re Petition of Bateman*, 11 R. I. 585; *Monroe v. Arledge*, 23 Tex. 478; *Belcher v. Weaver*, 46 Tex. 293, 26 Am. Rep. 267; *Talbert v. Dull*, 70 Tex. 675, 8 S. W. 530; *Deseret Nat. Bank v. Kidman*, 25 Utah, 379, 95 Am. St. Rep. 856, 71 Pac. 873; *Hurst v. Leckie*, 97 Va. 550, 75 Am. St. Rep. 798, 34 S. E. 464; *Pickens v. Knisely*, 29 W. Va. 1, 6 Am. St. Rep. 622, 11 S. E. 932; *Smith v. Garden*, 28 Wis. 685; *McCormack v. James*, 36 Fed. 14; *Carpenter v. Dexter*, 8 Wall. 513, 19 L. ed. 426.

But while a substantial compliance with the statute will be sufficient, yet it must be a substantial compliance with every requisite of the statute: *Hockman v. McClanahan*, 87 Va. 33, 12 S. E. 230.

V. Defects or Matters Relating to the Manner of Reciting the Facts or the Form of the Certificate.

a. **Rule in the Absence of a Statutory Form.**—Where no statutory form of acknowledgment is required for a chattel mortgage, it is sufficient if the fair import of it is that the mortgagor appeared in person before the officer and acknowledged that the instrument was his act and deed: *Brunswick-Balke-Collender Co. v. Brackett*, 37 Minn. 58, 33 N. W. 214. And it is held that where there is no form of acknowledgment prescribed, as, for instance, to articles adopting a child, the form prescribed for conveyances may be used: *Abney v. De Loach*, 84 Ala. 393, 4 South. 757. So, also, where the statute authorizing the execution of a deed by an administrator does not state what the certificate of acknowledgment shall set forth, it must conform to the general law on that subject: *Hughes v. McDivitt*, 102 Mo. 77, 14 S. W. 660, 15 S. W. 756.

b. **Necessity for the Certificate to State Facts in Positive Terms.**—A certificate of acknowledgment, to be effective, must be positive and direct, and not leave its meaning to mere inference. Hence a recital in a certificate that "I hereby certify that all erasures and interlineations were made before signing and acknowledgment" is not sufficient: *Hanley v. National Loan etc. Co.*, 44 W. Va. 450, 29 S. E. 1002.

c. **Order of Statement of the Various Facts to be Recited in the Certificate.**—The constituents of the certificate need not be separately stated, but may be blended together and one may include another: *Clarke v. Groce*, 14 Tex. Civ. App. 153, 41 S. W. 668. And the order in which the entries appear in the certificate is immaterial, since they are all parts of one transaction taking place at the same time: *Robbins v. Harris*, 96 N. C. 557, 2 S. E. 70.

d. **Certificate in the Form of an Affidavit.**—In *Ingraham v. Grigg*, 13 Smedes & M. 22, it was held where the probate of a deed is in

substance an acknowledgment, though in the form of a probate, it is considered an acknowledgment notwithstanding the jurat.

e. Acknowledgment of Several Instruments in One Certificate.—Two instruments on the same piece of paper, of the same date, and constituting one contract, may be acknowledged in one certificate where the acknowledgment is of the "foregoing instruments": *Bosley v. Pease* (Tex. Civ. App.), 22 S. W. 516.

f. Certificate in Body of the Instrument Acknowledged.—The fact that the certificate of acknowledgment to the deed, which was executed in Louisiana, according to the customary form in that state at that time, was contained in the body of the instrument, the officer before whom the acknowledgment was made signing the deed with the parties to the instrument, does not invalidate the certificate. *Brownson v. Scanlan*, 59 Tex. 222. And it was also said, in a later case in that same state, that the acknowledgment could be made in the body of the instrument: *Snowden v. Bush*, 69 Tex. 593, 6 S. W. 767.

g. Appending of the Certificate to the Instrument Acknowledged. It is not necessary that a certificate of acknowledgment be indorsed in the deed; it may be subjoined to the instrument: *Thurman v. Cameron*, 24 Wend. 87. It was held under a statute providing that "any officer taking the acknowledgment of a deed or other instrument of writing must place thereon his official certificate," etc., that the certificate of acknowledgment could be pasted on or otherwise attached to the instrument: *Schramm v. Gentry*, 63 Tex. 583. But in *Winkler v. Higgins*, 9 Ohio St. 599, the certificate of acknowledgment was made "upon a separate strip of paper attached to the deed by a wafer with the officer's seal upon the same." The statute required the officer to certify the acknowledgment on "the same sheet on which such deed . . . may be printed or written." The court said: "In such cases as the one under consideration, it is evident that to hold the attaching of a certificate of acknowledgment, made upon a distinct piece of paper, sufficient evidence of an acknowledgment would be throwing the door wide open for mistake, fraud, and mischief to enter"; and the court further observed: "The facility with which such certificates of acknowledgment might be removed from one instrument and attached to others would greatly impair the public security against intentional frauds. Indeed, such a certificate of acknowledgment upon a separate piece of paper is alike in contravention of the express language and the undoubted meaning of the statute. The statute, as we have seen, expressly requires the officer to certify the acknowledgment on the same sheet on which such deed may be printed or written."

But in *Norman v. Shepherd*, 38 Ohio St. 320, where the mortgage was written on several sheets of paper fastened together by brass fastenings, it was conceded that the certificate of acknowledgment which was written on one of the sheets did not come within the principles announced in *Winkler v. Higgins*, 9 Ohio St. 599.

VI. Clerical Errors, Omissions and Blank Spaces as Constituting Defects.

a. Clerical Errors in General.

1. **Effect of Clerical Errors.**—Whenever a certificate of acknowledgment substantially complies with the statutory requirements, obvious clerical errors and technical omissions or defects are disregarded: *Magness v. Arnold*, 31 Ark. 103; *Donahue v. Mills*, 41 Ark. 421; *Calumet etc. Co. v. Russell*, 68 Ill. 426; *Summer v. Mitchell*, 29 Fla. 179, 30 Am. St. Rep. 105, 10 South. 562, 14 L. R. A. 815; *Brunswick-Balke-Collender Co. v. Brackett*, 37 Minn. 58, 33 N. W. 214; *Gorman v. Staunton*, 5 Mo. App. 585; *Durst v. Daugherty*, 81 Tex. 650, 17 S. W. 388. Hence the unintentional use of one word for another, the mistake being obvious, does not affect the validity of the certificate: *Belcher v. Weaver*, 46 Tex. 293, 26 Am. Rep. 267. Or, as was stated by the court in a Vermont case, when it is perfectly apparent upon the face of the written instrument that a mere clerical error has been made, and it is apparent from the face of the instrument what it should be if the error had not occurred, the error is regarded as one not affecting the validity of the instrument: *Wood v. Cochrane*, 39 Vt. 544.

2. **Use of Words Which Have Different Meaning from Those Intended to be Used or the Use of Words Which are Meaningless.**—The error of referring in a certificate of acknowledgment to a deed to the "foregoing mortgage," instead of "deed," was held a mere clerical error: *Ives v. Kimball*, 1 Mich. 308. The use of the word "with" for "without" in the clause relating to the separate examination of the wife, whereby it was stated that she executed the instrument "with fear or compulsion of any person," was held to be a mere clerical error. The court, however, placed considerable weight upon the fact that the husband of the wife was a leading lawyer, as also was the notary who took the acknowledgment: *King v. Merritt*, 67 Mich. 194, 34 N. W. 689. So, also, the use of "with" for "without" in the recital that the wife "executed the same freely and with constraint on the part of her husband and that she did not wish to retract the same," was held a mere clerical mistake, not affecting the validity of the certificate: *Johnson v. Thompson* (Tex. Civ. App.), 50 S. W. 1055. And the same conclusion was announced where the word "with" was used in the clause which should have read "she had freely and voluntarily, without fear or compulsion," executed the conveyance: *Durst v. Daugherty*, 81 Tex. 650, 17 S. W. 388.

The use of the word "husband" instead of the word "deed" is a clerical error not affecting the certificate: *Calumet etc. Co. v. Russell*, 68 Ill. 426. The use of the word "the" for "they" in the clause "and acknowledged to me that the severally executed," etc., is a mere harmless clerical error: *Montgomery v. Hornberger*, 16 Tex. Civ. 28, 40 S. W. 628. So, also, the use of "the" for "he" in the phrase where it should appear that "he" (the maker) executed and

signed the instrument, is a harmless clerical error: *Durst v. Daugherty*, 81 Tex. 650, 17 S. W. 388. And in a certificate reciting that William C. Shaw appeared and "acknowledged that he had executed the same J. C. for Caskey all the uses, purposes and cases therein set forth and that he wished not to retract the same," the expression "J. C. Caskey" is surplusage, while the word "for" between the initials "J. C." and "Caskey" is a clerical error, and hence it was held that the certificate was not fatally defective: *Gray v. Kauffman*, 82 Tex. 65, 17 S. W. 513.

3. *Use of Singular for Plural Pronouns or Nouns.*—In the principal case (*Trerise v. Bottego*, 32 Mont. 244, ante, p. 521, 79 Pac. 1057), the blank "— he —" in the printed form of the certificate was not filled out by the officer taking the acknowledgment. The acknowledgment was by the husband and wife and should have read "and who severally acknowledged to me that they executed," whereas it merely recited that "he" executed the instrument. The court held that the use of "he" under the circumstances was not fatal to the certificate.

And where a certificate recited that A and B appeared before the officer and were known by him to be "the person who are described in and who executed" the foregoing instrument, it was held not to constitute a fatal error: *McCardia v. Billings*, 10 N. Dak. 373, 88 Am. St. Rep. 729, 87 N. W. 1008.

But it was held in *Threadgill v. Bickerstaff*, 7 Tex. Civ. 406, 26 S. W. 739, that a certificate stating that more than one person appeared before the officer to acknowledge the instrument, and merely reciting that "he" acknowledged that he executed it, was not sufficient.

4. *Mistakes in Spelling or Grammar.*—The fact that the officer in certifying the acknowledgment does not spell correctly is not a fatal objection to the certificate. Thus the following certificate was held sufficient: "West Virginia, Barbour County, to wit: I, Mikel Simon, justice of Union Township, in the County aforesaid, do certify that Sarah Jane Knisely, the wife of the above named L. M. Knisely, personally appeared before me in my township and being examined by me privily and apart from her husband, and having the above deed of trust date December the 15th, 1868, fully explained to her. She, the said Sarah Jane Knisely, acknowledged the said wrightly to be her act and declared, that she had willingly acknowledged the same and did knot wish to retract it. Given under my hand this 18th day of December, 1868. Michael Simon, Justice": *Pickens v. Knisely*, 29 W. Va. 1, 6 Am. St. Rep. 622, 11 S. E. 932.

As to the effect of grammatical mistakes it was said in *Merritt v. Yates*, 71 Ill. 636, 23 Am. Rep. 128: "But it is urged that mere grammatical inaccuracy should not vitiate. That is no doubt true; no matter how ungrammatical the language, so that it can be clearly seen what is intended to be expressed. But that must appear without mere inference or conjecture."

The use of a masculine instead of a neuter pronoun will not vitiate the certificate. Thus a recital "personally appeared Thomas Hill, attorney for the Frostburg Lodge No. 49, Independent Order of Odd Fellows, and acknowledged the foregoing mortgage to be his act and deed," was held sufficient notwithstanding the use of the pronoun "his" for the pronoun "its": *Frostburg Mut. Bldg. Assn. v. Brace*, 51 Md. 508. And the recital that "personally appeared before us, the subscribers two of his Lordships, justices of the peace for Dorchester County, the within mentioned and subscribing Robert Vass and Nancy, his wife, and did acknowledge this deed," etc., was held to show an acknowledgment by Robert Vass: *Blair v. Valliant*, 4 Har. & McH. 62. And a recital that the three grantors "is personally known to me as the same persons whose name are subscribed" was held not fatal to the certificate: *Cairo etc. Co. v. Parrott*, 92 Ill. 194.

5. **Variance Between Name of Acknowledging Party as Recited in the Instrument and in the Certificate.**—A variance between the name of the acknowledging party as recited in the instrument or as signed thereto and the recital of his name in the certificate is sometimes regarded as a harmless clerical error, while in some cases it is regarded as a fatal defect in the certificate. But where such variances are held to be harmless, it will generally be observed that there were other clauses in the certificate which, taken in connection with the instrument, remedied the defect. Thus, where the mortgage was executed by Wm. Schrieber, but the mortgagor was described in the certificate of acknowledgment as Wm. Strieber, it was held that as the certificate identified the person named as known to the officer taking the acknowledgment "to be the person above named," that it was evident that the variance was a harmless clerical error: *Rodes v. St. Anthony etc. Co.*, 49 Minn. 370, 52 N. W. 27. Likewise where the deed was from one Jesse Eason to Noah and Wm. Hinton, but one of the attesting witnesses was named H. W. King, the court held the recital in the certificate, "This deed from Jesse Eason to Noah and William King," to be a harmless clerical error: *Mitchell v. Bridgers*, 113 N. C. 63, 18 S. E. 91. And where a chattel mortgage was signed by J. H. Huntington, who was named in the mortgage as the mortgagor, a recital in the certificate of an acknowledgment "by the above-named J. H. Hennefin, the mortgagor therein named," was held to be a harmless error: *Brunswick-Balke-Collender Co. v. Brackett*, 37 Minn. 58, 33 N. W. 214. And where the deed was signed "M. Thompson," but the certificate recited "Before me personally appeared Michael Thompson, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed," was held sufficient: *Paxton v. Ross*, 89 Iowa, 661, 57 N. W. 428. So also where a deed described the grantor as "Abraham B. Kain," but was signed "A. Boudoin Kain," a certificate of acknowledgment that Abraham B. Kain and another party named, "both known to me to be two of the parties described

in and who executed the within deed," was held to sufficiently identify the person signing as the person described as grantor in the deed: *Lyon v. Kain*, 36 Ill. 362. And where the deed was signed "J. M. Williams," whose full name was proved on the trial to be "Jasper M. Williamson," but the certificate recited an acknowledgment by James M. Williamson, it was held that the use of the word "James" was a harmless clerical error: *Check v. Herndon*, 82 Tex. 146, 17 S. W. 763. And where the deed was signed by three persons named, respectively, Hale, Brown and Bailey, and in the body of the deed one of the grantors was described as Richard G. Bailey, but the deed was signed R. G. Bailey, and the certificate recited "this thirty-first day of January A. D. 1842, Oliver Hale and Daniel Brown, Richard G. personally appeared and acknowledged this instrument, by them sealed and subscribed to be their free act and deed," it was held that the reference to the instrument identified the Richard G. as the grantor Bailey: *Chandler v. Spear*, 22 Vt. 388. And where the deed was signed by one "Arnall," while the certificate recited an acknowledgment by one "Arnold," the court, though relying on the idem sonans of the names, also observed that the officer certified that the person was the party to the deed, from which it would also be presumed that the parties were the same: *Arnall v. Newcom*, 29 Tex. Civ. App. 521, 69 S. W. 92.

And where the deed was signed by James M. Barclay, but the certificate recited "that this deed from James M. Barclay to Samuel Beatty and others was this day produced to me in my office by the said John L. Barclay to be his act and deed and ordered to be certified," etc., it was held that the variance in the names was a mistake not affecting the validity of the certificate: *Kentucky Land etc. Co. v. Crabtree*, 113 Ky. 922, 70 S. W. 31. And where the deed was from Joseph and Sarah Rich to Ezra Going, but the certificate inserted the name of Sarah Going as the person privily examined, though it described the parties to the deed and after stating the acknowledgment "by the said Joseph Rich," recited "and the said Sarah Going being examined," etc., it was held that the name "Going" was obviously inserted by mistake for the name "Rich," and that the certificate was sufficient: *Geddes v. Western Baptist etc. Inst.*, 13 B. Mon. 530.

But it has also been held that a certificate showing an acknowledgment by one Robert Lewis does not show an acknowledgment of an instrument signed by a person named Robert Gaines: *Minor v. Powers*, (Tex. Civ. App.), 38 S. W. 400. And where the grantor of the deed was one Cochrane, while the grantee was one Wood, and the certificate recited "Then the above named Samuel F. Wood acknowledged the above instrument to be his free act and deed," etc., it was held that the certificate was fatally defective: *Wood v. Cochrane*, 39 Vt. 544. Likewise where the deed was signed by Jonas Butler, but the certificate recited "Appeared James Butler, Esq., to me personally known

and acknowledged the foregoing conveyance to be his act and deed," the certificate was held insufficient to authorize the registration of the deed: *Stephens v. Motl*, 81 Tex. 115, 16 S. W. 731. And where the deed was signed by "F. W. Chandler," while the certificate recited an acknowledgment by a person named T. W. Chandler, who was certuned to be known to the officer, the court in holding that the certificate was fatally defective, observed: "The certificate that he knew the party must be held to include that he knew his name and that he gave it correctly in the certificate. Presumptions cannot be indulged contrary to the facts stated in the certificate": *Carleton v. Lombardi*, 81 Tex. 355, 16 S. W. 1081. And likewise where the deed was signed "F. M. McKenzie," a certificate reciting "This day F. M. McKenzie acknowledged that he signed the foregoing instrument for all the purposes and intentions therein contained," was held insufficient to authorize the registration of the deed: *McKenzie v. Stafford*, 8 Tex. Civ. 121, 27 S. W. 790. And where the name of Hiram Sherman was stated in the deed as the grantor, but it was signed by Harmon Sherman, and the certificate of acknowledgment recited "personally appeared the above-named Hiram Sherman, to me known and acknowledged the above instrument by him subscribed to be his free act and deed," the court said: "Hiram Sherman, in legal presumption, has executed no deed which he could acknowledge. . . . If there had been proof in this case that Hiram Sherman was known also by the name of Harmon Sherman, we are not prepared to say it would not have laid a foundation for introducing the record. But it was not competent to introduce it until some such foundation had been laid to connect the two variant names": *Boothroyd v. Engles*, 23 Mich. 19.

Where the name "Geo. H. Case" appeared in the body of the deed and as the signer of the same, but the certificate recites that "Personally came before me Geo. H. Crane, who is known to me to be the signer and sealer of the foregoing deed," etc., it was held to be such a fatal defect as was not cured by remedial legislation: *Heil v. Redden*, 38 Kan. 255, 16 Pac. 743.

6. **Effect of Surplusage or Redundancy.**—If words are used in a certificate of acknowledgment, which is complete without them, such words may be rejected as surplusage: *Stuart v. Dutton*, 39 Ill. 91; *Chauvain v. Wagner*, 18 Mo. 531. Likewise redundancy does not vitiate a certificate of acknowledgment: *Martin v. Heilman Mach. Works*, 89 Ill. App. 159. The fact that a deed is also acknowledged by those who are not grantors but to whom the deed ought to be delivered, as, for instance, the trustees, does not vitiate the certificate if otherwise sufficient: *Bradford v. Dawson*, 2 Ala. 203. And it is held that appending the words "special deputy" to the signature of the officer signing the certificate was not material, since the word "special" could be regarded as surplusage: *Thompson v. Johnson*, 84 Tex. 548, 19 S. W. 784.

7. **Use of Pen Scratch to Indicate Elimination of Certain Matter from Printed Form.**—In *Farrell v. Palestine Loan Assn.* (Tex. Civ. App.), 30 S. W. 814, the certificate recited: "On this day personally appeared Mrs. Sarah Farrell, wife of Ed. Farrell, known to me [proved to me on the oath of ———] to be the person whose name is signed" etc.; the certificate was filled up on a printed form and there was a pen scratch or line in ink along the blank portion of the clause within the brackets, but the words themselves were left intact. It was held that the pen scratch or line indicated that the words within the brackets were not intended to be a part of the certificate, and hence that the certificate was sufficient.

8. **Omission to Strike Out Optional Portion of Printed Form.**—In *Adams v. Pardue* (Tex. Civ. App.), 36 S. W. 1015, the certificate recited: "Personally appeared before me J. K. Adams and N. A. Adams, his wife, both known to me (or proved to me on the oath of ———) to be the persons." etc. The form was evidently copied from the statutory form, though parenthetical marks were substituted for brackets. The court said: "We think, under a fair construction of the language of the certificate as it stands, that it is evident the officer intended to certify that the parties to the deed were known to him, and that he did not intend to indicate that they were proved to be the parties named by any person or persons, because the marks are left in the certificate, which have the effect of cutting off those words from the balance of the certificate. They are simply left blank and may be treated as surplusage."

b. Leaving of Blank Spaces in the Certificate.

1. Relating to the Acknowledging Party.

A. **Whole Name of the Acknowledging Party.**—A certificate of acknowledgment in due form of law, except that the name of the acknowledging party is left blank, is not fatally defective if such name can be supplied and ascertained by a reference to the body of the instrument acknowledged: *Milner v. Nelson*, 86 Iowa, 452, 41 Am. St. Rep. 506, 53 N. W. 405, 19 L. R. A. 279. Thus where the omission of a husband's name in his wife's acknowledgment of a mortgage, executed by both, at the place in the form of the certificate at which it was to be inserted is left blank, it was held not to vitiate the acknowledgment if his identity is shown by the certificate, in connection with the mortgage: *Frederick v. Wilcox*, 119 Ala. 355, 72 Am. St. Rep. 925, 24 South. 582. And where the fore part of the certificate had the name of the husband and wife and the phraseology was that of an acknowledgment of the husband, while the latter part of the certificate was a printed form for the acknowledgment of the wife, which read as follows: "I do further certify that on this day voluntarily appeared before me ———, to me well known as the person whose name appears upon the within and foregoing deed and in the absence ——— said husband declared

that ——— had of her own free will," etc., the court held the certificate to be sufficient, since there were only two names on the deed, one male and one female, and they both appeared before the notary and he had certified to the husband's acknowledgment, using masculine pronouns: *Donohue v. Mills*, 41 Ark. 421. And where the recital was "Personally appeared ———, signer and sealer of the foregoing instrument," it was held sufficient, the court saying: "The grantor signs and seals an instrument and the witnesses 'subscribe' or 'attest' it. The words 'signer and sealer,' therefore, used in the same connection, fairly import that the grantor appeared and made the acknowledgment": *Sanford v. Bulkley*, 30 Conn. 344. Likewise the recital "Personally came ——— to me known to be the identical person whose name is affixed to the foregoing instrument as grantor, and acknowledged the execution of the same to be his voluntary act and deed," was held not fatal: *Milner v. Nelson*, 86 Iowa, 452, 41 Am. St. Rep. 506, 53 N. W. 405, 19 L. R. A. 279. And the recital, "Personally appeared ———, who is personally known to me to be the same person whose name is subscribed to the within and foregoing conveyance," etc., was held sufficient when construed in connection with the deed: *Wilcoxon v. Osborn*, 77 Mo. 621. And where the certificate recited: "Personally came before me ———, to me personally known to be the identical person described in and who executed the foregoing instrument and acknowledged," etc., it was held sufficient, since it was said that the omission was clearly a clerical error: *Larson v. Elsner*, 93 Minn. 303, 101 N. W. 307.

But a certificate reciting: "Personally appeared ———, who acknowledged that he did sign and seal the foregoing instrument, and that the same is his free act and deed," was held fatally defective in not showing that the mortgagor acknowledged the instrument: *Smith's Lessee v. Hunt*, 13 Ohio, 260, 42 Am. Dec. 201. And likewise a certificate reciting that the grantors personally appeared and acknowledged the deed, and proceeding with the acknowledgment of the wife, stated: "And the said ———, wife of the said ———, having been by me examined," etc., was held fatally defective: *Merritt v. Yates*, 71 Ill. 636, 23 Am. Rep. 128. And a certificate reciting, "Personally appeared ——— and acknowledged this instrument by him sealed and subscribed, to be his free act and deed," was held fatally defective: *Hayden v. Wescott*, 11 Conn. 129.

B. Christian or Given Name of the Acknowledging Party.—A certificate of acknowledgment by a married woman reciting the personal appearance of "——— Clark, wife of the said Lewis Clark," and that she, the said "——— Clark, acknowledged," etc., was held to sufficiently identify her as the wife of Lewis Clark: *Noel v. Clark*, 25 Tex. Civ. App. 136, 60 S. W. 356. But an acknowledgment of a deed by "——— Murray," without other designation of the person making the acknowledgment, was held fatally insufficient: *Hiss v. McCabe*, 45 Md. 77.

C. Pronouns Relative to the Acknowledging Party.—A certificate of acknowledgment which recited "And acknowledged that ——— had signed" it was held fatally defective, in that it omitted the word "he": *Huff v. Webb*, 64 Tex. 284. Likewise a certificate that grantor "Acknowledged that ——— executed the said deed," was held fatally defective: *Buell v. Irwin*, 24 Mich. 145. And where the recital in the certificate was "they each acknowledged to me that ——— signed and executed the within deed," the omission of the pronoun "they" was held a mere harmless clerical error: *Musgrove v. Bonser*, 5 Or. 313, 20 Am. Rep. 737. But where the recital was "Personally appeared R. J. Chard and E. S. Chard, his wife, who are to me known and acknowledged that ——— signed, executed and delivered," etc., the certificate was held fatally defective: *Rork v. Shields*, 16 Tex. Civ. App. 640, 42 S. W. 1032. But, on the other hand, where the recital was that "the said Adaline Caskey acknowledged such instrument to be ——— act and deed, and that she had willingly signed the same for the purpose and considerations therein expressed," it was held not fatal, since the clauses read together corrected the omission: *Gray v. Kauffman*, 82 Tex. 65, 17 S. W. 513. Likewise where the recital was "and each for themselves acknowledged the execution thereof to be ——— free and voluntary act for the purposes named," it was held that the omission of "their" was not fatal: *Garton v. Hudson-Kimberly Pub. Co.*, 8 Okla. 631, 58 Pac. 946.

2. Relating to the Fact of the Acknowledging Party Being Known to the Officer.—In *Tully v. Davis*, 30 Ill. 103, 83 Am. Dec. 179, the word "known" was omitted after the word "personally," and a blank space was left. The court observed: "Whether he [the officer] omitted this because he had not such knowledge or because of carelessness, we cannot know. Even if it were impossible to fill this blank with any other word or set of words and make sense, except the word 'known,' we should not be authorized so to fill the blank, for then we should do what the law has required the certifying officer to do."

But where the certificate recited that "A. P. Henkins and Elizabeth Henkins, his wife, whose names appear subscribed to the foregoing deed of conveyance as having executed the same, who ——— personally known to me to be the real persons," etc., it was held the blank space where the verb "are" should have been used did not vitiate the certificate, since the word "who" necessarily related to A. P. Henkins and Elizabeth Henkins, his wife, and the sentence, though awkward and ungrammatical without "are," was still sufficient to show its meaning: *Hartshorn v. Dawson*, 79 Ill. 108. And the omission of the word "be" in the clause "known to me to ——— the president of the Badger Mill & Mining Co.," was held not fatal, since it was a mere harmless clerical error, it being apparent that

the word omitted was the word "be": *Johnson v. Badger Mill etc. Co.*, 13 Nev. 351.

3. **Relating to the Fact of Acknowledgment or the Authentication of the Certificate.**—"The court cannot, by intendment or construction, fill a blank or supply a word. They can only decide on the meaning and import of the words made use of." Hence it was held that the omission in the recital: "Personally appeared Shopley Morgan, signer to the above and within written instrument —, to be his free act and deed," was fatal to the certificate: *Stanton v. Button*, 2 Conn. 527. But the omission in the phrase "before me, a notary public in and for said county personally, — F. A. Meurer, to me personally known to be the identical person," etc., was held a mere harmless clerical error, because it was said the statute did not require that the certificate shall set forth that the person making the acknowledgment did personally appear before the officer: *Scharfenburg v. Bishop*, 35 Iowa, 60. And in the recital "Without undue influence of her said —," it was held the omission was not fatal, since the word "husband" is the only word which will supply the blank: *Gorman v. Stanton*, 5 Mo. App. 585. Likewise the omission of the word "seal" in the sentence "and — of office" was held not fatal, since it was merely a clerical error: *Nichols v. Stewart*, 15 Tex. 226.

c. **Clerical Omission of Specific Words.**—The omission of "before me" after the word "acknowledged" was held immaterial, since it was presumed to have been acknowledged before the signing of the certificate: *Woods v. James*, 87 Ky. 511, 9 S. W. 513. And a certificate commencing "I, P. S. Wren, county clerk in and for Galveston County, on this day personally appeared I. L. Belbaze, known to me to be," etc., was held sufficient to show that J. L. Belbaze, appeared before P. S. Wren, the county clerk for the purpose of making the acknowledgment, although there was an omission of words specifically showing that fact: *Belbaze v. Ratto*, 69 Tex. 636, 7 S. W. 501. A certificate reciting "personally appeared Wilton Snowden, he being known to me to be the person who is named and described as and professing to be the attorney named in the letter or power of attorney contained in the foregoing mortgage or instrument of writing, to be the act and deed of the Maryland Inebriate Asylum, the party of the first part hereto," was held sufficient, even though the words "and acknowledged the said mortgage" were apparently omitted: *Barshor v. Stewart*, 54 Md. 376. And a certificate stating "Personally came before me, Geo. Crockett, clerk of the probate court in and for said county, whose name is subscribed to the within deed as such, who acknowledged," etc., was held good, although it omitted the name of the sheriff who signed the deed, since the omission of the name before the phrase "whose name," etc., was a mere clerical mistake: *Pickett v. Doe*, 5 Smedes & M. 470, 43 Am. Dec. 523.

And the omission of the word "his" before "free and voluntary act" was held not fatal, since the court said it was a mere clerical omission to fill the printed form: *Dickerson v. Davis*, 12 Iowa, 353. And likewise the omission of "they" between the words "being informed of the contents of the conveyance" and "executed the same," was held not fatal: *Tew v. Henderson*, 116 Ala. 545, 23 South. 128. And the omission of the words "and seal" was held not fatal: *Spitznagle v. Vanhessch*, 13 Neb. 338, 14 N. W. 417.

VII. Defects or Matters Relating to the Venue.

a. *In General*.—A certificate should show the place where the officer taking the acknowledgment exercised the act of taking it: *Connelly v. Bowie*, 6 Har. & J. 141; *In re Henschel*, 109 Fed. 861.

But where the statute setting forth the form of acknowledgment of a chattel mortgage does not require a venue to be stated, it was held that the portion of the certificate giving the venue may be rejected as surplusage: *Martin v. Heilman Mach. Works*, 89 Ill. App. 159. And where the capacity of the officer to receive acknowledgments is admitted, it is not material that the certificate of acknowledgment does not state that the act of sale occurred within his jurisdiction: *Morrison v. White*, 16 La. Ann. 100. And where the certificate shows the state and county and is signed by a justice of the peace, it will be presumed that the justice of the peace took the acknowledgment within his township: *Douglass v. Bishop*, 45 Kan. 200, 25 Pac. 628, 10 L. R. A. 857. The omission of the notary's place of residence in his certificate of acknowledgment of a mortgage is not such a material defect as to invalidate the mortgage, as against third persons: *Griffin v. Catlin*, 25 Wash. 474, 87 Am. St. Rep. 782, 65 Pac. 755. And where the venue showed "State of New York, City and County of New York, ss.," while the signature was "George W. Cassedy, Master in Chancery of New Jersey," the court allowed parol evidence to show that the certificate was actually executed in New Jersey: *Rogers v. Pell*, 47 App. Div. 240, 62 N. Y. Supp. 92.

b. *Omission of Certificate to Show Name of the State*.—A certificate of acknowledgment is not fatally defective because the officer states the venue "County of St. Louis, ss.," and nowhere states that the St. Louis county of which he declares himself to be a justice is in the state of Missouri: *Robidoux v. Cassilegi*, 10 Mo. App. 516. And where the caption of the certificate was merely "The State of ——— County, ss.," and the body of the certificate did not show the state or county, but the certificate was signed "Thos. B. Tilton, J. P.," and the grantors and grantee were each described as "Of the county of Montgomery and state of Ohio," and the property conveyed was likewise in said state and county, the court held that the phrase, "A justice of the peace within and for said county," could

be fairly understood as referring to the county named in the body of the instrument: *Beckel v. Petticrew*, 6 Ohio St. 247.

But where the caption of the certificate was merely "County of New York," and there was nothing in the deed to show that the acknowledgment was taken in New York state, it was held fatally defective: *Hardin v. Kirk*, 49 Ill. 153, 95 Am. Dec. 581. Though in a later case this same certificate was held sufficient because of the addition to it of a certificate of magistracy which showed that the officer who took the acknowledgment was a commissioner of deeds for the city, county and state of New York: *Hardin v. Osborne*, 60 Ill. 93.

And where the certificate recited "Lincoln, ss., Wiscasset," as the venue, it was held insufficient to show a judicially assignable locality, even though a notarial seal accompanied the signature of the person who described himself as a notary public: *Vance v. Schuyler*, 6 Ill. 160. Though in *Harding v. Curtis*, 45 Ill. 252, where the same acknowledgment was again before the court, it was held sufficient when aided by a certificate of the clerk of the county court showing that the official who had signed the certificate of acknowledgment was a notary public of Lincoln county, state of Massachusetts.

And where the instrument showed on its face that the grantor resided in Rockbridge county in the state of Virginia, it was held that "Rockbridge County," signed by two justices of the peace as the venue, was sufficiently shown to be in the state of Virginia: *Oney v. Clendenin*, 28 W. Va. 34. And where the deed shows that the grantors are "Of the county of Fayette in the state of Pennsylvania," and the venue of the certificate states "Fayette County, ss.," but the certificate is accompanied by a certificate under seal of the court of common pleas of Fayette county, state of Pennsylvania, to the effect that the justices signing the certificate of acknowledgment were justices of that county, it was held to show sufficiently that Fayette county is in Pennsylvania: *Adams v. Medsker*, 25 W. Va. 127.

c. **Omission of the Certificate to Show Name of the County.**—Where the acknowledgment is taken before a judge of probate and the venue gives only the name of the state, the certificate is valid because it will be presumed that the judge of probate took the acknowledgment within the limits of his county, the court taking judicial notice of his existence: *McCarver v. Herzberg*, 120 Ala. 523, 25 South. 3. But the omission of the certificate to show the county of the notary making the certificate was held a fatal defect, notwithstanding the presence of the seal: *Willard v. Cramer*, 36 Iowa, 22. But the recital of the venue as "State of New York" was held a sufficient venue to a certificate of acknowledgment by a commissioner of deeds, since it will be presumed that he exercised his office within the territorial limits for which he was appointed: *Carpenter v. Dexter*, 8 Wall. 513, 19 L. ed. 426. And the omission of the name

of the county in the caption of the certificate was held immaterial where the certificate shows that the acknowledgment was taken by Oscar L. Hawley, clerk of the county court with the delineation of a seal with the words "Will County Seal": *Chiniquy v. Catholic Bishop of Chicago*, 41 Ill. 149. And where the certificate of acknowledgment of a chattel mortgage recited, "State of Illinois, _____ County, ss. The mortgage was acknowledged before me by W. H. Luther and entered by me this 29th day of June A. D. 1891. Witness my hand and seal. Thomas Bradwell, Justice of the Peace. Town of South Chicago," with the seal of the justice, it was held to show a sufficient venue, since the court will take judicial notice of the county in which an incorporated town is located: *Gilbert v. National Cash Register Co.*, 176 Ill. 288, 52 N. E. 22; *Irving v. Brownell*, 11 Ill. 402.

d. **Showing Name of a County not Within the State.**—Where the venue was stated as "State of Wisconsin, County of St. Louis, ss.," but there was no such county in the state of Wisconsin, but notaries were allowed by the statute to take acknowledgments anywhere within the state, it was held that the recital "County of St. Louis" could be disregarded as being surplusage, and it was thereupon held that the certificate was sufficient: *Roussain v. Norton*, 53 Minn. 560, 55 N. W. 747.

VIII. Defects or Matters Relating to the Time of the Acknowledgment or the Date of the Certificate.

a. **In General.**—The want of a date to a certificate of acknowledgment will not, in general, vitiate the certificate, since it will be presumed to have been made at the time the deed purports to bear date in the absence of proof to the contrary: *Doe v. Peeples*, 1 Ga. 3; *Irving v. Brownell*, 11 Ill. 402; *Webb v. Huff*, 61 Tex. 677. Though it has also been said that the officer taking the acknowledgment must certify the same with the day and year when made: *Cover v. Manaway*, 115 Pa. St. 338, 2 Am. St. Rep. 552, 8 Atl. 393. So, also, in *Downing v. Gallagher*, 2 Serg. & R. 455, the certificate was held fatally defective for want of a date, but the court placed considerable weight upon the fact that the land described in the instrument lies in the county which was Bedford, afterward Huntingdon, and later Cambria, and hence that the deed may have been acknowledged after the land ceased to be in Bedford county and before a justice of the court of common pleas had power to take an acknowledgment of a deed conveying lands lying outside of his county.

b. **Time When Acknowledgment may be Taken or Certificate Made.**—An acknowledgment may be taken at any time where no period is designated by the statute: *Johnson v. McGehee*, 1 Ala. 186; *Smith v. Porter*, 10 Gray, 66. In *Grant v. Oliver*, 91 Cal. 158, 27 Pac. 596, 861, the certificate showed that the deed was acknowledged on August 24, 1885, while the certificate of the notary was not made

until October 11, 1887. The court held that fact to be immaterial, though there was no question of notice, actual or constructive, involved in the case.

Where the deed was acknowledged in open court, the acknowledgment must be indorsed by the clerk on the deed itself, and it was held that a clerk of another court could not, after a lapse of fifty years, indorse the acknowledgment upon the deed: *Allen v. King*, 35 Mo. 216. In *Murphy's Lessee v. McCleary*, 3 Yeates, 405, it was held that a sheriff's deed cannot be acknowledged before the return day named in the writ.

c. **Taking of Acknowledgment on Sunday.**—An acknowledgment is not void because taken on Sunday: *Lucas v. Larkin*, 85 Tenn. 355, 3 S. W. 647. And in *Tracy v. Jenks*, 15 Pick. 465, it was held that the fact that a mortgage was made, executed, acknowledged, and recorded on Sunday evening was not material. The court, however, in referring to the statute prohibiting work and business on Sunday, placed considerable weight upon the fact that the prohibitory regulation extended merely to the time included between the midnight preceding and the sun setting of the same day, and the fact that it appeared that the acts above named were executed about 10 P. M. The case does not show the form of certificate used.

d. **Incomplete Date, or Recital of Impossible Date.**—Where the deed was dated May 14, 1811, and the acknowledgment May 14th, without stating the year, but the deed was recorded May 29, 1811, it was held that the defective date was not material: *Galusha v. Sinclear*, 3 Vt. 394. And where the deed was dated August 6, 1872, and the certificate of acknowledgment certified "that on this — day of Aug., A. D. 1872," etc., but the certificate of the clerk of the superior court, which was dated August 6, 1872, followed, certifying that the officer "before whom the annexed acknowledgment and affidavit were made was, at the time of so doing," a duly commissioned officer, and the instrument was recorded on August 6, 1872, it was held that by a reference to the whole instrument, including the magistracy certificate and certificate of recordation, that the certificate of acknowledgment was sufficient: *Kelly v. Rosenstock*, 45 Md. 389. And where the deed was dated March 4, 1899, and the certificate of acknowledgment recited "On this 3d day of March, A. D. 189—, before me," etc., the court held that error was a harmless clerical error, and that a reference to the deed could be made to correct the error, but nothing was said with respect to the failure to fill the blank space after 189: *Mosier v. Momsen*, 13 Okla. 41, 74 Pac. 905.

e. **Dating Certificate Prior to Date Set Forth as that of the Instrument Acknowledged.**—In *Fisher v. Butcher*, 19 Ohio, 406, 53 Am. Dec. 436, the deed was dated January 6, 1842, while the certificate of acknowledgment was dated January 6, 1840. The court said: "The paper itself sufficiently shows an acknowledgment of the deed after

its execution, and the contradiction of dates arises from a clerical mistake. An examination of the certificate will show how the mistake occurred. It is a printed form, with a blank after the word 'forty' for the insertion of the units. This blank was omitted to be filled and makes the date read 'eighteen hundred and forty.' "

The case of *Mosier v. Momsen*, 13 Okla. 41, 74 Pac. 905, referred to in the preceding subdivision was one in which a mistake similar to the above occurred, and the certificate was sustained.

Where the deed was dated June 17, 1856, and purported to be acknowledged June 9, 1856, and objection was raised to the deed because it purported to be acknowledged before its date, Justice Cooley observed: "But this discrepancy was no reason for rejecting the deed. The date of a deed is not very important: the acknowledgment authenticates the instrument and we need not speculate upon the reason for the deed appearing to be dated later."

In *Yorty v. Paine*, 62 Wis. 154, 22 N. W. 137, the fact that a tax deed was executed February 5, 1881, while the certificate of acknowledgment was dated February 5, 1880, was held not to constitute a fatal defect.

f. **Recital in Certificate of the Acknowledgment Having Occurred on Date Later Than that of the Certificate.**—In *Homer v. Schonfeld*, 84 Ala. 313, 4 South. 105, the certificate of acknowledgment, which was dated August 7, 1883, recited that the acknowledgment was made September 4, 1883, but the court held that the date of September 4, 1883, would be held to be the true date and the certificate was sustained.

IX. Defects or Matters Relating to the Officer Taking the Acknowledgment.

a. Right of the Officer to Take the Acknowledgment.

1. **Parties to the Instrument.**—We do not propose to discuss the subject of what interest of an officer will disqualify him from taking an acknowledgment because such a discussion, in so far as the disqualification is not apparent on the face of the certificate, would be foreign to this note. For a discussion of the subject see the monographic note to *Cooper v. Hamilton*, 56 Am. St. Rep. 798.

In *Lee v. Murphy*, 119 Cal. 364, 51 Pac. 549, 955, it was held that the presumption of identity of person from identity of name will be indulged where the name of the officer taking the acknowledgment and the names of one of the parties to the instrument are identical. The case of *Stapleton v. Pease*, 2 Mont. 550, was also to the same effect.

Hence it will be seen that where the disqualification of the officer is apparent from a reading of the certificate, the question whether the officer taking the acknowledgment had a right to take it may well be considered as a matter which may constitute a defective certificate.

Thus it is held that an acknowledgment taken before one of the parties to the instrument is not good: *Green v. Abraham*, 43 Ark. 420; *Hubble v. Wright*, 23 Ind. 322; *Holden v. Brimage*, 72 Miss. 228, 18 South. 383; likewise that the grantee of a deed cannot take or certify an acknowledgment of the instrument: *Greenlee v. Smith*, 4 Kan. App. 733, 46 Pac. 543; *Iron Belt etc. Assn. v. Groves*, 96 Va. 138, 31 S. E. 23; *Hunton v. Wood*, 101 Va. 54, 43 S. E. 186; that a mortgage cannot be acknowledged before the mortgagee: *Lee v. Murphy*, 119 Cal. 364, 51 Pac. 549, 955; *Amick v. Woodworth*, 58 Ohio St. 86, 50 N. E. 437; and that the trustee named in a deed of trust cannot take the acknowledgment of the grantors therein: *Bussell v. Bosworth*, 106 Ill. App. 314; *Dail v. Moore*, 51 Mo. 589; *Rothschild v. Daugher*, 85 Tex. 332, 34 Am. St. Rep. 811, 20 S. W. 142, 16 L. R. A. 719; *Bowden v. Parrish*, 86 Va. 67, 19 Am. St. Rep. 873, 9 S. E. 616; *Nicholson v. Gloucester Charity School*, 93 Va. 101, 24 S. E. 899; *Travener v. Barrett*, 21 W. Va. 656.

But the mere fact that the trust deed describes the trustee as "L. Triplett, Jr.," and the certificate of acknowledgment commences "L. L. Triplett, Jr., a notary public," etc., but is signed "L. Triplett, N. P.," does not show that the trustee and the person taking the acknowledgment are one and the same person: *Corey v. Moore*, 86 Va. 721, 11 S. E. 114.

Though a grantee cannot take and certify the acknowledgment of his grantor, still where there are several grantees, each taking a separate and defined interest, the deed should be treated as if made separately to each of such grantees, and such an acknowledgment is good as to all of such grantees except the one taking it: *Murray v. Tulare Irr. Co.*, 120 Cal. 311, 49 Pac. 563, 52 Pac. 586; and it has been held that the acknowledgment of a deed of trust before one of the trustees is valid as to the other trustees: *Darst v. Gale*, 83 Ill. 136.

Where only the county clerk and his deputies are authorized to take acknowledgments of deeds, the clerk may take the acknowledgment of a deed in which he is the grantee: *Stevenson v. Brashee*, 90 Ky. 23, 13 S. W. 242.

A United States marshal may properly acknowledge a deed before the court of which he is an officer: *Baker v. Underwood*, 63 Mo. 384; and it is no objection to a sheriff's deed that the judge of the court before which it was acknowledged is the grantee: *Lewis v. Curry*, 74 Mo. 49. But it was also held that a clerk of a court cannot take the acknowledgment of a deed executed by him: *Leftwich v. Richmond*, 100 Va. 164, 40 S. E. 651; or of a deed executed to him: *Davis v. Beazley*, 75 Va. 491.

2. **Deputy Officers.**—The question whether a certificate is improperly taken or improperly certified by a deputy is one which is naturally presented by the certificate itself. The decisions upon the question are not very numerous and the subject in whose name a deputy should act having been treated in the recent monographic note to

Wilkerson v. Dennison, 106 Am. St. Rep. 825, we shall not discuss the matter in this note.

b. **Necessity for Setting Forth Official Character of Officer Taking the Acknowledgment.**—The officer taking the acknowledgment should in certifying to the acknowledgment set forth his official character: *Connelly v. Bowie*, 6 Har. & J. 141; *Johnston v. Haines*, 2 Ohio, 55, 15 Am. Dec. 533. Such official character should be shown in the body of the certificate or appended to the signature of the officer: *Coffey v. Hendricks*, 66 Tex. 676, 2 S. W. 47. Though the certificate of itself, or aided by the instrument acknowledged, should show the title and character of the officer taking the acknowledgment, still, it may be shown by the initials of the officer as well as if the title were fully written out. And if the certificate states the title of an officer not authorized to take acknowledgments, but the initials standing for the officer's official character, or read in the connection with the instrument acknowledged, show an officer entitled to take acknowledgments, the certificate will be deemed sufficient: *Summer v. Mitchell*, 29 Fla. 179, 30 Am. St. Rep. 106, 10 South. 562, 14 L. R. A. 815. But it has been held where the body of the certificate purports to be an acknowledgment in the county court and an examination of the wife before some member of that court, and the certificate was signed by a judge of the superior court that the discrepancy is fatal to the certificate: *Burbee v. Taylor*, 6 Jones, 40. But where the officer taking the acknowledgment describes himself as an officer authorized to take acknowledgments, he need not state the fact that he is so authorized: *Livingston's Lessee v. McDonald*, 9 Ohio, 168. Likewise the mere omission of a judge of a court in New York to certify that his court was one of record does not invalidate his certificate where the laws of New York show the court to be one of record: *Pierce v. Hakes*, 23 Pa. St. 231.

c. **What Constitutes a Sufficient Designation of Official Character of the Officer Taking the Acknowledgment.**

1. **Notaries Public.**—The omission of a notary public to write the name of his office under his signature does not vitiate his certificate of acknowledgment where he has described himself in the body of the certificate as a notary public: *Lake Erie etc. R. Co. v. Whitham*, 155 Ill. 514, 46 Am. St. Rep. 355, 40 N. E. 1014, 28 L. R. A. 612. And where the certificate recited that Frank Patch was a notary public in and for O'Brien county, it was sufficient for the notary to sign "Frank Patch, Notary Public," without again designating the county: *Colby v. McOmber*, 71 Iowa, 469, 32 N. W. 459. The letters "N. P." give official character to the certificate, notwithstanding that the words "notary public" are not in the body of the certificate: *Leech v. Karthouse*, 141 Ala. 509, 37 South. 696. And where the venue of the certificate of acknowledgment of articles of incorporation shows the name of the state and county and the signa-

ture of the officer is followed by the words "notary public," it is a sufficient official designation: *Smith v. Sherman*, 113 Iowa, 601, 85 N. W. 747. And where the certificate, though purporting to be under the seal of a notary, had no seal attached, but was recorded, inasmuch as the notarial seal was by law required to have thereon the name of the county, it will be presumed that the certificate was made by an officer of the proper county: *Stephens v. Motl*, 81 Tex. 115, 16 S. W. 731. And where the certificate commenced "State of Texas, County of Hopkins," and recited the appearance of the parties before the "undersigned authority," and ended as follows: "Witness my hand and official seal at Douglass this 6th day of Oct., A. D. 1854. John B. Clute, Notary Public, N. C.," it was not a fatal discrepancy: *Blythe v. Houston*, 46 Tex. 65.

Where the certificate recited "State of Texas, Runnels County. Before me, Geo. W. Caldwell, a notary public in and for said county," etc., but ended with "Given under my hand and seal of office this 5th day of June, 1882. Geo. W. Caldwell, Notary Public, Bexar County, Texas," it showed that the acknowledgment was taken before an officer of Bexar county: *Alexander v. Houghton*, 86 Tex. 702, 26 S. W. 937. Likewise, if the caption shows an acknowledgment taken in the county of Calhoun, state of Michigan, but the officer's name is followed by the words "Notary Public in and for Eaton County," it is sufficient, since it shows that the notary was one for Eaton county: *Lamb v. Lamb* (Mich.), 102 N. W. 645. And the fact that in his certificate the notary described himself as a notary public within and for the county of Livingston, but appended to his name "Notary Public, Howard County," was not sufficient to invalidate the certificate: *Merchants' Bank v. Harrison*, 39 Mo. 433, 93 Am. Dec. 285.

But where the certificate commenced, "State of California, City and County of San Francisco, ss. On this 8th day of Dec., A. D. 1879, before me, H. I. Tillotson, a notary public in and for said city and county," and was signed "H. I. Tillotson, Notary Public," but the closing clause of the certificate recited that the official has hereunto "affixed my official seal," but the seal affixed was one, the impression of which read "Seal H. I. Tillotson, Notary Public, Contra Costa County," it was held that the certificate was fatally defective in failing to show "the name and quality of the officer taking the acknowledgment": *Emeric v. Alvarado*, 90 Cal. 444, 27 Pac. 356. And where the certificate recited "I. D. W. Coan, a notary public in said city and for said county and the state aforesaid, do hereby certify," etc., but was signed "D. W. Coan," with a notarial seal stating "D. W. Cone, Notary Public, Elgin, Illinois," and it did not otherwise appear what city, county or state was meant, the court held the certificate fatally defective: *Greenwood v. Jenswold*, 69 Iowa, 53, 28 N. W. 433.

2. **County Clerks, Commissioners, Clerks of Court Commissioners and Masters in Chancery and Registers of Deeds.**—A certificate of a county clerk is not sufficient where it does not appear that he was the clerk of a court of record: *Donahue v. Klassner*, 22 Mich. 252. But a certificate which describes the officer as "the clerk of Harris county," with the abbreviations "Clk. H. C." following his name, is sufficient to show his official character: *Riviere v. Wilkens*, 31 Tex. Civ. App. 454, 72 S. W. 608. Where the body of the certificate described the officer as "a commissioner for the state of Michigan within and for said county," and was signed "Commissioner for the state of Michigan in New York," with his official seal attached, it was sufficient, notwithstanding it did not recite the source of his power or that he had duly qualified: *Sparrow v. Hovey*, 41 Mich. 708, 3 N. W. 198. The description of an official as "circuit clerk" has been held sufficient to identify the officer as clerk of the circuit court: *Sidwell v. Birney*, 69 Mo. 144. But a certificate which does not show that the officer is a clerk "of a court of record," but merely recites that he is "clerk of the county" and is attested by the "seal of the county," was held fatally defective: *Shephard v. Caryl*, 19 Ill. 313.

If a deed is entitled to record upon being acknowledged before "a commissioner in chancery of a court of record," and under the laws of the state there are no such officers except commissioners in chancery of the circuit and corporation courts, which are courts of record, a deed should be admitted to record where its certificate of acknowledgment defines the territorial jurisdiction of the officer taking it to have been a city named, certifies in the body of the certificate that it was made before him as a commissioner in chancery, and there was no circuit court at the time for such city: *Hurst v. Leckie*, 97 Va. 550, 75 Am. St. Rep. 798, 34 S. E. 464; and where the caption of the certificate was "State of New York, ss.," and the signature attached to the certificate was "Gideon Hawley, master in chancery," it sufficiently showed the official character of the master in chancery: *Secrist v. Green*, 3 Wall. 744, 18 L. ed. 153. But in *Hayes v. Banks*, 132 Ala. 354, 31 South. 464, the court said: "A chancery clerk of another state is not designated in our statute as one of the officers authorized to take acknowledgments of deeds; and, in the absence of an official seal as notary public, or other evidence of notarial powers, the mere fact that he styles himself 'ex officio notary public' does not aid the matter."

In *McCauslin v. McGuire*, 14 Kan. 234, it was held not necessary to set forth the name of the officer in the body of the certificate where he certifies "that before me, a register of deeds," etc., and then signs the certificate with his name thus: "L. J. Trover, Register of Deeds."

3. **Justices of the Peace.**—The official designation "Justice of the peace of Hancock Co.," may be shown by the initials "J. P. H.

C."': *Russ v. Wingate*, 30 Miss. 440. In *Final v. Backus*, 18 Mich. 218, the initials "J. P." were held a sufficient official designation to a certificate of acknowledgment made in New York, where the certificate was accompanied by another certificate attesting to the official character of the person employing the initials.

Where the certificate recited, "Given under my hand and notarial seal this 20th day of July, A. D. 1878. John D. Keedy, Justice of the Peace," the use of the word "notarial" is surplusage and does not affect the validity of the certificate: *Foster v. Latham*, 21 Ill. App. 165. And where the certificate is signed by two aldermen of the city of New York it is in Virginia sufficient, since it corresponded to the official designation of justices of the peace as used in Virginia: *Welles v. Cole*, 6 Gratt. 645.

4. **Officers of Foreign Countries.**—In *Bowser v. Cravener*, 56 Pa. St. 182, a certificate reciting that the officer before whom the acknowledgment was taken was the "Magistrate in the chief office of said town of Carlò, in the county of Carlo, Ireland," and signed "E. Butler, Sovereign of Carlo, Ireland," accompanied by the seal of the town, was held a sufficient official designation.

5. **Effect Where Officer Sets Forth Several Official Designations.**—It is not material that the officer describes himself as a justice of the peace and notary public: *Buntyn v. Shippers' Compress Co.*, 63 Miss. 94; and the fact that a justice of the peace signs the certificate as justice and alderman will not vitiate, since the word "alderman" may be regarded as surplusage: *Wilson v. Braden*, 56 W. Va. 372, 107 Am. St. Rep. 927, 49 S. E. 409. So, also, where the clerk of the circuit court is also ex-officio recorder of deeds, the addition to his signature of the word "recorder" is not fatal, since the designation of recorder indicates that he was also circuit clerk, and, with the recitals in the certificate, make it clear it was taken as clerk: *Owen v. Baker*, 101 Mo. 407, 20 Am. St. Rep. 618, 14 S. W. 175.

d. **Necessity for Signature of Officer Taking the Acknowledgment to be Attached to the Certificate.**—The omission of the officer certifying to the acknowledgment to sign the certificate of acknowledgment is a fatal defect: *Marston v. Brashaw*, 18 Mich. 81, 100 Am. Dec. 152; *Hout v. Hout*, 20 Ohio St. 119; *Andrews v. Marshall*, 26 Tex. 212. An unsigned certificate of acknowledgment is void, even though it purports to be attested by the seal of a notary public: *Clark v. Wilson*, 127 Ill. 449, 11 Am. St. Rep. 143, 19 N. E. 860. But where the certificate recited, "Before me, Benjamin Pinney, Commissioner of Deeds for the State of Illinois," it was sufficiently signed. "It is just as reasonable to say this was a signature as to say it was a mere recital. The presumption of law is in favor of the regularity of official action."

But in *Carlisle v. Carlisle*, 78 Ala. 542, it was decided that a recital of an officer's name and style of office in the blank spaces at the beginning of a printed form of certificate of acknowledgment will

not be deemed to constitute his official signature where he has omitted to sign at the end of the certificate. The fact that the notary public signs his name to the certificate as "W. F. Bill," and his name so appears in the impression made by his notarial seal, but the certificate of the Secretary of State and copy of his notarial commission attached thereto recite his name as "Wilbur F. Bill," will not invalidate the certificate of acknowledgment: *Denny v. Ashley*, 12 Colo. 165, 20 Pac. 331; and where a certificate to an acknowledgment in open court by one W. L. H. Frazier, administrator de bonis non, etc., ends as follows: "In testimony whereof I, W. L. H. Frazier, judge of said court, have hereunto set my hand," etc., but is signed "M. L. Wyrick, Probate Judge," the signature to the certificate is sufficient: *Agan v. Shannon*, 103 Mo. 661, 15 S. W. 757. And where the certificate recited, "that on the thirty-first day of May, 1882, before me, the undersigned, a notary public in and for said county, personally came," but did not recite the name of the notary though it was signed by him, it complied with the statute requiring that the certificate shall set forth the title of the court or officer before whom the acknowledgment was made: *Fogg v. Holcomb*, 64 Iowa, 621, 21 N. W. 111.

In *Wright v. Wilson*, 17 Mich. 192, the certificate recited that the acknowledgment of "the above-named John M. Ellis" was made out in due form, and ended with the recital: "Given under my hand this 6th day of Aug. A. D. 1836." Immediately following was the certificate of the separate examination of Josephena M. Ellis, the wife of the said John M. Ellis; the first certificate was not signed but the certificate immediately underneath it was signed. The court determined that the two certificates were in effect one certificate only, and that the signature at the end of the second was intended to be the signature to both.

a. Necessity for Authentication by the Officer's Seal of Office.—The question whether a seal must be attached to the signature of the officer taking the acknowledgment is a matter of statute: *Stark v. Barrett*, 15 Cal. 361. The certificate need not be under seal unless the statute authorizing the official to take it expressly requires it: *Thompson v. Morgan*, 6 Minn. 292. Sometimes the statute does not require judicial officers to use a seal; if so, none is required to be attached to a certificate of acknowledgment: *Powers v. Bryant*, 7 Port. 9.

The use of a seal by the officer taking the acknowledgment is required under the statutes of most of the states: *Worsham v. Freeman*, 34 Ark. 55; *Mason v. Brock*, 12 Ill. 273, 52 Am. Dec. 490; *Booth v. Cook*, 20 Ill. 129; *Moore v. Titman*, 33 Ill. 358; *Watson v. Clendenin*, 6 Blatchf. 477; *Pitts v. Seavey*, 88 Iowa, 336, 55 N. W. 480; *Koch v. West*, 118 Iowa, 468, 96 Am. St. Rep. 394, 92 N. W. 663; *Meskimen v. Day*, 35 Kan. 46, 10 Pac. 14; *Miller v. Henshaw*, 4 Dana, 325; *Kemper v. Hughes*, 7 B. Mon. 255; *Blanchard v. Taylor's Heirs*, 7 B. Mon.

645; *Herd v. Cist* (Ky.), 12 S. W. 466; *Buell v. Irwin*, 24 Mich. 145; *Pope v. Cutter*, 34 Mich. 150; *City of Grand Rapids v. Hastings*, 36 Mich. 122; *Thompson v. Scheid*, 39 Minn. 102, 12 Am. St. Rep. 619, 38 N. W. 801; *Geary v. City of Kansas*, 61 Mo. 378; *Fund Commissioners v. Glass*, 17 Ohio, 542; *Barney v. Sutton*, 2 Watts, 31; *Texas Land Co. v. Williams*, 51 Tex. 51; *Richards v. Randolph*, 5 Mason, 115.

If an official seal is required, a private seal is insufficient: *Sweigart v. Frey*, 8 Serg. & R. 299. Of course if the statutes authorize the use of a private seal and the officer recites that he had not obtained an official seal, the use of a private seal will not invalidate the certificate: *Fogarty v. Sawyer*, 23 Cal. 570.

In *De Graw v. King*, 28 Minn. 118, 9 N. W. 636, there were two certificates following each other, both by the same notary, but there was only one seal attached. The court held that the one seal was not sufficient for both certificates.

f. **What Constitutes the Use of a Sufficient Seal by the Officer.**—Anciently, seals were required to be impressed upon wax or some other tenacious substances: *Pillow v. Roberts*, 15 How. 472, 14 L. ed. 228.

In *Collins v. Boyd*, 5 Dana, 316, on an objection that the clerk of the county court had not affixed his seal of office, the court said: "We are not disposed to stick to the letter in the construction of the statute. If that seal is annexed by the clerk which he has been accustomed to use, it is, *pro hac vice*, the seal of his office, and comes within the contemplation of the legislative requisition. We will presume that his own private seal which he annexes is the seal which has been recognized and adopted by his court as his official seal for the occasion, and as such it subserves all the purposes of authentication under our statute."

But the seal of a county clerk cannot be used as a substitute for a notarial seal, even by mistake: *McKellar v. Peck*, 39 Tex. 331.

On the other hand, the fact that the emblems and devices required by the statute to be on a notary's seal are absent therefrom does not invalidate the certificate of acknowledgment authenticated by such a seal: *Sonfield v. Thompson*, 42 Ark. 46, 48 Am. Rep. 49. And, in the absence of a statute requiring a commissioner for Texas to provide himself with a seal with a star with five points in the center of the seal, the use of a seal in which the name of Texas appears to be written on the impression, and which contains no such star, is not fatal to the certificate: *Davis v. Roosevelt*, 53 Tex. 305. A seal with the words "S. Steinhammer, Commissioner for ———, in the State of New York," impressed on the paper of the instrument, with the word "Wisconsin" written with a pen in the blank space of the impression, was held not to constitute a sufficient seal to give effect to the certificate of acknowledgment: *Oelbermann v. Ide*, 28 Wis. 669, 57 Am. St. Rep. 947, 68 N. W. 393. The decision in *Gage v. Dubuque etc. R. Co.*, 11 Iowa, 310, 77 Am. Dec. 145, also held a

somewhat similar impression with the name of the state written in not to constitute a seal, though the question did not arise with respect to an acknowledgment.

It is not a material defect that the impression of the seal shows only the first name "Edwin" of the officer describing himself as the "Commissioner for the State of Michigan in New York," since it frequently happens that a clear and distinct impression is not made: *Sparrow v. Hovey*, 41 Mich. 708, 3 N. W. 198.

A horizontal slit in the parchment upon which the instrument is written, with a ribbon drawn through it, opposite the name of the justice before whom the acknowledgment was made, does not constitute a sufficient seal: *Duncan v. Duncan*, 1 Watts, 322. And where, at the place where the notarial seal is usually placed, there is a circle surrounded by a reddish discoloration of the paper, together with small particles of red sealing wax adhering, but no impress of the seal discernible, it is a question for the jury whether the notary had used a seal: *Stooksberry v. Swan* (Tex. Civ. App.), 21 S. W. 694.

In *Gilbreath v. Dilday*, 152 Ill. 207, 38 N. E. 572, the court said: "It is not requisite that the seal of the justice should follow the name, and its appearance in the certificate of acknowledgment preceding the name is sufficient."

And where the notarial seal is impressed on the opposite side of the paper on which the certificate was written, the certificate being written on the other side of the sheet of paper upon which the instrument was written, but the impression of the seal is distinctly visible on the side of the sheet whereon the certificate was written, though at the opposite end of the sheet, and there is no other certificate to which the seal could apply, it refers to the certificate of acknowledgment and constitutes a sufficient seal: *Evans v. Smith*, 43 Minn. 59, 44 N. W. 880.

X. Defects or Matters Relating to the Party Making the Acknowledgment or to His Identity.

a. **Necessity to Show that the Acknowledging Party is Known to the Officer Taking His Acknowledgment.**—The identity of a person who acknowledges the execution of an instrument is a matter of substance, and when the law requires that the means by which such identity is known to the officer before whom the instrument is acknowledged be stated, the omission to so state it in the certificate is fatal: *Smith v. Garden*, 28 Wis. 685. It is intended by requiring the officer to certify that the person examined is the person or was made known to the officer, to prevent another from personating the person who is to make the acknowledgment: *Gates v. Hester*, 81 Ala. 357, 1 South. 848. In *Short v. Coulee*, 28 Ill. 219, it was said: "It must be perceived from all the legislation upon this subject that one fact must prominently appear in the certificate, that the party executing the deed did in fact acknowledge it to the officer to be his

deed. Nothing less than this will satisfy the requirements of the statute." Hence the general rule is that the certificate must show that the person making the acknowledgment was known to the officer to be the person whose name is signed to the instrument as having executed it: *Davidson v. Alabama etc. Steel Co.*, 109 Ala. 383, 19 South. 390; *Lindley v. Smith*, 46 Ill. 523; *Murphy v. Williamson*, 85 Ill. 149; *Gage v. Wheeler*, 129 Ill. 197, 21 N. E. 1075; *Callaway v. Fash*, 50 Mo. 420; *Cannon v. Deming*, 3 S. Dak. 421, 53 N. W. 863; *McAnulty v. Ellison*, 6 Tex. Civ. App. 277, 71 S. W. 670; or that the acknowledging party was either known to the officer or proved to him to be the party whose name is subscribed to the instrument: *Hayden v. Moffatt*, 74 Tex. 647, 15 Am. St. Rep. 866, 12 S. W. 820; *Frost v. Erath Cattle Co.*, 81 Tex. 505, 26 Am. St. Rep. 831, 17 S. W. 52. But where the statute does not require it, the recital is not necessary. Thus in *Northrop v. Wright*, 7 Hill, 476, it was determined under the laws which were in force previous to the act of February, 1797, relating to acknowledgment of deeds, that it was not necessary for the officer to recite in his certificate of acknowledgment that he knew the person making the acknowledgment or that he had proof of his identity.

b. What Constitutes a Sufficient Showing That the Acknowledging Party was Known to the Officer.

1. **In General.**—Where the certificate omits the name of the grantor in the phrase, "On this day came before me the undersigned, a justice within and for the county aforesaid, to me personally well known to be the person whose name is subscribed to the deed as a party thereto," but refers to the grantor by name in the certificate as to the acknowledgment of the wife, it is a sufficient identification: *Magness v. Arnold*, 31 Ark. 103. Likewise the recital, "Personally came and appeared Chas. B. Hicks, to me personally known, who acknowledged," etc., sufficiently identifies the person executing the instrument: *First Nat. Bank v. Hicks*, 24 Tex. Civ. App. 269, 59 S. W. 842. And it is a substantial compliance with the statute where the officer certifies that at a certain time "Came Julia P. Munger, who is personally known to me to be the identical person whose name is affixed to the foregoing instrument of writing as grantor and duly acknowledges that she executed the same and for the purposes therein set forth": *Munger v. Baldrige*, 41 Kan. 236, 13 Am. St. Rep. 273, 21 Pac. 159. The use of the words "within named," referring to the parties, and the words "within conveyance," may be used to show that the persons who appeared before the officer were the grantors: *Bell v. Evans*, 10 Iowa, 353. So, also, the recital "Personally came William M. Campbell, to me well known, and acknowledged he signed and delivered the foregoing transfers for the purposes and considerations therein stated," substantially identifies the grantor: *Hays v. Tilson*, 45 Tex. Civ. App. 479, 45 S. W. 479. And where the acknowledging officer was also a subscribing wit-

ness, that fact may be called in to aid his certificate reciting that "the above-named William T. Davenport, who has signed, sealed, and delivered the above instrument of writing, personally appeared," before him and acknowledged the instrument, in order to show the identity of the grantor: *Carpenter v. Dexter*, 8 Wall. 513, 19 L. ed. 426.

And where a sheriff's deed is signed "John H. McKenny, Sheriff of Des Moines County, I. T.," and the officer certifies that "John H. McKenny, Sheriff of the County of Des Moines aforesaid," whose name is subscribed to the above instrument, "appeared before him and acknowledged that he executed the same as sheriff as aforesaid," it shows that he executed the same as a party thereto: *Cavender v. Heirs of Smith*, 5 Iowa, 157.

A recital, "Subscribed and acknowledged before me this 8th day of July, 1872," is fatally defective in not showing what was acknowledged nor by whom any acknowledgment was made nor the appearance of any acknowledging party: *Myers v. Boyd*, 96 Pa. St. 427.

2. Identity of Acknowledging Party by Proof.—Under the Missouri statute, where the party making the acknowledgment is not known to the officer, he must prove his identity by at least two witnesses whose names and residences must be inserted in the certificate; hence a certificate merely reciting that the grantor was "satisfactorily identified" is fatally defective: *Riehl v. Noel*, 89 Mo. App. 178. But where the certificate recites the appearance of the grantors before the officer, and that at the same time there appeared a witness, who was named, to the officer known, who being by him duly sworn, testified that he resided in the city and county of New York, that he knew the grantors to be the individuals described in and whom he saw execute the within deed, this is sufficient to show that the officer knew or had satisfactory evidence that the persons making the acknowledgment were the grantors: *Ritter v. Worth*, 58 N. Y. 627.

3. Effect Where Certificate Recites that Identity is Known "by Introduction."—In *Lindley v. Lindley* (Tex. Civ. App.), 50 S. W. 159, the certificate recited "Known to me by introduction by C. W. Deems." The court said: "Had the words, 'by introduction by C. W. Deems' been left out, the acknowledgment would have read 'known to me to be the person,' etc., conforming to the statute. These words merely indicated how the grantor become known to him, did not state when the introduction was made, nor how long the grantor had been known to him. We think these words should be treated as surplusage, and not given the effect to destroy the force of the statutory language used in the acknowledgment. All that is required by the statute is stated in the acknowledgment, and because there is more, which is not necessarily inconsistent, the acknowledgment should not be held bad."

c. **Effect of Omission of Such Words as "Known," "Personally Known," "Personally Acquainted," and the Like.**—A failure to use the word "known" or some word of equivalent import in the certificate is fatal where the statute requires the officer to certify that the party acknowledging the instrument is known to him: *Rogers v. Adams*, 66 Ala. 600; *Blain v. Rivard*, 19 Ill. App. 477; *Hill v. Smith*, 6 Tex. Civ. App. 312, 25 S. W. 1079. In *Penny v. British etc. Mortgage Co.*, 132 Ala. 357, 31 South. 96, it was said that it was essential to recite in the certificate that the party was "known" or "made known," or words of like import, since these words are the quasi judicial ascertainment of the fact that the person making the acknowledgment is the proper person to acknowledge the instrument.

A certificate reciting "Personally appeared Constant A. Duprey, to be the individual described in and who executed the foregoing instrument," etc., is fatally defective, in that it failed to show that person was known to the officer: *Wolf v. Fogarty*, 6 Cal. 224, 65 Am. Dec. 509. But a certificate reciting that "Samuel S. Haight, who is to me well known personally appeared before me and acknowledged," etc., is sufficient, though it does not state that the person "was well known to the officer to be the person described in and who executed the mortgage": *Troup v. Haight*, *Hopk. Ch.* 239. And where the certificate recites that the acknowledging party is "to me well known," it is sufficient, though it omits to recite "To me known to be the person described in and who executed," etc., but the decision was based largely on the ground of the general practice of using the form at bar: *Jackson v. Gumaer*, 2 Cow. 552. The decision in *Miller v. Link*, 2 *Thomp. & C.* 86, was to the contrary effect, and in *Paolillo v. Faber*, 56 App. Div. 241, 67 N. Y. Supp. 638, a recital, "Before me came Joseph A. Thompson, to me personally known and acknowledged the above letter of attorney to be his act and deed," etc., was held fatally defective because of failing to show that the person who appeared was known to the officer to be the person described in and who executed the power of attorney. The same ruling was made in *Freedman v. Oppenheim*, 80 App. Div. 487, 81 N. Y. Supp. 110. But a certificate of acknowledgment in October, 1813, reciting that the acknowledging parties were known to the officer as the persons described in the deed, but not stating that they were known to him as the persons who executed the deed, was sufficient: *Hunt v. Johnson*, 19 N. Y. 279. And *West Point Iron Co. v. Beymert*, 45 N. Y. 703, was to the same effect as to a deed dated 1824. In *Fryer v. Rockefeller*, 63 N. Y. 268, a certificate of acknowledgment made after the adoption of the Revised Statutes, which merely described the acknowledging person as the "grantors of the within indenture," without certifying that they were known to the officer to be the same persons who are described in and who executed the instrument, was held to be fatally defective.

It is sometimes said, in a general way, that the certificate must show that the person making the acknowledgment is "personally known" to the officer: *Kelsey v. Dunlap*, 7 Cal. 160; *Wiley v. Bean*, 6 Ill. 302; *Heinrich v. Simpson*, 66 Ill. 57; *Baker v. City of St. Paul*, 8 Minn. 491 (Gil. 436). But it is also said that the omission of the word "personally" from the clause "to me personally known" does not render the certificate insufficient: *Hopkins v. Delaney*, 8 Cal. 85; *Rosenthal v. Griffin*, 23 Iowa, 263; *Alexander v. Merry*, 9 Mo. 514.

But the failure to certify that the person "was personally known" to the officer "to be the identical person whose name was affixed to the deed as grantor," or anything substantially importing the same, has been held to be fatal: *Reynolds v. Kingsbury*, 15 Iowa, 238. And in Illinois, under the act of 1853, the certificate to a deed by a husband and wife must show that the wife of the grantor joining with him was personally known to the officer taking the acknowledgment or proven by a credible witness: *Coburn v. Harrington*, 114 Ill. 104, 29 N. E. 478.

But a certificate of acknowledgment to articles of incorporation which omitted to state that the individuals who acknowledged the articles were personally known to the officer, was sufficient under a statute which simply declared that the acknowledgment should be "before some officer authorized to take the acknowledgment of deeds." The court, however, admitted that it would be insufficient as applied to a deed but said: "The declaration that the same officer shall officiate does not necessarily imply that he must certify to precisely the same matters in both instances."

Under the Missouri statute, the certificate of acknowledgment to a sheriff's deed need not state that the grantor was personally known: *Laughlin v. Stone*, 5 Mo. 43.

In Tennessee, the omission of the words "With whom I am personally acquainted" from the certificate of acknowledgment is fatal: *Fall v. Roper*, 3 Head, 485; *Mullins v. Aiken*, 2 Heisk. 535. But in *Mount v. Kesterson*, 6 Cold. 452, it was held that in a certificate of acknowledgment issued in 1848 it was not necessary for the clerk to certify that "he is personally acquainted with her."

XI. Defects or Matters Relating to the Identification of the Instrument Acknowledged.

A reference in the certificate to the deed as "the foregoing writing" sufficiently identifies it without giving its date: *Fouse v. Gilfillan*, 45 W. Va. 213, 32 S. E. 178. Likewise a reference in the certificate to the deed as "the within indenture" sufficiently identifies the instrument: *Adams v. Medsker*, 25 W. Va. 127. Where there were two instruments on the same sheet of paper, one a relinquishment of dower and the other a deed by the husband and wife, a reference in the certificate of acknowledgment to the "foregoing instrument" applied to the relinquishment of dower which imme-

diately preceded the certificate of acknowledgment, and not to the deed conveying the fee: *Doe v. Wilkinson*, 21 Ala. 296.

XII. Defects or Matters Relating to the Act of Making the Acknowledgment.

a. Recitals Respecting the Acts or Duties on the Part of the Acknowledging Officer.

1. **In General.**—The omission of the recital at the end of the certificate of acknowledgment: "Given under my hand seal of office" is not fatal to the certificate: *Webb v. Huff*, 61 Tex. 677. And the omission in the certificate of acknowledgment to a chattel mortgage of the statutory words "and entered by me" after the words "acknowledged before me," is not fatal: *Harvey v. Dunn*, 89 Ill. 585.

2. **Showing Use of an Interpreter in Taking the Acknowledgment.** In *Norton v. Meader*, 4 Saw. 603, the certificate recited the separate examination of the wife and that on being made acquainted with the contents of the conveyance, "through Frank Alzine, an interpreter duly sworn, acknowledged," etc. The certificate was objected to as being defective because of having been taken through the intervention of an interpreter, but Justice Field said: "The certificate is sufficient in all particulars. The officer taking the acknowledgment of a married woman to a conveyance is directed to see that she is made acquainted with the contents of the instrument. He is thus authorized and required to use the ordinary and customary mode of communicating the information to her. If she understands our language, that would be the appropriate vehicle of communication; if a foreigner, ignorant of our language, the employment of a sworn interpreter would be the natural means in analogy to the course pursued in taking testimony in the courts of justice; if deaf and she reads writing, the information might be given by the pen; or if she understood them, by the signs employed by mutes. The officer will comply with the law when he avails himself of the common means used by men in the ordinary transactions of life, exacting from the agents employed the security of an oath. It is not necessary, however, for him to state in his certificate in what manner the information is imparted."

But in *Dewey v. Camau*, 4 Mich. 565, the court, strange to say, took an entirely opposite view of the matter. The court there said: "But the most palpable error on the face of the certificate is, that the notary public took the acknowledgment in a manner entirely unauthorized by law. There is no law authorizing the notary to swear an interpreter, in a case of acknowledgment. It was, in fact, taking an acknowledgment by mere hearsay. This error is too manifest to admit of discussion. If the circumstance that the notary did not understand the vernacular of the squaw would justify the intervention of an interpreter, no man would feel safe in any prop-

erty, a claim to which might be supported by proof so easily obtained. Such a practice would lead to endless frauds, and cannot be sanctioned."

3. **Manner or Time of Conducting the Privy Examination of a Married Woman.**—In many of the states a certificate of acknowledgment of a married woman must recite the fact that she was examined separate and apart from her husband at the time of taking her acknowledgment: *Shryock v. Cannon*, 39 Ark. 434; *McLeran v. Benton*, 43 Cal. 467; *Lyon v. Kain*, 36 Ill. 362; *Jordan v. Corey*, 2 Ind. 385, 52 Am. Dec. 516; *Sibley v. Johnson*, 1 Mich. 380; *Krieger v. Crocker*, 118 Mo. 531, 24 S. W. 170; *Robinson v. Barfield*, 2 Murph. 391; *Ives v. Sawyer*, 4 Dev. & B. 179; *Louden v. Blythe*, 27 Pa. St. 22, 67 Am. Dec. 442; *Spencer v. Reese*, 165 Pa. St. 158, 30 Atl. 722; *Laughlin v. Fream*, 14 W. Va. 322. "As to how the privy examination should be made, the statute is directory; it is only as to the fact that there was a privy examination and a free and intelligent acknowledgment that it requires a certificate": *Nantz v. Bailey*, 3 Dana, 111.

In *Adams v. Smith*, 11 Wyo. 200, 70 Pac. 1043, a certificate failing to recite that the wife was examined "separate and apart from her husband" was held not fatally defective because under the statutes in force prior to 1895 it was not required for the certificate to state that fact. So also in *Gill v. Fauntleroy's Heirs*, 8 B. Mon. 177, it was held that the certificate of the acknowledgment of a married woman need not show that she was privily examined apart from her husband, since the statute provided that the simple certification of acknowledgment presumes such fact.

It has, however, been held that the certificate must show that the wife's acknowledgment was taken "separately" as well as apart from the husband: *Dewey v. Campan*, 4 Mich. 565; *Warren v. Brown*, 25 Miss. 66, 57 Am. Dec. 197. But it has been held that the recital of an acknowledgment of an examination of the married woman "separate and apart from her husband" is sufficient without reciting that the examination was a "private" one, since the intent of the statute was not to make it private as to anyone save the husband: *Dennis v. Tarpenny*, 20 Barb. 371.

Where the certificate shows on its face that the husband was present at the time when the wife acknowledged the deed, the certificate is fatally defective: *Allen v. Shortridge*, 62 Ky. 34. And where the certificate recited that "J. M. Roberson and L. D. Roberson, his wife, whose names are signed to the foregoing deed for land, personally appeared before the undersigned justices of the peace for Wise County, Virginia, and acknowledged the same to be their act and deed, the said L. D. Roberson being examined separate and apart from her husband, to the effect that she signed the said deed willingly, and that she does not wish to retract it," it was held insufficient, because it did not appear that the writing was explained

to her, and also that her acknowledgment appeared to be prior to her privy examination: *Virginia Coal etc. Co. v. Roberson*, 88 Va. 116, 13 S. E. 350. In other words, the certificate must show that the acknowledgment by the wife was made by her subsequently to her privy examination by the officer: *Hockman v. McClanahan*, 87 Va. 33, 12 S. E. 230; *McMullen v. Eagan*, 21 W. Va. 233. Likewise, where the certificate shows that the explanation of the instrument was prior to the privy examination of the wife, the certificate is fatally defective: *Watson v. Michael*, 21 W. Va. 568.

4. **Showing Fact that Contents of the Instrument were Made Known or Explained to the Acknowledging Party.**—The certificate must show that the contents of the deed were made known to the acknowledging party by the officer: *Steele v. Thompson*, 14 Serg. & R. 84. But it was held that even if the certificate failed to show that the deed was read and its contents made known to the wife, that the omission was not fatal where it recited that the acknowledgment was taken "as the law directs": *Buffner v. McLenan*, 16 Ohio, 639. And it was held that where the deed was executed in 1798, it was necessary for the certificate to show that the deed was "explained" to the wife: *Hairston v. Randolphs*, 12 Leigh, 445. But in Illinois, it was held that the act of 1819, requiring the officer taking the acknowledgment to examine the wife separate and apart from her husband and to read or otherwise make known the full contents of such deed or conveyance, to the wife, does not require the officer taking the acknowledgment to affirmatively show these facts in his certificate: *Coleman v. Billings*, 89 Ill. 183. But in New Jersey, under the act of 1821, it was necessary for the certificate to show that the officer taking the acknowledgment first made known to the party the contents of the instrument: *Pinckney v. Burrage*, 31 N. J. L. 21.

The failure of the certificate to show that the instrument was "explained" to the acknowledging party has been held to be a fatal defect: *Moore v. Linney*, 2 Tex. Civ. App. 293, 21 S. W. 709. Likewise the failure of the certificate to show that the deed was "shown and explained" to the wife was held a fatal defect: *Paine v. Baker*, 15 R. I. 100, 23 Atl. 141. So, also, the omission of the certificate to show that the deed was "fully explained" to the wife, was held fatal to the certificate: *Laidley v. Knight*, 23 W. Va. 735. And under the statute it was held that a certificate which failed to show that the contents of the mortgage were explained to the wife was a fatal defect: *Pease v. Barbiers*, 10 Cal. 436. And where the certificate of acknowledgment to a homestead declaration fails to state, as required by the statute, that upon an examination without the hearing of her husband she was made acquainted with the contents of the instrument, the defect is fatal: *Kennedy v. Gloster*, 98 Cal. 143, 32 Pac. 941. But where a certificate recited, "And the said Ellen McCahill, after being made acquainted with the contents of said in-

strument, acknowledged," etc., it was held sufficient, it not being required that the contents of the instrument be made known to the wife by the officer: *Jansen v. McCahill*, 22 Cal. 563, 83 Am. Dec. 84. But it has been held in Alabama that the failure to state that the grantors were informed of the contents of the conveyance is fatal to the certificate: *Roney v. Moss*, 76 Ala. 391; *Stamphill v. Buller*, 121 Ala. 250, 25 South. 928.

b. Recitals Respecting the Acts or Statements Made by the Acknowledging Party at the Time of Acknowledging the Instrument.

1. **Showing Fact that Instrument was "Acknowledged."**—The certificate must set forth that the grantor acknowledged the execution of the instrument: *Lewis' Lessee v. Waters*, 3 Har. & McH. 430; *Hoddy's Lessee v. Harryman*, 3 Har. & McH. 581; *Cabell v. Grubbs*, 48 Mo. 353; *People v. Harrison*, 8 Barb. 560. But the word "acknowledge" need not be used if words of equivalent import are used: *Chouteau v. Allen*, 70 Mo. 290. Under the statute the certificate of the acknowledgment of a married woman should state that she "acknowledged" that she executed the instrument; the word "stated" is not sufficient: *Dewey v. Campau*, 4 Mich. 565. And it was held that in a statute providing, "The certificate of acknowledgment may be in the following form: This [name of instrument] was acknowledged before me," etc., the word "may" was imperative: *First Nat. Bank v. Baker*, 62 Ill. App. 154.

A certificate which affirms as a fact, not as an acknowledgment, that the grantor "being informed of the contents of the conveyance, acknowledged," etc., is not in substantial compliance with the statutory form: *East Tennessee etc. Ry. Co. v. Davis*, 91 Ala. 615, 8 South. 349. In *Bryan v. Ramirez*, 8 Cal. 461, 48 Am. Dec. 340, the court in holding that a certificate which merely states that the person was known to the officer to be the person who executed the mortgage, freely and voluntarily for the uses and purposes therein contained, was not a sufficient certificate, said: "It is the fact of acknowledgment that forever afterward binds the party. Although a man may not execute the instrument freely in point of fact, yet if he make the acknowledgment properly, he is afterward estopped to deny it, as against subsequent innocent parties. The object of the statute was to make acknowledgment of the party operate as an estoppel and for that reason requires the fact of acknowledgment to be stated in the certificate."

2. **Showing Fact that Instrument Acknowledged was Signed, Sealed and Delivered.**—Under the old Kentucky statute it was necessary for the certificate to show that the instrument acknowledged was subscribed in the presence of the officer: *Kay v. Jones*, 7 J. J. Marsh. 38; *Harris v. Price*, 14 B. Mon. 414. In *Shelton v. Armor*, 13 Ala. 647, it was held that a certificate which failed to recite whether

the deed was sealed or delivered by the grantor was insufficient. But in *Stewart v. Fowler*, 3 Ala. 629, an acknowledgment that the delivery of the deed was to the cestui que trust instead of to the trustee, was held not fatal since it was equivalent to a delivery to the trustee.

3. **Showing "Purposes and Considerations" of the Execution.**—The omission of the words "for the consideration and purposes therein mentioned and set forth," or words of similar import is fatal to the certificate: *Jacoway v. Gault*, 20 Ark. 190, 73 Am. Dec. 494; *Little v. Dodge*, 32 Ark. 453; *Shayock v. Cannon*, 39 Ark. 434. And the omission of the words "and purposes" after the word "consideration," in the statutory words "consideration and purposes," has been held fatal to the certificate: *Ford v. Burks*, 37 Ark. 91. Likewise the omission to certify that the instrument was acknowledged to have been executed "for the purposes therein expressed," or the use of an equivalent expression, has been held to be fatal to the certificate: *Currie v. Kerr*, 79 Tenn. 138; *Literer v. Huddleston* (Tenn. Ch.), 52 S. W. 1003; but the contrary was held with respect to the omission of the statement that the deed was executed for the purposes therein expressed: *Butler v. Brown*, 77 Tex. 342, 14 S. W. 136.

4. **Showing of Voluntary Character of the Act by the Various Forms of Statutory Expressions in Use.**—The voluntary character of the acknowledgment is particularly essential with respect to the acknowledgments of married women under those statutes providing for their acknowledgment upon a privy examination apart from their husbands: *Spitznagle v. Vanhesssch*, 13 Neb. 338, 14 N. W. 417; *Keeling v. Hoyt*, 31 Neb. 453, 48 N. W. 66. And it is held that it is necessary for the certificate to show that the wife acknowledged that she executed the conveyance "without fear or compulsion from her husband": *Pratt v. Battels*, 28 Vt. 685; or "without fear, threats or compulsion of her husband": *Toulmin v. Heidelberg*, 32 Miss. 268. And the certificate must show that the execution of the deed was "voluntary": *Newman v. Samuels*, 17 Iowa, 528. But it has also been held that though the appearance of a married woman before the officer must be "voluntary," still his certificate need not show that fact: *Mickel v. Gardner*, 41 Ark. 491; and under a statute providing that the instrument should be merely acknowledged, but appending a statutory form of certificate containing a recital that the execution of the instrument was the free and voluntary act of the party executing the same, it was held that the form was not exclusive and that the omission of the word "voluntary" was not fatal: *Kley v. Geiger*, 4 Wash. 484, 30 Pac. 727.

Likewise it has been held necessary that the certificate show that the execution of the deed was "free and voluntary": *Dalton v. Murphy*, 30 Miss. 59. And the failure of the certificate to show that the wife declared on her privy examination that she executed the instrument "without undue influence on the part of the husband"

has been held fatal to the certificate: *Stillwell v. Adams*, 29 Ark. 346; and where such certificate failed to show that the wife executed the instrument freely and without any compulsion or fear of her husband, it has been held a fatal defect: *Wambole v. Foote*, 2 Dak. Ter. 1, 2 N. W. 239. But the omission of "and voluntary," in the phrase "acknowledged the same as their free act and deed," was held immaterial, since "if executed as their free act and deed, it of necessity was done voluntarily": *Mosier v. Momsen*, 13 Okla. 41, 74 Pac. 905. And where the certificate failed to show that the married woman "willingly signed" the instrument, it has been held a fatal defect: *Smith v. Elliott*, 39 Tex. 201. Likewise, where the certificate fails to state that the wife "had willingly executed it and wished not to retract it": *Bartett v. Fleming*, 3 W. Va. 163; *Linn v. Patton*, 10 W. Va. 187. And the omission of the statement that the married woman executed the instrument "understandingly," as required by the statute, has been regarded as fatal to the certificate: *Literer v. Huddleston* (Tenn. Ch.), 52 S. W. 1003.

And where the certificate recited "And the said Lillis [his wife] being examined separately and apart from her husband, also acknowledged the same before me," was held fatally defective, in that it failed to show whether she executed the instrument freely, without constraint, and that at the moment of the examination it was her free and voluntary act: *Churchill v. Monroe*, 1 R. I. 209. And the failure of the certificate of acknowledgment of a married woman to show that she acknowledged that "she wished not to retract it," has been held to constitute a fatal defect: *Chauvin v. Wagner*, 18 Mo. 531; *Le Bourgeoise v. McNamara*, 5 Mo. App. 576; *Murphy v. Reynaud*, 2 Tex. Civ. App. 470, 21 S. W. 991; *Euleman v. Pritchett*, 56 Tex. 482; *Davis v. Agnew*, 67 Tex. 206, 2 S. W. 43, 376; *Williams v. Ellingsworth*, 75 Tex. 480, 12 S. W. 746; *Grove v. Zumbro*, 14 Gratt. 50.

XIII. What Phrases or Words in a Certificate of Acknowledgment are Substantially Equivalent to Those Required by the Statute.

a. General Rule Respecting the Use of Equivalent Expressions or Phrases.—In *Gates v. Hester*, 81 Ala. 357, 1 South. 848, the court said: "To avoid making the security and validity of titles dependent on strict phraseology, the settled mode of construction in respect to such certificates is that substantial compliance is sufficient. While in order that there may be substantial compliance, words must be used of equivalent import and meaning with those employed to express the legislative intent, nice shades and distinctions of signification, and mere verbal criticisms should not be observed nor regarded."

b. Recitals Relating to the Party Being Known to the Officer Taking the Acknowledgment.—The recital that persons whose names are given were well known to the officer, and that such persons acknowledged that they signed and delivered the instrument, sufficiently identifies the parties, for it shows that the officer personally

knew the persons to be those who executed the instrument: *Watkins v. Hall*, 57 Tex. 1. The recital, "before me personally appeared," etc., has been held to include the proposition that the acknowledging party was "personally known": *Warder v. Henry*, 117 Mo. 530, 23 S. W. 776. And the recital of the officer that the acknowledging party was personally known to him and that he declared to him that he executed the deed, was held to show that the officer knew the party to be the individual who executed the deed and who was therein described: *Schramm v. Gentry*, 63 Tex. 583. Recital "personally appeared J. T. Bates, tax collector of said county, to me well known, and acknowledged," etc., the deed being signed "J. T. Bates, tax collector of Concho County," was held sufficient to show that the grantor was known to the officer taking the acknowledgment to be the person who executed the deed: *Schleicher v. Gatlin*, 85 Tex. 270, 20 S. W. 160. Recital "Personally appeared W. R. May, agent and attorney in fact for H. L. Moss and Amanda Shedd of Pike Co., Georgia, to me personally known, who signed," etc., sufficiently shows that May was personally known to the officer: *Moses v. Dibrell*, 2 Tex. Civ. App. 457, 21 S. W. 414. And it has been held that express recital asserting actual knowledge of the identity of the person is sufficient to show that he was known to be the grantor: *Sanford v. Bulkley*, 30 Conn. 344. And a recital "personally came Thos. Arnett (who to me is personally known to be the same person that executed the deed and the identical Thos. Arnett of said county) before me," etc., sufficiently shows that the grantor was personally known to the officer: *Doe v. Reed*, 3 Ill. 371. Certificate naming the acknowledging parties and adding, "With all of whom I am acquainted," is equivalent to stating that he is "personally acquainted" with them: *Davis v. Bogle*, 11 Heisk. 315.

And where the acknowledging officer was one of the attesting witnesses to the tax deed, and the certificate recited that "F. J. Wood, county clerk aforesaid," personally appeared before the officer, it was held that the fact of the officer being an attesting witness could be used to aid in showing that the officer knew that the person who made the acknowledgment was the person who executed the deed: *Hiles v. La Flesh*, 59 Wis. 465, 18 N. W. 435. And where the certificate states that the parties were known to the officers to be the parties named in the deed, it shows that the officers were satisfied of the identity of the parties from their own knowledge: *Warner v. Hardy's Lessee*, 6 Md. 525. "Personally known" is equivalent to "personally acquainted with": *Kelly v. Calhoun*, 95 U. S. 710, 24 L. ed. 544. And the words "well known" are equivalent to the words "personally known": *Bell v. Evans*, 10 Iowa, 353. And it is sufficient to show that the person was "known" without showing that he was "personally known": *Brown v. McCormick*, 28 Mich. 215; *Robson v. Thomas*, 55 Mo. 581; *Hughes v. McDivitt*, 102 Mo. 77, 14 S. W. 660, 15 S. W. 756;

Wilson v. Quigley, 107 Mo. 98, 17 S. W. 891. A certificate reciting "Personally appeared before me E. A. R., the signer of the above instrument, who duly acknowledged to me that he executed the same," sufficiently affirms the identity of the person making the acknowledgment, even though it omits the words, "Personally known to me": Deseret Nat. Bank v. Kidman, 25 Utah, 379, 95 Am. St. Rep. 856, 71 Pac. 873. But the recital, "This day personally appeared Jacob Presley, to be the person whose name is subscribed to the foregoing instrument and acknowledged," etc., is fatally defective because of the omission of the word "known": McKie v. Anderson, 78 Tex. 207, 14 S. W. 576.

c. **Recitals Relating to the Fact of Instrument Being Signed, Sealed, Executed, or Acknowledged.**—The recital "acknowledged the foregoing instrument to be his act and deed" is equivalent to "acknowledged that he signed, sealed and delivered the foregoing deed": Hall v. Thompson, 1 Smedes & M. 443. And a recital that the grantors acknowledged the instrument "to be their act and deed for the uses and purposes therein mentioned," is equivalent to "they signed, sealed and delivered the same": Den v. Hamilton, 12 N. J. L. 109. And certificate reciting as to married woman that "She did acknowledge to me that she signed the same as her voluntary act and deed" is not fatally defective because omitting the words "sealed and delivered," since the word "delivered" is not used in the statute though in the statutory form: Mullins v. Weaver, 57 Tex. 5. But a certificate merely showing that grantors "signed" the instrument does not show that they "delivered" it, and hence was held insufficient: Buntyn v. Shippers' Compress Co., 63 Miss. 94. Where the certificate shows that the instrument was signed voluntarily, it shows that the sealing was also done voluntarily: Barton's Lessee v. Morris' Heirs, 15 Ohio, 408.

The recital showing the appearance of the parties and that they acknowledged "that they signed the foregoing deed," was held to show an acknowledgment of its execution: Johnson v. Thompson (Tex. Civ. App.), 50 S. W. 1055; Stuart v. Dutton, 39 Ill. 91; Bensimer v. Fell, 35 W. Va. 15, 29 Am. St. Rep. 774, 12 S. E. 1078. The words "signed, sealed and delivered" are equivalent to the statutory word "executed": Jacoway v. Gault, 20 Ark. 190, 73 Am. Dec. 494. And the recital that the grantor declared "that he signed and acknowledged the foregoing deed for purposes therein named" was held, when considered in connection with the attestation clause of the deed, to show its execution: L'Engle v. Reed, 27 Fla. 345, 9 South. 213. And the recital "Personally came Geo. W. Cardwell, the executor of the annexed deed and acknowledged it," was held to state substantially that the party "acknowledged the execution of the annexed deed": Davar v. Cardwell, 27 Ind. 478.

In Smith v. Tim, 14 Abb. N. C. 447, a certificate of acknowledgment to an assignment for the benefit of creditors reciting an acknowledg-

ment that the parties "executed the same for the purposes therein mentioned" was held fatally defective for using "the same," instead of "the within instrument," but in subsequent phases of this case, namely in *Claffin v. Smith*, 15 Abb. N. C. 241, and *Smith v. Boyd*, 101 N. Y. 472, 5 N. E. 319, the defect was held to be a mere harmless clerical error.

With respect to the word "acknowledge," the court in *Short v. Conlee*, 28 Ill. 219, observed: "Perhaps the word 'acknowledge' need not be used, if some word equivalent to it is found in its place. As applied to deeds, an acknowledgment means nothing more than the act of the grantor going before a competent officer, and then and there to him acknowledging or declaring the instrument produced to be his act and deed."

The failure to recite that a married woman acknowledged the deed to be her act is not fatal where the certificate shows she declared she had willingly executed the deed and did not wish to retract it: *Geil v. Geil*, 101 Va. 773, 45 S. E. 325.

d. **Recitals Relating to the Instrument Acknowledged Being for the Considerations and Purposes Therein Expressed.**—In the phrase "for the uses and purposes therein specified," the word "uses" is not equivalent to the statutory word "considerations": *Martin v. O'Bannon*, 35 Ark. 62. And "for the purposes therein expressed" is not equivalent to "for the consideration and purposes therein mentioned and set forth": *Johnson v. Godden*, 33 Ark. 600. But the mention of the word "consideration" may be omitted in the clause "for the consideration and purposes therein stated": *Monroe v. Arledge*, 23 Tex. 478. But the recital "without fear or compulsion from any person" is fatally defective in not being equivalent to "without constraint from her husband and for the purposes therein expressed": *Cox v. Railway etc. Loan Assn.*, 101 Tenn. 490, 48 S. W. 226. The recital "Who acknowledged his signature to the annexed deed for all the purposes therein expressed," is, however, equivalent to "who acknowledged that he executed the within instrument for the purposes therein contained": *Hughes v. Powers*, 99 Tenn. 480, 42 S. W. 1.

e. **Recitals Relating to the Manner of Taking the Acknowledgment.**

1. **Privy Examination of Married Woman.**—A recital showing that the officer examined the wife separate and apart from her husband shows that she was personally before the officer: *Sandlin v. Dowdell* (Ala.), 39 South. 279. A certificate showing that the deed was explained and acknowledgment made apart from the wife's husband, shows that she was examined privily and apart from her husband: *Clark v. Groce*, 16 Tex. Civ. App. 453, 41 S. W. 668. When a certificate states that the wife was examined separate and apart from her husband, it need not state that there was a privy examination:

Love v. Taylor, 26 Miss. 567; Torrey v. Thayer, 37 N. J. L. 339; Coombes v. Thomas, 37 Tex. 321. Recital "On private examination separate and apart from her husband," is equivalent to "on an examination apart from and without the hearing of her husband": Muir v. Galloway, 61 Cal. 498. Likewise the recital that the wife was "privately examined" is equivalent to stating that she was "privately examined out of the hearing of the husband": Webster's Lessee v. Hall, 2 Har. & McH. 19, 1 Am. Dec. 370. And recital that examination was "private and out of the hearing of her husband" is equivalent to "out of the presence of her husband": Deery v. Cray, 72 U. S. 795, 18 L. ed. 653. So, also, recital that wife "Having been by me examined separate and apart and out of hearing of her husband," is equivalent to statutory direction that officer shall certify that the acknowledgment was made upon an examination separate and apart from the husband and out of the presence of the husband: Nippell v. Hammond, 4 Colo. 211. A "separate" examination of the wife is equivalent to a "private" one: Timber v. Desparois (S. Dak.), 101 N. W. 879. Likewise "separate and apart from her husband" is equivalent to reciting that the examination was a "private examination apart from her husband": Torrey v. Thayer, 37 N. J. L. 339. And certificate stating that the examination of the wife was "apart" from her husband is equivalent to stating that it was "separate" from him: Belo v. Mayes, 79 Mo. 67. But a recital of appearance of wife "and, being examined and apart from her husband, acknowledged that she signed, sealed and delivered the same," is fatally defective in not showing that she was examined separate and apart from her husband and she acknowledged the instrument apart from her husband: Rice v. Peacock, 37 Tex. 392.

2. **Explanation of Contents of the Instrument to the Acknowledging Party.**—The recital in the certificate that the party "was made acquainted with the contents of the within deed" is equivalent to reciting "that the contents were made known and explained to her": Hughes v. Lane, 11 Ill. 123, 50 Am. Dec. 436. Recital "She was by me first made acquainted with the contents thereof and thereupon acknowledged to me, on examination separate and apart and without the hearing of her husband," is not equivalent to the statutory requirement that the certificate should show that the party was made acquainted with the contents of the instrument by the officer on an examination without the hearing of her husband: Beck v. Soward, 76 Cal. 527, 18 Pac. 650. And a certificate of acknowledgment of an instrument by a married woman which fails to show that the officer made her acquainted with the contents of the instrument upon an examination without the hearing of her husband, is fatally defective: Hutchinson v. Ainsworth, 63 Cal. 286; Bollinger v. Manning, 79 Cal. 7, 21 Pac. 375.

A recital that "the contents of said indenture being made fully to her" was held sufficient to show that they were made "fully

known": *Hornbeck v. Mutual Bldg. etc. Assn.*, 88 Pa. St. 64. But the recital, "Personally appeared before him and acknowledged the indenture to be their act and deed and desired the same to be recorded, she being of full age and by him examined apart," was held insufficient to show that the contents of the instrument were made known to the parties: *Watson's Lessee v. Bailey*, 1 Binn. 470, 2 Am. Dec. 462.

The recital that a deed was "explained" shows that it was "fully explained": *Johnson v. Thompson* (Tex. Civ. App.), 50 S. W. 1055. But the mere recital that the wife was examined by the officer does not show that the instrument was "fully explained" to her: *Bolling v. Teel*, 76 Va. 487, 44 Am. Rep. 152. Neither are the words, "and the deed being read to her" equivalent to the words "being fully explained to her": *Watson v. Michael*, 21 W. Va. 568. And a recital that the wife on her privy examination "declared that she fully understood the contents of said deed," are not equivalent to the statement that the deed was fully explained to her by the officer: *Langton v. Marshall*, 59 Tex. 296. And a recital that the married woman was "examined by me and interrogated touching the same," referring to the deed, is not equivalent to a recital that the officer explained the deed to her or ascertained that she understood it: *Runge v. Sabin* (Tex. Civ. App.), 30 S. W. 568. But a recital that the wife voluntarily executed the deed, "fully understanding the contents thereof," sufficiently shows that she was informed of its contents: *Schley v. Pullman Car Co.*, 120 U. S. 575, 7 Sup. Ct. Rep. 730, 30 L. ed. 789. Where the certificate shows that the wife executed the instrument with knowledge and full explanation of the contents and meaning of the deed, she cannot be said to have been ignorant of the "effect" of the deed: *Nippell v. Hammond*, 4 Colo. 211.

f. Recitals Relating to the Acts or Statements of the Acknowledging Party at the Time of the Acknowledgment.

1. Expressions Showing Voluntary Character of the Execution of the Instrument.—The recital, "Freely and of her own accord," is equivalent to "as her voluntary act and deed, freely": *Dundas v. Hitchcock*, 53 U. S. 256, 13 L. ed. 978. But the use of the word "persuasion" instead of "threats" in the recital of the separate acknowledgment of the wife is fatal to the certificate: *Marx v. Threet*, 131 Ala. 340, 30 South. 831; *Daniels v. Lowery*, 92 Ala. 519, 8 South. 352. The use of the words "constraint" and "threat," instead of their plural forms as used in the statute, is not fatal to the certificate: *Homer v. Schonfeld*, 84 Ala. 313, 4 South. 105. Recital that wife "freely and voluntarily executed" the conveyance is not equivalent to statement that she did so "understandingly and for the purposes therein expressed": *Roulston v. Darby* (Tenn. Ch.), 53 S. W. 318. Where the certificate recites that the married woman executed the conveyance "without threats, fear, or compulsion," it

is not a fatal defect that it does not also state it was "without undue influence": *Goode v. Smith*, 13 Cal. 81. And recital that married woman "acknowledged the same to be her act and deed in due form," is not in compliance with statute requiring an acknowledgment that she executed the deed freely "and doth voluntarily assent thereto": *Lucas v. Cobbs*, 1 Dev. & B. 228. But a recital that the wife declared that she voluntarily executed the deed is sufficient without saying that "she doth voluntarily assent thereto": *Etheridge v. Ferebee*, 9 Ired. 312.

Certifying that a thing is "freely" done is equivalent to certifying that it was "voluntarily" done: *Hunt v. Harris*, 12 Heisk. 243. And where the certificate recited that the grantors acknowledged they signed, sealed, and delivered the conveyance as their act and deed, it was held that the omission of the term "voluntary" was immaterial: *Den v. Geiger*, 9 N. J. L. 225. The recital that the wife "freely executed the deed without the threats, etc., of her husband" is equivalent to the use of the word "voluntarily": *Battin v. Bigelow*, Pet. C. C. 452.

Recital that married woman "signed, sealed, and delivered the instrument of her own free will and accord, and without any force, persuasion, or threats from her said husband and for the purposes therein stated," is not equivalent to recital "that she signed, sealed and delivered the instrument as her voluntary act, without any fear, threats, or compulsion of her said husband": *Boykin v. Rain*, 28 Ala. 332, 65 Am. Dec. 349. And a recital that the wife "acknowledged that she signed the same of her own free will and accord, and without fear, constraint, or persuasion on the part of her husband," is not equivalent to the statutory form which uses "fear, constraint or threats on the part of the husband": *Strauss v. Harrison*, 79 Ala. 324. But recital that a wife acknowledged the instrument as her "voluntary act and deed" shows she acted "without fear or coercion" of her husband: *Brown v. Farran*, 3 Ohio, 140. And recital "she, being of full age, separate and apart from her said husband, executed and the full contents made known to her, voluntarily consenting thereto," shows that she executed it "without coercion or compulsion of her husband": *Shaller v. Brand*, 6 Binn. 435, 6 Am. Dec. 482.

The word "restraint" is considered equivalent to "constraint": *Mullens v. Big Creek etc. Co. (Tenn. Ch.)*, 35 S. W. 439. Recital that wife signed the mortgage "voluntarily, without any fear, compulsion or threats of her said husband," is equivalent to the expression "of her own free will and accord and without fear, constraints or threats on the part of her husband": *Gates v. Hester*, 81 Ala. 357, 1 South. 848. The recital "without compulsion or undue influence of her husband" is equivalent to execution of her "own free will": *Tubbs v. Gatewood*, 26 Ark. 128. The recital in the certificate that the party acknowledged that he "executed the same," implies that

the execution was "free and voluntary": *Henderson v. Grewell*, 8 Cal. 581. And the recital, "without any fear or compulsion from her said husband," is equivalent to a declaration of free will: *Miller v. Wentworth*, 82 Pa. St. 280. And recital that acknowledgment was "without fear or compulsion" shows that it was "freely" made: *Dennis v. Tarpenny*, 20 Barb. 371. The recital that the wife "acknowledged the same to be her own act and deed and that she did not wish to retract therefrom" is fatally defective, in that it does not show that she signed the deed "freely": *Tiemann v. Cobb* (Tex. Civ. App.), 80 S. W. 250.

But the recital, "Without the fear, threats, or compulsion of her husband," shows that the wife acted freely and voluntarily: *Bernard v. Elder*, 50 Miss. 336; *Allen v. Lenoir*, 53 Miss. 321. The word "freely," used in connection with acknowledgments of married women, relates entirely to the relation between husband and wife, and indicates a freedom on her part from the influence of her husband and not a freedom from the obligation of a contract or other duty: *Goldstein v. Curtis*, 63 N. J. Eq. 454, 52 Atl. 218. A recital that the wife "declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it," is not equivalent to a statement that she executed it "freely, voluntarily, without compulsion, constraint or coercion by her husband": *Henderson v. Rice*, 1 Cold. 223. But "without being induced to do so by fear of, or ill-usage by her husband, or by fear of his displeasure," is equivalent to a declaration that the wife executed and acknowledged the deed freely, voluntarily and understandingly: *Murdock v. Memphis etc. Co.*, 60 Tenn. 557. Likewise a recital that the wife declared that she signed the deed without any bribe, threat or compulsion from husband is equivalent to a declaration that she signed it freely and willingly: *Belcher v. Weaver*, 46 Tex. 293, 26 Am. Rep. 267. The recital that a married woman acknowledged that she executed a deed without any fear, threat or compulsion of her husband is equivalent to the statutory requirement that she execute the deed freely, without any fear or compulsion of her husband: *Merriam v. Harsen*, 2 Barb. Ch. 232.

The recital that a married woman "acknowledged the same freely and willingly" is not equivalent to a recital that she "acknowledged such instrument to be her act and deed and declared that she had willingly signed the same": *Hayden v. Moffatt*, 74 Tex. 647, 15 Am. St. Rep. 866, 12 S. W. 820. But a recital that the married woman "acknowledged it to be her own free act and deed and that she wished not to retract it," shows that the deed was signed willingly: *Wilson v. Simpson*, 80 Tex. 279, 16 S. W. 40. And the recital that the woman "had willingly acknowledged the same and that she did not wish to retract it," is held equivalent to a statement that she "willingly executed the same": *Pickens v. Knisely*, 29 W. Va. 1, 6 Am. St. Rep. 622, 11 S. E. 932. But the mere recital that the wife

"does not wish to retract it" is not equivalent to stating that she "willingly executed" the instrument: *Leftwich v. Neal*, 7 W. Va. 569.

The recital that the wife was "made acquainted with the contents of the deed" is equivalent to a recital that she understood the nature and effect of the instrument: *Chauvin v. Wagner*, 18 Mo. 531.

2. **Expressions Showing Fact of Acknowledging Party not Wishing to Retract Execution of the Instrument.**—The recital that the wife "still voluntarily assents thereto" is equivalent to "she does not wish to retract it": *Morton v. Davis*, 33 Tex. 32, 18 S. W. 430. But the recital "that she did execute the instrument of her own free will" is not equivalent to "she wishes not to retract it": *Freeman v. Preston* (Tex. Civ. App.), 29 S. W. 495. And the recital that the wife acknowledged that she "did execute the deed of her own free will and accord" is not equivalent to the recital that she did not wish to retract it: *In re Petition of Bateman*, 11 R. I. 585. But the recital that the wife "freely and voluntarily signed and acknowledged the instrument" after being informed of its contents out of her husband's presence, shows that "she does not wish to retract such execution": *Northwestern etc. Bank v. Berry*, 89 Fed. 408. In *Ward's Heirs v. McIntosh*, 12 Ohio St. 231, a certificate which recited that the wife on her separate examination declared that she signed the instrument of her own free will and accord was held insufficient to show that she was still satisfied with it, thereby disapproving the former rule announced in *Card v. Patterson*, 5 Ohio St. 319.

The omission of "it" after the word "retract" was held a clerical error not affecting the meaning of the phrase: *Montgomery v. Hornberger*, 16 Tex. Civ. App. 28, 40 S. W. 628. And in the recital "that she does not wish to contract the same," it was held that the word "contract" was a mere clerical error for the word "retract": *Belcher v. Weaver*, 46 Tex. 293, 26 Am. Rep. 267.

g. **Recitals Relating to the Authentication of the Certificate.**—The recital of "Witness my hand and seal," instead of "official seal," is not a fatal error when it appears that the notarial seal was impressed: *Monroe v. Arledge*, 23 Tex. 478. Likewise, the recital that the certificate was executed under "his hand and official signature" instead of "seal" is immaterial: *Dale v. Wright*, 57 Mo. 110.

XIV. Defects or Matters Relating to Certificates of Acknowledgment by Corporations, Partnerships or Attorneys in Fact.

a. **Corporations.**—"Where the deed or other instrument is executed by or on behalf of an individual, there is but little difficulty in establishing before the officer the identity of the party described therein, and who executed it, for as a rule such fact is personally known to such officer, but where the deed is executed by a corporation, the difficulty is greatly increased. The acknowledgment for the corpora-

tion can be made only by some officer or representative who has authority to execute such instrument in its behalf—a fact not generally within the personal knowledge of the officer taking the acknowledgment. It is nevertheless essential to the validity of such acknowledgment that it appear, *prima facie*, from the officer's certificate, when read in connection with the deed, that the person making the admission or acknowledgment as to the execution thereof was authorized to execute it for the corporation. If the certificate fails in this particular, the proof of the execution fails, precisely as it would in the case of the deed of an individual if the officer failed to certify as to the identity of the party acknowledging it": *Bennett v. Knowles*, 66 Minn. 4, 68 N. W. 111.

In West Virginia it must appear that the officer or agent executing the conveyance for the corporation was sworn and deposed to the facts contained in the certificate: *Abney v. Ohio Lumber etc. Co.*, 45 W. Va. 446, 32 S. E. 256. In the absence of statutory provision the officer affixing the corporate seal is the proper person to make the acknowledgment: *Kelly v. Calhoun*, 95 U. S. 710, 24 L. ed. 544. In Michigan, where a conveyance is signed by the president and cashier, it was held that the acknowledgment may be made by the cashier: *Merrell v. Montgomery*, 25 Mich. 73. In *Hopper v. Lovejoy*, 47 N. J. Eq. 573, 21 Atl. 298, 12 L. R. A. 588, the court said: "With regard to corporate deed, he must therefore be satisfied that such person is, in the eye of the law, the grantor mentioned in it—that is, authorized to represent the corporation in the executing and acknowledging the conveyance. Being so satisfied, he accepts the acknowledgment of the representative as that of the grantor itself."

An acknowledgment by an officer of a corporation that he executed the deed for the purposes therein expressed, is equivalent to acknowledging that it was the act of the corporation when the deed purports to be the act of the corporation: *Ballard v. Carmichael*, 83 Tex. 355, 18 S. W. 734. In *Duke v. Markham*, 105 N. C. 131, 18 Am. St. Rep. 889, 10 S. E. 1017, it was held where the mortgage was signed by the president, secretary, and two stockholders, but no common seal was attached, that the certificate, reciting that the instrument was "acknowledged by the secretary, who also proves the execution by the president and two stockholders," was insufficient to authorize the registration of the deed.

But in *Bowers v. Hechtman*, 45 Minn. 238, 47 N. W. 792, where the mortgage was signed by the vice-president and attested by the secretary and the corporate seal attached, and both officers acknowledged the executing of the instrument by them as the act and deed of the corporation, and the secretary made affidavit that he was such officer and that the seal affixed was the corporate seal, and was affixed thereto by him by order of the board of directors, it was held sufficient.

And where the deed was signed with the corporate name by secretary and treasurer, and with the name of the president, a certificate reciting that the corporation by its president and secretary personally came before the officer was held to show an acknowledgment by the corporation: *Missouri Fire Clay Works v. Ellison*, 30 Mo. App. 67. In New York the following form, omitting the venue, was held sufficient in the absence of a statutory form, viz.: "On this 16 day of May, 1893, before me, the subscriber, personally came Asa L. Rogers, who is, I am satisfied, the president of the Rogers Mfg. Co., who being by me duly sworn, did depose and say that he resides in the city of Brooklyn in the state of New York, that he knows the corporate seal of said company, and that the seal affixed to the foregoing conveyance is the corporate seal of said company; that the seal was affixed to the said conveyance by order of the directors of the said company, and that he, as president of said company, did sign the said instrument by like order of the board of directors": *Rogers v. Pell*, 47 App. Div. 240, 62 N. Y. Supp. 92. But a certificate reciting, "Do hereby certify that this mortgage was duly acknowledged before me by the above-named James B. Rielly, secretary, and Francis V. Corey, president, the mortgagors therein named," was held fatally defective, in that the Corey Car and Manufacturing Company was the mortgagor and the officers named in the certificate were not named in the mortgage: *First Nat. Bank v. Baker*, 62 Ill. App. 154. Though in another case where the mortgage was signed "David C. French, President of the East Warren Lumber Co. [Seal] Ephraim S. Calley, Treasurer of the East Warren Lumber Co. [Seal]," and the certificate recited, "Personally appearing the above-named David C. French and Ephraim S. Calley, acknowledged the foregoing instrument to be their voluntary act and deed," it was held good: *Tenny v. East Warren Lumber Co.*, 43 N. H. 343. And a certificate reciting, "Personally appeared William Wallace, agent of the Flower Brook Mfg. Co., signer and sealer of the above-written instrument, and acknowledged the same to be his free act and deed," was held good: *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274. And a certificate reciting, "Be it remembered that S. Houck, President, and Theo. S. Case, Secretary, who are personally known to the undersigned, a notary public within and for said county, to be the persons whose names are subscribed to the foregoing deed as parties thereto, this day appeared before me and acknowledged that they executed and delivered the same as their voluntary act and deed for the purposes therein mentioned," was held sufficient when read in connection with the deed, which mentioned the name of the corporation and the officers above named: *City of Kansas v. Hannibal etc. R. Co.*, 77 Mo. 180. And where the instrument was signed "Minneapolis Improvement Company by Thomas L. Rosser, President," a certificate reciting an acknowledgment by "Thomas L. Rosser, President, whose name is signed to the writing hereto annexed," was held sufficient: *Banner v. Rosser*, 96 Va. 238, 31 S. E. 67.

A deed by a banking corporation may be acknowledged by its cashier: *Sheehan v. Davis*, 17 Ohio St. 571. A certificate reciting, "This day personally appeared John Kerr, president of said First National Bank of the city of Dallas, and R. P. Annspaugh, cashier of said bank, both of whom are to me well known, and severally acknowledged that they executed the above and foregoing instrument for the purposes and considerations therein contained," was held sufficient to show the acknowledgment to be the act of the corporation: *Muller v. Boone*, 63 Tex. 91. But it has been held that the mere designation in the certificate of the officers of a corporation as the president and cashier of the bank, but not certifying or stating that they are such officers, is not sufficient to establish the official character of the persons making the acknowledgment: *Klemme v. McLay*, 68 Iowa, 158, 26 N. W. 53. And where the statute provides that the corporation can only acknowledge instruments by their "president or secretary," a certificate showing the acknowledgment to have been by the vice-president is fatally defective: *Erickson v. Conniff* (S. Dak.), 101 N. W. 1104.

A certificate reciting the appearance of the president and cashier of the banking corporation, naming them, and reciting the personal knowledge of the officer that they are "the persons whose names are subscribed to the foregoing instrument or writing as parties thereto," and the further recital that they "acknowledged that they executed and delivered the same as their voluntary act and deed for the uses and purposes therein contained," was held sufficient when considered with the deed: *Eppright v. Nickerson*, 78 Mo. 482. But a certificate reciting "Personally came Joseph Sampson and John C. French, to me personally known to be the identical persons whose names are subscribed to the foregoing instrument as president and secretary of the Fidelity Loan & Trust Co., the grantor therein named, and acknowledged said instrument to be the act and deed of said company, by them as officers of said company voluntarily done and executed," was held fatally defective, because of failing to show that the persons who acknowledged the instrument were known to him, or proved to him, to be the president and secretary of the corporation: *Holt v. Metropolitan Trust Co.*, 11 S. Dak. 456, 78 N. W. 947. A certificate reciting "Personally appeared G. Jordan, vice-president, and A. S. Richardson, secretary, of the Texas Central Ry. Co., who are to me well known as such, and each acknowledged that he executed and delivered the foregoing instrument bearing date of the seventeenth day of May, 1891, for the purposes and consideration therein specified, and as the act of said corporation," was held to identify the persons who acknowledged the execution and delivery of the deed: *Zimpleman v. Stamps*, 21 Tex. Civ. App. 129, 51 S. W. 341. In Minnesota a certificate which did not show that the officer of the corporation was known to be an officer of the corporation or authorized to execute the deed for the corporation, or prove

the facts by the oath of the acknowledging officer as required by the statute, was fatally defective: *Bennett v. Knowles*, 66 Minn. 4, 68 N. W. 111.

b. Partnerships.—In *Citizens' Nat. Bank v. Johnson*, 79 Iowa, 290, 44 N. W. 551, the court said: "We are not aware of any form of acknowledgment required by the statute where one member of a firm mortgages property of the firm for a partnership debt." And in *Fabian v. Callahan*, 56 Cal. 159, it was observed that no particular form of acknowledgment is required by the code to be attached to a certificate of partnership.

But it has been held that a deed purporting to be made by a firm should be acknowledged by one of its members: *Blum Land Co. v. Dunlap*, 4 Tex. Civ. App. 315, 23 S. W. 473. And it is said that a certificate of acknowledgment by a firm should show by which member of the firm the signature was made and acknowledged: *Sloan v. Owens etc. Co.*, 70 Mo. 206. But the certificate need not recite that the partner who signed the name of the partnership acknowledged that he was so authorized by the other partners: *Troy Nat. Bank v. Scriven*, 18 N. Y. Supp. 277; but the contrary was held in *Shirley v. Fearn*, 33 Miss. 653, 69 Am. Dec. 375.

Where an assignment was made by "Daniel Flynn as surviving partner of M. J. Flynn & Bro.," and by "Daniel Flynn, party of the first part," and the certificate of acknowledgment recited that "Daniel Flynn," without further description, personally appeared before the notary and acknowledged the same "to be his free act and deed," it was held a sufficient acknowledgment for all the uses and purposes disclosed by the instrument itself: *Hanson v. Metcalf*, 46 Minn. 25, 48 N. W. 441.

c. Attorneys in Fact.—Where a deed is executed by three attorneys in fact, the acknowledgment should be by all the attorneys as the act of their principal: *Peter's Lessee v. Condron*, 2 Serg. & R. 80. A certificate reciting, "Be it known that on this thirtieth day of June, A. D. 1856, personally came before me James O. Gill, by his attorney in fact, Robert Whitacre, the signer and sealer of the foregoing deed, and acknowledged the same to be his own free act and deed," though not in commendable form, was held sufficient: *Bigelow v. Livingston*, 28 Minn. 57, 9 N. W. 31. And a certificate reciting the appearance of "L. M. Black by Z. H. Daniels, one of his attorneys in fact, and who is personally known to me to be the person described in and who executed the foregoing mortgage, and who acknowledged to me that he had executed the same freely and voluntarily for the uses and purposes therein set forth," was held good: *McAdow v. Black*, 6 Mont. 601, 13 Pac. 377. Likewise where the certificate recited "Personally appeared before me . . . James H. Dubose, attorney in fact for Isaiah Dubose, and acknowledged that he signed, sealed . . . the foregoing deed," it was held to show that he acknowledged the deed on behalf of and as agent of

his principal: *Robinson v. Mauldin*, 11 Ala. 977. So, also, where the certificate after the recital of the acknowledgment of the husband recited, "And I do further certify that personally appeared Peter Voorhees, personally known to me to be the same person whose name is subscribed to the within instrument as the attorney in fact of Mary A. Voorhees, his wife, and the said Peter Voorhees duly acknowledged to me that he subscribed the name of Mary A. Voorhees, thereto, as principal and his own as attorney in fact; and that said Peter Voorhees acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned," it was held a sufficient acknowledgment by the husband on behalf of the wife, as well as in his own behalf; the court, however, attached considerable importance to the fact that the husband had separately acknowledged the deed for himself individually: *Richmond v. Voorhees*, 10 Wash. 316, 38 Pac. 1014.

COLLINS v. METROPOLITAN LIFE INSURANCE COMPANY.

[32 Mont. 329, 80 Pac. 609.]

INSURANCE, LIFE—Connection with the Sale of Liquors, What is not.—One who keeps a restaurant adjacent to a saloon between which there is an archway, allowing free passage, and with whom the saloon-keeper boards, is not, though he sometimes, when the latter is at meals or temporarily absent, waits on customers at the bar, without having any interest in the business, connected with the sale of liquors. His statement in an application for life insurance that he is not in any way connected with the sale of ale, wine, or liquor is, therefore, true, and cannot occasion the forfeiture of a policy issued to him. (p. 583.)

INSURANCE, LIFE—Representations Made in Application and Known by Agent to be Untrue.—If statements made in an application for life insurance are untrue, it is not material that the agent or solicitor knows the true state of facts, if, in the application, the assured agrees that inasmuch as only the home officers of the company have authority to determine whether the policy shall issue and act only on the written statements contained in the application, no statements, promises, or information made or given by him to the person soliciting or taking the application, or by or to any other person shall be binding on the company or in any way affect its rights unless reduced to writing and presented to the officers of the company at the home office. (p. 584.)

INSURANCE, LIFE—Agents, Limitation Upon Authority of.—If a policy provides that the contract between the parties is completely set forth therein and in the application, and none of its terms can be varied or modified, nor any forfeiture waived, or premiums in arrears received, except by agreement in writing signed by the president, vice-president, secretary or assistant secretary, whose authority for that purpose will not be delegated, the insured is conclusively presumed to know that no engagement entered into between

him and the agent who took the application extending the time for payment of premiums is binding on the insurer, unless brought to its knowledge and ratified by it. (p. 586.)

INSURANCE, LIFE—Waiver of Time of Payment of Premiums.—The fact that one quarterly payment of premium was made two days after it was due and was reported to the insurer within the next sixteen days after due, but reported as made when due, and the last was made to a clerk of the agent sixteen days after due, but the return of which was tendered three days later, does not show that the insurer knew of and ratified an oral agreement between the assured and the agent that the former might make payment of such premiums as late as sixteen or twenty-four days after they became due, nor estop it from tendering a return of the money received by such clerk and claiming a forfeiture. (pp. 588, 589.)

INSURANCE, LIFE—Waiver of Forfeiture in Other Cases.—The fact that an insurer waives forfeitures of policies held by other persons is of no evidentiary value in an action brought to recover on a policy issued on the life of a person not shown to have had any knowledge of such waivers and whose policy was by its terms forfeited for nonpayment of premiums. (p. 589.)

INSURANCE, LIFE—Forfeiture, Waiver of, Knowledge Essential to.—If after a policy has been issued for nonpayment of a premium when due, and such payment is afterward tendered and received by the insurer, fair dealing requires that it be informed of the condition of the assured, and a payment made without such information while he is probably in extremis is fraudulent. (p. 589.)

INSURANCE, LIFE—Connection with the Sale of Liquor.—Where it is claimed that a policy was forfeited because the assured was connected with the sale of liquor, evidence that he received no compensation for his occasional services at the bar of a saloon-keeper is material as tending to show the exact relation of the assured to the business. (p. 589.)

Carpenter, Day & Carpenter, for the appellant.

E. A. Carleton, for the respondent.

³³¹ **BRANTLY, C. J.** The Metropolitan Life Insurance Company of New York, on August 6, 1902, issued to August Erickson, of the city of Helena, Montana, a policy of insurance on his life for one thousand dollars, the consideration being the payment on or before the delivery of the policy of a premium of thirty-five dollars and six cents, and the promise to pay a like sum on the 6th of February and August of each year during the continuance of the policy. The assured could not meet the first payment on the date named in the policy, and requested Mr. Thompson, the agent of the company in Helena, who held the policy for delivery, to arrange with the company so that he could pay quarterly instead of semi-annually. The arrangement was effected, and the assent of the company was given in writing that the premiums might be paid in installments of seventeen dollars and eighty-eight cents each on the sixth day of August, No-

his principal: *Robinson v. Mauldin*, 11 Ala. 977. So, also, where the certificate after the recital of the acknowledgment of the husband recited, "And I do further certify that personally appeared Peter Voorhees, personally known to me to be the same person whose name is subscribed to the within instrument as the attorney in fact of Mary A. Voorhees, his wife, and the said Peter Voorhees duly acknowledged to me that he subscribed the name of Mary A. Voorhees, thereto, as principal and his own as attorney in fact; and that said Peter Voorhees acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned," it was held a sufficient acknowledgment by the husband on behalf of the wife, as well as in his own behalf; the court, however, attached considerable importance to the fact that the husband had separately acknowledged the deed for himself individually: *Richmond v. Voorhees*, 10 Wash. 316, 38 Pac. 1014.

COLLINS v. METROPOLITAN LIFE INSURANCE COMPANY.

[32 Mont. 329, 80 Pac. 609.]

INSURANCE, LIFE—Connection with the Sale of Liquors, What is not.—One who keeps a restaurant adjacent to a saloon between which there is an archway, allowing free passage, and with whom the saloon-keeper boards, is not, though he sometimes, when the latter is at meals or temporarily absent, waits on customers at the bar, without having any interest in the business, connected with the sale of liquors. His statement in an application for life insurance that he is not in any way connected with the sale of ale, wine, or liquor is, therefore, true, and cannot occasion the forfeiture of a policy issued to him. (p. 583.)

INSURANCE, LIFE—Representations Made in Application and Known by Agent to be Untrue.—If statements made in an application for life insurance are untrue, it is not material that the agent or solicitor knows the true state of facts, if, in the application, the assured agrees that inasmuch as only the home officers of the company have authority to determine whether the policy shall issue and act only on the written statements contained in the application, no statements, promises, or information made or given by him to the person soliciting or taking the application, or by or to any other person shall be binding on the company or in any way affect its rights unless reduced to writing and presented to the officers of the company at the home office. (p. 584.)

INSURANCE, LIFE—Agents, Limitation Upon Authority of.—If a policy provides that the contract between the parties is completely set forth therein and in the application, and none of its terms can be varied or modified, nor any forfeiture waived, or premiums in arrears received, except by agreement in writing signed by the president, vice-president, secretary or assistant secretary, whose authority for that purpose will not be delegated, the insured is conclusively presumed to know that no engagement entered into between

him and the agent who took the application extending the time for payment of premiums is binding on the insurer, unless brought to its knowledge and ratified by it. (p. 586.)

INSURANCE, LIFE—Waiver of Time of Payment of Premiums.—The fact that one quarterly payment of premium was made two days after it was due and was reported to the insurer within the next sixteen days after due, but reported as made when due, and the last was made to a clerk of the agent sixteen days after due, but the return of which was tendered three days later, does not show that the insurer knew of and ratified an oral agreement between the assured and the agent that the former might make payment of such premiums as late as sixteen or twenty-four days after they became due, nor estop it from tendering a return of the money received by such clerk and claiming a forfeiture. (pp. 588, 589.)

INSURANCE, LIFE—Waiver of Forfeiture in Other Cases.—The fact that an insurer waives forfeitures of policies held by other persons is of no evidentiary value in an action brought to recover on a policy issued on the life of a person not shown to have had any knowledge of such waivers and whose policy was by its terms forfeited for nonpayment of premiums. (p. 589.)

INSURANCE, LIFE—Forfeiture, Waiver of, Knowledge Essential to.—If after a policy has been issued for nonpayment of a premium when due, and such payment is afterward tendered and received by the insurer, fair dealing requires that it be informed of the condition of the assured, and a payment made without such information while he is probably in extremis is fraudulent. (p. 589.)

INSURANCE, LIFE—Connection with the Sale of Liquor.—Where it is claimed that a policy was forfeited because the assured was connected with the sale of liquor, evidence that he received no compensation for his occasional services at the bar of a saloon-keeper is material as tending to show the exact relation of the assured to the business. (p. 589.)

Carpenter, Day & Carpenter, for the appellant.

E. A. Carleton, for the respondent.

331 BRANTLY, C. J. The Metropolitan Life Insurance Company of New York, on August 6, 1902, issued to August Erickson, of the city of Helena, Montana, a policy of insurance on his life for one thousand dollars, the consideration being the payment on or before the delivery of the policy of a premium of thirty-five dollars and six cents, and the promise to pay a like sum on the 6th of February and August of each year during the continuance of the policy. The assured could not meet the first payment on the date named in the policy, and requested Mr. Thompson, the agent of the company in Helena, who held the policy for delivery, to arrange with the company so that he could pay quarterly instead of semi-annually. The arrangement was effected, and the assent of the company was given in writing that the premiums might be paid in installments of seventeen dollars and eighty-eight cents each on the sixth day of August, No-

vember, February, and May in each year. In the meantime the first quarterly payment had been made, and the policy delivered. This took place on August 21, 1902. In his application to the company he made certain representations concerning his health, occupation, etc., concluding with a declaration warranting them to be true, and agreeing that they should be made the basis of any contract between him and the company, and that, if any of his statements proved to be untrue, the policy issued to him should be void, and all moneys paid thereon should be forfeited to the company. He further agreed that, inasmuch as only the officers at the home office in the city of New York had authority to determine whether a policy should issue upon any application, and as they acted only on the written statements, etc., contained in the application, no statements, promises, or information made or given by or to the person soliciting or taking the application, or by or to any other person, should be binding upon the company or in any way affect its rights, unless ³³² such statements, promises or information should be reduced to writing and presented to the officers of the company at the home office. This application, signed by the applicant, was forwarded to the home office, and upon it the policy was issued and delivered, as heretofore stated. It recited that it had been issued in consideration of the answers and statements contained in the application, a copy of which was annexed to and made a part thereof, and also of the premiums paid and to be paid.

Among the statements contained in the application were the following: "(2) My occupation is proprietor of a restaurant, and I have no other occupation except . . . (8) I am not in any way connected with the manufacture or sale of ale, wine or liquor." Among the conditions stated in the policy are the following: "Second. If any statement in the application herein referred to is not true, or if any premium or installment of premium be not paid when due, this policy shall be void. . . . Eighth. The contract between the parties hereto is completely set forth in this policy and the application therefor taken together, and none of its terms can be varied or modified, nor any forfeiture waived or premiums in arrears received except by agreement in writing signed by either the president, vice-president, secretary or assistant secretary, whose authority for this purpose will not be delegated; no other person has or will be given authority." The

assured died on June 3, 1903. Soon thereafter the plaintiff was appointed his executor. The policy provides that proof of death shall be made to the home office in the manner and to the extent required by blanks furnished by the company, etc. The plaintiff made seasonable demand upon the company for the necessary blanks, but they were refused. Thereupon this action was brought.

The issues presented at the trial and agitated on the motion for a new trial were whether the policy had been forfeited (1) by reason of false representations of the assured as to his occupation, and his connection with the sale of malt, vinous or alcoholic liquors; and (2) by his failure to pay premiums at ³³³ the times specified, or whether his failure to do so had been waived by the defendant. The plaintiff had verdict and judgment. The defendant has appealed to this court from the judgment and an order denying it a new trial.

³³⁶ While several errors are assigned as grounds for the reversal of the judgment and order, the principal question submitted for decision is that of forfeiture. It was presented upon a motion for nonsuit and specifications of the insufficiency of the evidence to sustain the verdict. It is contended by the defendant that the evidence is conclusive on this question in its favor on both the grounds urged in the trial court.

1. The evidence bearing on the question of forfeiture for material misrepresentations to induce the issuance of the policy is the following: The assured was a restaurant-keeper. The room in which he conducted his business was divided by a partition set at a right angle to its length, and pierced by an archway, allowing free passage from the front to the rear. In the front part of the room was a saloon kept by one Nelson. The rear portion of the building was fitted up with a kitchen, dining-room, etc. Entrance was gained to the restaurant by means of a side door going through the kitchen, or through the saloon by means of the archway. Nelson boarded with the assured. Sometimes while Nelson was taking his meals, and in order to accommodate him, the assured would wait on customers at the ³³⁷ bar, going to Nelson to secure change when necessary, but not using the cash till or register. At times, also, when Nelson was called out temporarily during the day, the same accommodation was extended by the assured. The latter had no interest in the

saloon in any way, and such occasional service as he thus rendered to Nelson was without compensation. At the time when Thompson, the agent of the defendant company, took the application for the policy, he and one Roberts, a solicitor employed by him, were invited by the assured to drink, and did so, he serving them. At that time Thompson asked him if he had any connection with the saloon. He replied: "Only as you see. When Nelson is away, if anybody comes in, I generally wait on them."

Do these facts show that the assured made false statements as to his connection with the manufacture and sale of spirituous liquors, within the meaning of his declaration contained in the application? It is certainly clear that the assured had no other occupation (that is, no other vocation, calling, employment, trade or business) than conducting the restaurant, for all the witnesses who had knowledge of his business testified to this effect. That was the business from which he obtained his livelihood, and to which he devoted his time and attention. His statement as to his occupation was therefore literally true.

The word "connected," in its popular sense—and in this sense it must be presumed to have been used here (Civil Code, section 2209), for there is no ground to think that it was used in any other sense—means joined to, connected or closely associated with, conveying the idea of more or less permanency. This idea is associated with the expressions "connected by blood," "connected in business," "connected by rail or water," and the like, involving the idea of something more than a casual or accidental association or union. In this sense we think it was intended to be used by the parties here. Otherwise the single accommodation extended to Nelson at the time the application was written—such as when the assured invited ³³⁸ Thompson and his solicitor to drink with him, and he himself served them—would have to be construed as such a connection with the particular business as to work a forfeiture of the policy, if not stated. Thompson evidently understood such connection as he observed between the assured and the business of Nelson not to be substantial or permanent in the sense in which the word "connected" is ordinarily used. Thompson's understanding of the term, while not conclusive upon the company, is illustrative of the sense in which it was intended to be employed. If this be the correct interpretation of the term, then such

incidental or occasional service of the assured in tending that bar was not such connection with the business as to make his negative statement in the application a misrepresentation. The evident purpose of requiring the declaration in the application was to inform the company exactly as to the business connections of the applicant, so that it, through its agents, could determine whether or not the risk was a suitable one. From this point of view—and we think it the proper one—the statement was true, and the contention of the defendant cannot be sustained.

Counsel cite many authorities in support of their contention—among them, the following: *Metropolitan Life Ins. Co. v. Rutherford*, 98 Va. 195, 35 S. E. 361; *Graham v. Firemen's Ins. Co.*, 87 N. Y. 69, 41 Am. Rep. 348; *Jeffrey v. United Order of the Golden Cross*, 97 Me. 176, 53 Atl. 1102; *Dimick v. Metropolitan Life Ins. Co.*, 67 N. J. L. 367, 51 Atl. 692, 69 N. J. L. 384, 55 Atl. 291, 62 L. R. A. 774; *Aetna Life Ins. Co. v. France*, 91 U. S. 510, 23 L. ed. 401; *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. Rep. 837, 29 L. ed. 934. These cases undoubtedly sustain the view that it makes no difference whether the particular representation is material to the risk or not, or whether the applicant acts in good faith. The question of materiality is settled and determined by the stipulations of the contract, and their truth or falsity made determinative of the rights of the parties. They do not, however, sustain the view contended for by the defendant.

³³⁹ The case of *Metropolitan Life Ins. Co. v. Rutherford*, 98 Va. 195, 35 S. E. 361, involved a warranty by the assured touching the cause of the death of his father. In the application the cause given was cholera morbus. In the proof of death the cause given was fistula. The court held that, it having been made to appear that the statement made in the application was false, the policy was avoided.

In *Graham v. Firemen's Ins. Co.*, 87 N. Y. 69, 41 Am. Rep. 348, two policies of fire insurance were issued upon application of the agent of the plaintiff, who made false representations as to the ownership of the property insured. These representations were held to avoid the policy, since by the terms of the contract they were made material.

In *Jeffrey v. United Order of the Golden Cross*, 97 Me. 176, 53 Atl. 1102, the truth of the representations of the assured as to her previous condition of health was by the

terms of the policy made a condition precedent to the liability of the company. She stated in the application, among other things, that she had suffered from dyspepsia, in light form, previous to the date of the application, but that her health was then good, whereas it appeared from the evidence that she had for twenty years been suffering from chronic dyspepsia and other ailments, which continued up to the date of the application. This representation, being false, was held sufficient to avoid the policy.

So the other cases cited all support the general rule that where, by the terms of the policy, the statements contained in the application are made a part of it, as conditions precedent, and the insurer assumes the risk only on the faith that they are true, the insurer does not become liable unless the representations are literally true. In each of the cases cited the representation was an unequivocal false statement in direct reply to the question propounded to the applicant.

Nor does it make any difference that the agent or solicitor knows that the representations are not true, since, under the terms of the contract, he has no authority to waive any requirement in this regard made by his principal: *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. Rep. 837, 29 L. ed. 934.

³⁴⁰ In this case we have seen that the applicant stated the truth about his occupation. So, also, he did as to his connection with the sale of intoxicating liquors, under a proper construction of the term "connected," as used in the application; for an occasional or gratuitous service by way of accommodation to another in his business may not be construed into an engagement in the pursuit of such business. Such a construction would be excessively technical, and not in accordance with the meaning of the term in its ordinary, popular sense.

2. The contention that the policy was forfeited by the failure of the assured to pay the premiums according to its terms must be sustained. The facts shown by the evidence are that, within a few days after the policy was remitted to Thompson, he went to the restaurant of the assured to deliver it and to collect the first premium. The assured told him that he did not have the money, and would not have it until the 20th or 21st of the month. He further said that he could not pay the premiums semi-annually, and desired Thompson to arrange for him with the company so that he could pay quar-

terly on the 20th or 21st of the month, his reason being that his customers were railroad men, and, as their pay-day came on the 20th and 21st, his collections were made at that time, and it would be more convenient for him. Thompson agreed to arrange for the quarterly payments. At the same time he told the assured that he could pay on the 20th, 21st or 22d, or, as some of the testimony tends to show, at any time before the 30th. Upon the delivery of the policy on the 21st, one-half of the semi-annual premium was accepted. On August 29th permission was granted by the company, in writing signed by its secretary, to pay the premiums quarterly, but the sixth days of August, November, February and May were fixed as the dates of payment, thus indicating either that Thompson did not report to the company the proposed change in date of payment, or that the company was not willing to grant this further departure from the terms of the policy as already written. Thereafter, according to the receipts of payment to Thompson ²⁴¹ introduced in evidence, and his statements accompanying his remittances to the company, payments of premiums were made as follows: November 8, 1902; February 6, 1903; May 22, 1903. According to the testimony of Roberts, the solicitor, the payment of February 6, 1903, was actually made on the 22d of the month.

The insured became ill in May, 1903, and was taken to a hospital. The plaintiff, being a personal friend, went to the office of the agent, Thompson, on May 22d, and paid the premium due on the 6th to a clerk—Thompson being absent—and obtained the receipt. He did this at the request of the assured, but said nothing to the clerk in Thompson's office of the illness of the assured. On the 25th Thompson, having discovered the facts, and presumably at the instance of the company, tendered to the plaintiff, for the assured, the amount of the premium so paid. It was not accepted. There is no evidence in the record that the written consent of the defendant was obtained that the premiums might be paid at times other than those fixed in the written permission of the company to pay on the dates named therein.

It is conceded by the respondent that, under the terms of the written contract, the premiums should have been paid at the time specified, and that a failure in this respect would ordinarily avoid the policy. The contention is made, however, that the evidence shows that Thompson, the agent, permitted the payments of November, 1902, and February, 1903,

to be made at later dates, and that this fact, coupled with the fact that he agreed that any and all payments might be made as late at least as the 22d of the designated months, showed a waiver of this condition, so that the company could not repudiate the payment made on May 22d, and thus avoid the policy. This contention involves the assumption that the acts and engagements of Thompson were within the apparent scope of his authority, and therefore binding upon the company, or that, if such be not the case, the knowledge of his acts was brought ³⁴² home to the company, and a course of dealing thus permitted by the company which estopped it to deny its liability.

That the acts and engagements of Thompson were not within the apparent scope of his authority is clear. The eighth condition of the policy is an express limitation upon the authority of the agent. It declares that "the contract between the parties hereto is completely set forth in this policy and the application therefor taken together, and none of its terms can be varied or modified, nor any forfeiture waived or premiums in arrears received except by agreement in writing signed by either the president, vice-president, secretary or assistant secretary, whose authority for this purpose will not be delegated; no other person has or will be given authority." It limits the authority of the agent to the taking of applications, the delivery of policies, the collection of premiums, and other matters of like nature, and to this limitation the assured gave his assent. He knew of it at the time he accepted the policy, or, what is the same thing, the conclusive presumption is that he knew. Such being the case, he knew that any engagement he entered into with Thompson was not binding on the company unless it was brought to its knowledge and ratified by it. It was his duty to read the policy and all the conditions and limitations it contained, and, if he did not do so, the omission was his own fault, and the loss, if any, must fall on him. He could not be permitted to enter deliberately into the contract, and then, after disregarding its plain conditions, be heard to say that the other contracting party was nevertheless bound. In such case the knowledge of the agent cannot be imputed to the principal so as to bind it, for the obvious reason that the particular act or declaration in controversy is known by the party dealing with him to be beyond the scope of his authority. The opposite view would render nugatory and

destroy the very precaution taken by the principal to prevent the agent from departing from the strict terms of the contract without authority granted, as in the contract provided, and would result in a substitution of a different contract for the one made by the parties. The ³⁴³ following authorities fully support this view: *Knickerbocker Life Ins. Co. v. Norton*, 96 U. S. 234, 24 L. ed. 689; *Insurance Co. v. Wolff*, 95 U. S. 326, 24 L. ed. 387; *Northern Assur. Co. v. Grand View Bldg. Assn.*, 183 U. S. 308, 22 Sup. Ct. Rep. 133, 46 L. ed. 213; *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. Rep. 837, 29 L. ed. 934; *Allen v. German-American Ins. Co.*, 123 N. Y. 6, 25 N. E. 309; *Quinlan v. Providence-Washington Ins. Co.*, 133 N. Y. 356, 28 Am. St. Rep. 645, 31 N. E. 31; *Modern Woodmen of America v. Tevis*, 117 Fed. 369, 54 C. C. A. 293; 1 *Current Law Review*, 50, and notes; *Deweese v. Manhattan Ins. Co.*, 35 N. J. L. 366; *Assurance Co. v. Norwood*, 57 Kan. 610, 47 Pac. 529; *Kyte v. Commercial Co.*, 144 Mass. 43, 10 N. E. 518. See notes to *Smith v. Niagara Fire Ins. Co.*, 60 Vt. 682, 6 Am. St. Rep. 144, 15 Atl. 353, 1 L. R. A. 216, and *Lamberton v. Connecticut Fire Ins. Co.*, 39 Minn. 129, 39 N. W. 76, 1 L. R. A. 222.

In *Northern Assur. Co. v. Grand View Bldg. Assn.*, 183 U. S. 308, 22 Sup. Ct. Rep. 133, 46 L. ed. 213, the United States supreme court, after an extensive review of the authorities, both state and federal, touching the authority of insurance agents, expressed its views as follows: "That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; that provisions contained in fire insurance policies that such a policy shall be void and of no effect if other insurance is placed on the property in other companies without the knowledge and consent of the company are usual and reasonable; that it is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing, either by indorsement upon the policy or by other writing; that it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the ³⁴⁴ policies as executed and delivered; that where fire insur-

ance policies contain provisions whereby agents may, by writing indorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by nonobservance of such conditions; that, where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that, where the waiver relied on is an act of an agent, it must be shown either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent." These conclusions were stated after a consideration of the conditions contained in a fire insurance policy, but they apply with equal force to any species of contract.

The company not being presumed to have knowledge of the engagements and conduct of the agent, do the facts tend to show that it ratified them, or that after notice it pursued such a course toward the assured that it estopped itself? The first payment was made on the delivery of the policy. This was a condition precedent to the validity of the policy. The payment in November was made on the 8th, two days after it was due. It was so reported to the company. By retaining this premium the company is conclusively presumed to have ratified the act of the agent, and to have waived the forfeiture. The only knowledge the company had of the date of the next payment, so far as the evidence tends to show, was that it was made on February 6th, the agreed date. The last payment was made sixteen days after it was due, but was tendered back, and the act of the agent in receiving it repudiated. It seems significant that, though the third payment was in fact not made until it was overdue, the company was informed that it was made ³⁴⁵ when due. From this fact the inference might be drawn that this misrepresentation was made because the agent understood that the company would not waive another forfeiture. But be this as it may, it was a misrepresentation which prevented any ratification or waiver by the company. There was then but the single act of waiver by the company in November upon which the plain-

tiff bases his claim of estoppel. This is not sufficient to sustain it.

Nor is the fact incidentally shown in the evidence that the company waived forfeitures of policies held by other persons, of evidentiary value, it not being shown that the holder of this policy knew of such waivers, and that his conduct was influenced by such knowledge. Under the circumstances, fair dealing also required that the assured inform the company of his condition at the time the last payment was made. For it was entitled to know the facts, so that it might intelligently exercise its option, for, the forfeiture having already occurred, the concealment of the fact that the assured was probably already in extremis was fraudulent: *Globe Mutual Ins. Co. v. Wolff*, 95 U. S. 326, 24 L. ed. 387.

3. No complaint is made that the court erred in admitting or excluding evidence, except with reference to that showing that the assured received no compensation for his occasional service at Nelson's bar. Objection was made that this was immaterial. We think it was of some materiality, as tending to show the exact relation of the assured to the business.

Some criticism is made of the instruction submitted to the jury. It is not necessary to notice them, since what has already been said is sufficient to guide the court in further proceedings in the case.

The judgment and order are reversed, and the district court is directed to grant a new trial.

Mr. Justice Milburn and Mr. Justice Holloway concur.

On Warranties in Life Insurance policies against the use of intoxicating liquors, see *Chambers v. Northwestern Mutual Life Ins. Co.*, 64 Minn. 495, 58 Am. St. Rep. 549; *Union Mutual Life Ins. Co. v. Reif*, 36 Ohio St. 596, 38 Am. Rep. 613, and note.

On the Waiver of Conditions and forfeitures in insurance policies by the agents of the insurer, see *Johnson v. Aetna Ins. Co.*, 123 Ga. 404, 107 Am. St. Rep. 92, and note.

**BUTTE LAND AND INVESTMENT COMPANY v. MER-
RIMAN.**

[32 Mont. 402, 80 Pac. 675.]

MINING CLAIMS—Adverse Claims, Suits to Determine Effect of as Against the United States.—To a suit under the Revised Statutes of the United States to determine adverse claims to mining lands, the government is not a party, and is not bound by the judgment, except to the extent that it determines which of the contending claimants is entitled to the possession. The adjudication in the state court is not conclusive of the prevailing party's right to the property as against the United States, nor does it divest the government's title. (p. 595.)

MINING LANDS—Adverse Claims, Effect on Third Parties of Suits to Determine.—A judgment in a suit in a state court under section 2326 of the statutes of Montana to determine adverse claims to mining lands is not conclusive except between the parties before the court and those in privity with them, and does not preclude third parties from subsequently maintaining that there existed a known lode of rock in place, bearing gold, copper, or other valuable minerals to which they had acquired title by locating the same under the laws of the United States. (p. 597.)

Alexander Mackel, J. L. Wines and C. P. Connolly, for the appellants.

Kirk & Clinton, for the respondents.

407 HOLLOWAY, J. On December 20, 1890, S. V. Kemper and Josephine Lorenze, the predecessors in interest of these plaintiffs, located the Butte and Boston placer mining claim in Silver Bow county, Montana, and on May 11, 1891, made application in the land office for patent therefor. Thereupon Charles S. Passmore and another filed their protest and adverse claim to a large portion of the ground included within such placer location, basing their rights upon the Pleasant View lode claim and the Point Pleasant lode claim. The adverse claims were allowed, and, within the time limited by law, adverse suits were duly commenced in the district court for Silver Bow county, and such proceedings had therein that in each of these suits a judgment in favor of the defendants Kemper and Lorenze was duly entered, a certified copy thereof filed in the land office, and on December 19, 1895, a patent was issued for the placer claim to Kemper and Lorenze, the applicants therefor. In January, 1901, this action was commenced by these plaintiffs, who had

succeeded to the interests of Kemper and Lorenze, against the defendants Merriman, Mason, MacGinniss, and Heinze, for damages for ores alleged to have been taken from the ground within the Butte and Boston placer, and for an injunction to restrain further mining operations by such defendants.

Defendants MacGinniss and Heinze answered, disclaiming any interest in the property, and denying any trespass upon it. The defendants Merriman and Mason answered, denying the allegations of plaintiffs' complaint, and, by way of an affirmative defense or counterclaim, set forth that the plaintiffs' claim ⁴⁰⁸ to the property in controversy is founded upon the Butte and Boston placer patent; that, at the time application for such patent was made, there existed within the confines of such placer claim a known lead or lode of rock in place, bearing gold, copper and other valuable minerals; that, by direct reservation in the placer patent, this known lead or lode was excepted from the grant to Kemper and Lorenze; and that thereafter, on March 19, 1900, Kift and Knoyle duly located on such known lead or lode the Hornet quartz lode mining claim; that they duly complied with the laws, rules, and customs in completing such location and filing for record a sufficient declaratory statement; that by mesne conveyances these defendants, Merriman and Mason, succeeded to the rights of Kift and Knoyle; that the Hornet lode claim covers the same ground and is part and parcel of the ground claimed by the plaintiffs as the Butte and Boston placer; that thereafter, in May, 1900, defendant Merriman located on such known lead or lode the Gulf, Hope, Rabbit and Olivia quartz lode mining claims; that he complied with the laws, rules and regulations in completing each of such locations, and filed proper declaratory statements therefor; that each of these claims is part and parcel of the same ground that is claimed by the plaintiffs under the patent for the Butte and Boston placer; and that by mesne conveyance defendant Mason became the owner of a one-half interest in and to each of these last-mentioned lode claims. It is then set forth that J. H. Burns, William Burns, James Doyle and Perry Delmas claim some interest in the disputed premises adverse to these defendants. The prayer of the answer is that Burns, William Burns, Doyle, and Delmas be brought in, and be required to set up their interest, that the same may be adjudicated; that these defendants, Merriman and Mason, be adjudged to be the owners of the ground comprised

within the limits of their several lode claims; and that the other parties to the action be enjoined from trespassing upon or mining ores in such claims. By order of the court, J. H. Burns, William Burns, Doyle, and Delmas were brought in, and set forth that ⁴⁰⁰ they were lessees operating in the disputed ground under a lease from the plaintiffs.

To the answer and counterclaim of defendants Merriman and Mason, the plaintiffs replied, denying that at the date of the application for patent to the Butte and Boston placer there was any known lead or lode within the ground embraced within the placer application, denying the other allegations of the answer, and pleading the former adjudication in the suits by Passmore and others against Kemper and others, numbered 3620 and 3621, as estoppels against the defendants Merriman and Mason.

On June 5, 1903, the cause came on for trial before the court, sitting with a jury, whereupon the following proceedings were had: To sustain the allegations of their complaint and reply, the plaintiffs introduced in evidence the records of the location of the Butte and Boston placer; the application for patent therefor; protest and adverse claim of Passmore and others; the conveyances by which these plaintiffs succeeded to the interests in the ground in dispute; proof of the conflict between the Butte and Boston placer and the Pleasant View and Point Pleasant lode locations, and showing that the Butte and Boston placer ground was not all comprised within those lode locations; the patent to the Butte and Boston placer; and the judgment-rolls in causes 3620 and 3621. They then waived their claim for damages and rested. The defendants Merriman and Mason then sought to show that at the date of the application for patent for the Butte and Boston placer there existed a lead or lode of rock in place, bearing gold, copper and other valuable minerals, which lead or lode was known to Kemper and Lorenze, the patentees; but this was objected to as to any portion of the ground within the boundaries of the Butte and Boston placer which had been embraced within either the Pleasant View or Point Pleasant lode claims, and this upon the theory that it was an attempt to impeach by oral testimony the judgments in causes Nos. 3620 and 3621. This objection was sustained by the court in the following language: "My ⁴¹⁰ holding, understand, as to this area in conflict, is that that was tried and a judgment was entered, and that that is

conclusive as to that area. But from the map here there is an area outside of that to the east, and this evidence might be competent as to that portion. I will sustain this objection, unless shown to be without or on the outside of the area in conflict with the Point Pleasant and Pleasant View, and involved in the controversy in those two causes." Further examination of the witness then on the stand developed that, at the time application for the Butte and Boston placer patent was made, there was no known lead or lode within the boundaries of that claim, and without the boundaries of either the Pleasant View or Point Pleasant lode claim; and counsel for the defendants Merriman and Mason then renewed their attempt to show that there was such known lead or lode within the confines of the Butte and Boston placer, and within the ground claimed by the Pleasant View and Point Pleasant lode claims, at the time application was made for the Butte and Boston placer; but all this evidence was excluded, and all further offers of this character of proof rejected, upon the theory that the judgments in 3620 and 3621 were conclusive of the fact that at the date of the application for patent to the Butte and Boston placer there was no known lead or lode within its boundaries.

Upon the conclusion of the testimony the court gave to the jury an instruction as follows: "The court instructs the jury that plaintiff has introduced in evidence documentary proofs, free from legal objection, showing title to all ground in controversy to be in them; that defendants have offered no competent or material evidence contradicting plaintiffs' proof. You are therefore instructed to find a verdict to the effect that plaintiffs are the owners and entitled to the possession of all ground in controversy in this action." In compliance with this instruction, the jury returned a verdict in favor of the plaintiffs, and a judgment was entered thereon, from which judgment, and an order overruling their motion for a new trial, defendants Merriman and Mason appealed.

⁴¹¹ The only question for determination is, Are the judgments in causes Nos. 3620 and 3621 conclusive, as against the defendants Merriman and Mason, of the fact that, at the date of the application for the patent to the Butte and Boston placer claim, there was not any known lead or lode within the boundaries of that claim? If this is answered in the affirmative, then the ruling of the trial court was correct; if not, then it was erroneous.

Under the pleadings in causes 3620 and 3621 it may be conceded, for the purpose of this decision, that, as between the parties to those actions and their privies, there was an adjudication of that fact. It is also a conceded fact that defendants Merriman and Mason were not parties to either of those actions, and are not claiming under anyone who was designated as such. But on behalf of respondents here it is contended that, though not nominally a party, yet, as a matter of fact, the United States government was actually a party, and as such was bound by the judgment in each of those actions, and, as the only claim of defendants Merriman and Mason is founded upon rights acquired from the government by virtue of their lode locations, therefore they are in privity with the government, and likewise bound to the same extent as though actually parties by name.

But in what sense was the government a party to either of those suits in the district court? It was not a party plaintiff asserting any right, and it has never consented to be made a defendant and to be sued in the state courts; neither did it intervene to have any supposed right of its own adjudicated. But it is contended that the government is bound by the judgment in an adverse suit, and *Last Chance M. Co. v. Tyler M. Co.*, 157 U. S. 694, 15 Sup. Ct. Rep. 737, 39 L. ed. 859, is cited in support of this contention. In the course of the opinion in that case it is said: "An applicant for public lands cannot have his right thereto as against the government determined by the courts in a suit against the latter: *United States v. Jones*, 131 U. S. 1, 9 Sup. Ct. Rep. 669, 33 L. ed. 90. The only ⁴¹² jurisdiction which the district court could have was of a controversy between individual claimants; and, though its judgment is by statute made conclusive upon the government of the rights of the party in whose favor the judgment goes, it is none the less true that the condition of jurisdiction is a controversy between individual claimants."

Section 2326 of the Revised Statutes of the United States (United States Compiled Statutes of 1901, page 1430), which makes provision for the proceedings to be had in case an adverse claim be filed to an application for patent, among other things provides: "It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so

to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the commissioner of the general land office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess." This is the only provision under which the government has agreed to be bound by the judgment of a state court, if at all, and to what extent has it done so in this instance? It has said, in language which is free from ambiguity, that for the purpose of determining which, if either, of two claimants is entitled to possession of the ground in controversy, it will relegate them to the local courts, where such question may be determined, and, when determined, ⁴¹⁸ the government will accept the judgment as conclusive, as between the parties to it, of the right of the prevailing party to assert his claim before the land department. In other words, the government has merely said that it will accept a certified copy of the judgment-roll in the adverse suit as a part of the prevailing party's proof before the land department, just as it has said it will accept the surveyor general's certificate that five hundred dollars' worth of work has been done, or improvements made, as evidence of that fact. The government is not bound by the adjudication, except in the limited sense that it has declared in advance by statute that it will accept the judgment as determinative of the single question—the right of possession—as between the contending claimants. With any other question which may have been involved in the litigation the government has no concern.

The adjudication in the state court is not conclusive of the prevailing party's right to the property as against the government, nor sufficient to divest the government of the title; neither is it of itself sufficient to entitle the prevailing party to a patent. In *Re Alice Placer Mine*, 4 L. D. 314, Mr. Justice Lamar, then Secretary of the Interior, said: "The judg-

ment of the court is, in the language of the law, 'to determine the question of the right of possession.' It does not go beyond that. When it has determined which of the parties litigant is entitled to possession, its office is ended, but title to patent is not yet established. The party thus placed in possession may 'file a certified copy of the judgment-roll with the register and receiver.' But this is not all. He may file 'the certificate of the surveyor general that the requisite amount of labor has been performed or improvements made thereon.' Why file this, or anything further, if the judgment-roll settles all questions as to title and right to patent? Clearly, because the law vests in the commissioner the authority and makes it his duty to see that the requirements of law relative to entries and granting of patents thereunder shall have been complied with before the issue of patent. His judgment should therefore ⁴¹⁴ be satisfied before he is called upon to take final action in any case. In this case the judgment of the court ended the contest between the parties, and determined the right of possession. The judgment-roll proves the right of possession only. The applicant must still make the proof required by law to entitle him to patent: *Branagan v. Dulaney*, 2 L. D. 744. The sufficiency of that proof is a matter for the determination of the land department. It follows, therefore, that further hearing may, if deemed necessary, be ordered, for the purpose of ascertaining with greater certainty the character of the land, or whether the conditions of the law have been complied with in good faith. To hold differently, and to say that, after the presentation of the judgment-roll, nothing remains for the commissioner save the ministerial acts of preparing and issuing patent, would be to say that the land department loses all jurisdiction in a case after commencement of suit by an adverse claimant. I am well satisfied that the law contemplates no such condition of affairs." This decision is cited with approval by the supreme court of the United States in *Perego v. Dodge*, 163 U. S. 168, 16 Sup. Ct. Rep. 971, 41 L. ed. 113, where it is also said: "Thus the determination of the right of possession as between the parties is referred to a court of competent jurisdiction in aid of the land office."

The government might have made provision for such adverse controversies in the land office, for the disposition of the public lands is vested in the executive department of the government, and is a matter of administration rather than of judicature; but, owing to the limited facilities of the land of-

fee for conducting such trials, and for the better accommodation of contestants, they are relegated to the state courts where the land is situated.

To say that, in an adverse suit by A against B, either party can have his claim to a particular piece of mining ground litigated as against the government, is to say that one may do by indirection that which he cannot do directly, for it is settled beyond controversy that one may not have his right to public ⁴¹⁵ land, as against the government, determined by the courts in an action against the government: *United States v. Jones*, 131 U. S. 1, 9 Sup. Ct. Rep. 669, 33 L. ed. 90; *Last Chance M. Co. v. Tyler M. Co.*, 157 U. S. 694, 15 Sup. Ct. Rep. 737, 39 L. ed. 859.

In speaking of these adverse suits in the state courts, the supreme court, in *Perego v. Dodge*, 163 U. S. 168, 16 Sup. Ct. Rep. 971, 41 L. ed. 113, further said: "It must be remembered that it is 'the question of the right of possession' which is to be determined by the court, and that the United States is not a party to the proceedings. The only jurisdiction which the courts have is of a controversy between individual claimants, and it has not been provided that the rights of an applicant for public lands, as against the government, may be determined by the courts in a suit against the latter."

These considerations seem sufficient in determining that the government is not a party to an adverse suit; and as these defendants, Merriman and Mason, were not parties to either suit (3620 and 3621), and are not in privity with anyone who was, it follows, as a matter of course, that they are not concluded by the judgments rendered in those actions: 24 Am. & Eng. Ency. of Law, 2d ed., 724. We are therefore of the opinion that the trial court erred in excluding the offered proof.

The judgment and order overruling defendant's motion for a new trial are reversed, and a new trial ordered.

Mr. Chief Justice Brantly and Mr. Justice Milburn concur.

A Judgment Rendered in an Action of ejectment brought by a person claiming the ownership of the right of possession to land in the possession of a United States officer in his official capacity, while it may be executed to the extent of placing the plaintiff in possession, is not conclusive against the United States: See the monographic note to Henderson v. Henderson Bridge Co., 105 Am. St. Rep. 210.

CORNISH v. WOOLVERTON.

[32 Mont. 456, 81 Pac. 4.]

NEGOTIABLE INSTRUMENTS—Provisions Destroying Negotiability.—A note, otherwise negotiable in form, bearing interest at the rate of six per cent per annum and referring to interest coupons, but adding that the note and coupons are to draw interest at the rate of twelve per cent per annum after maturity, is non-negotiable. (p. 606.)

NEGOTIABLE INSTRUMENT—When Rendered Non-negotiable by Reference to Mortgage.—A promissory note, negotiable in form, but declaring that it is secured by a mortgage of even date, recorded in a specified county, must be construed in connection with such mortgage. Hence, if the mortgage contains conditions which render the note uncertain as to the amount to be paid or the time of payment, these must be read into the note, and make it non-negotiable. (pp. 606, 607.)

A MORTGAGE Does not Convey the Legal Title, but is a mere lien to secure the performance of the contract to which it is incident. (p. 607.)

NEGOTIABLE INSTRUMENT, When Rendered Non-negotiable by a Mortgage.—If a note, otherwise negotiable in form shows on its face that it is secured by mortgage, and such mortgage, as it appears of record, provides that the mortgagor will pay all taxes on the property, all liens and encumbrances on the premises and for insurance, and that on default the mortgagee may make such payment, and that the payments so made shall bear interest at the rate of twelve per cent per annum, and be secured by the mortgage; that the mortgagor will keep the property in repair, commit no waste, keep the property insured, and that on default of the payment of interest when due, or in the performance of any covenant therein, the principal and interest shall become due at the option of the holder, who may proceed to foreclose the mortgage, and that in such proceeding one hundred and fifty dollars attorneys' fee may be allowed, the note is thereby rendered non-negotiable. (pp. 607, 608.)

NEGOTIABLE INSTRUMENTS.—The Transfer without Indorsement of a Negotiable Instrument destroys its negotiable character, and the assignee takes it subject to such defenses as might have been available against it in the hands of the payee. (p. 608.)

ASSIGNMENT of Non-negotiable Instrument—Effect of Subsequent Payment to the Assignor.—If the maker of a non-negotiable instrument, without notice of its assignment, in good faith, pays it to the original payee, and takes an acquittance, this constitutes a complete defense to an action by the assignee. (p. 610.)

A MORTGAGE is a Conveyance within the meaning of the recording laws of Montana. (p. 611.)

MORTGAGES.—The title to a mortgage passes to the assignee on the assignment of the obligation secured by it. (p. 611.)

MORTGAGES.—The Record of the Assignment of a Mortgage Imparts Notice to all persons dealing with the assignor in any capacity whatever. Hence, payment to him after such assignment, unless he continues to hold the evidence of the deed, does not discharge the mortgage. (p. 612.)

MORTGAGE—Notice of Assignment of.—One who purchases real property which is subject to a mortgage, after the assignment of such mortgage has been filed for record, is charged with notice thereof, and cannot satisfy the mortgage debt to the assignor. (p. 612.)

MORTGAGE, Assignment of.—The Release of a Mortgage by the Original Mortgagee After the Assignment from him to another has been filed for record is ineffective, and all persons dealing with the property are chargeable with notice that such is the case. (p. 613.)

MORTGAGE, Assignee of, When not Estopped from Enforcing Notwithstanding Payment Made to His Assignor.—The fact that the assignee of a mortgage, after placing his assignment on record, permits his assignor to collect interest coupons, does not show that such assignor is entitled to receive payment of the principal and discharge the mortgage debt, nor does it estop the assignee from subsequently enforcing the mortgage, though payment thereof in full has been made to the original mortgagee by one having no actual notice of the assignment. (p. 613.)

PRINCIPAL AND AGENT.—One dealing with a supposed agent is bound to ascertain the scope of his authority. Otherwise he assumes the risk and must suffer the consequences. (p. 613.)

MORTGAGE, Assignor of, Duty of to the Mortgagor and Others.—One who purchases the indebtedness secured by a mortgage on real property and takes an assignment which he places on record, does not owe any further duty to the mortgagor or his successor in interest or others dealing with the property. Hence, his failure to give actual notice of the assignment, and his delay to foreclose the mortgage for any period less than the full time allowed by the statute of limitations, do not estop him from asserting his mortgage indebtedness and lien against a successor in interest of the original mortgagor, who has, in the meantime, paid the indebtedness to the original mortgagee without actual notice of the assignment. (p. 614.)

Bolinger & Stewart and Hartman & Hartman, for the appellants.

John A. Luce, for the respondent.

⁴⁶² BRANTLY, C. J. Action to foreclose a mortgage executed on August 1, 1895, to secure a promissory note for borrowed money, by the defendants, ⁴⁶³ William W. Woolverton and his wife, Joanna Woolverton, to the Bunnell and Eno Investment Company, a New Jersey corporation (hereinafter referred to as "the company").

The plaintiff sues as the purchaser for value of the mortgage and note prior to maturity, evidenced by written assignment to him by the company, duly acknowledged, and recorded in Gallatin county on September 28, 1895. The complaint is in the ordinary form, alleging a breach of the contract by a failure to pay the note according to its terms, and asks for a decree of sale of the mortgaged property for the

satisfaction of the indebtedness, with interest and costs, including attorney's fees. Copies of the mortgage and note are attached. The following is a copy of the note:

"On the first day of August A. D. 1900, for value received I promise to pay to the order of The Bunnell and Eno Investment Company, the principal sum of Fifteen Hundred Dollars, with interest thereon at the rate of six per cent per annum from August 1, 1895, until maturity, payable semi-annually, according to the tenor of ten interest notes, each for Forty-five Dollars, bearing even date herewith and hereto attached, both principal and interest notes payable in gold coin of the United States of America of or equal to, the present standard of weight and fineness at the Merchants' National Bank in Helena, Montana. This note and these coupons are to draw interest at the rate of twelve per cent per annum after maturity and are secured by mortgage of even date herewith, duly recorded in Gallatin county, of the State of Montana.

"Dated at Helena, State of Montana, on the first day of August, 1895."

The defendants answered, setting up four separate defenses. The first of these it will not be necessary to notice further than to observe that it contains a general plea of payment of the full amount of the note and interest, and a release of the mortgage of record by the company on or about February 26, 1900, and deraignment of title to the defendant Metheny from Woolverton and wife, through Kirk, by deeds of warranty.

⁴⁶⁴ The second defense alleges, in substance, that on February 25, 1897, the defendants William W. Woolverton and Joanna, his wife, conveyed the mortgaged property to defendant Ira L. Kirk; that he was at the time of his purchase informed of the encumbrance thereon in favor of the company, and agreed to assume and pay it off as a part of the purchase price; that up to the date of this sale the defendants Woolverton had paid to the company all the interest which had fallen due, and had received the coupons therefor from the company, properly canceled; that after his purchase defendant Kirk had paid to the company all the other installments falling due; that a short time before the principal of the note fell due the said Kirk paid it in full, with interest up to the date of maturity, and received from the company a written release and acknowledgment of satisfaction in full, duly acknowledged for record, and had the same recorded in

the records of Gallatin county; that none of the defendants received notice that the plaintiff owned or claimed to own the note and mortgage until May 12, 1902, more than two years after the said principal had been discharged and canceled by his payment; and that the plaintiff should be held to be estopped to claim payment to him, because he failed and neglected to give notice of the assignment to him of the said note and mortgage.

The third defense, in addition to the foregoing, alleges further that the plaintiff never at any time gave notice to any of the defendants that he claimed to be the owner by assignment or other right of the note and mortgage until May 12, 1902, more than two years after the note had been fully paid to the company and its satisfaction of the mortgage entered of record in Gallatin county; that the plaintiff, by his acts and conduct in permitting the company to collect the interest coupons from time to time, had held it out to the defendants as his agent to collect the note and cancel the mortgage, and that for this reason the said company had authority to collect the note and enter the satisfaction of the mortgage, and that by reason of his silence and omission and failure to notify defendants that ⁴⁶⁵ the company did not have authority to collect the indebtedness, and by reason of the conduct of the plaintiff in holding out to the defendants that the company did have authority to collect and receive payment of the same, the plaintiff cannot now be heard to say that the company did not have such authority, both to receive payment and discharge the mortgage.

The fourth defense alleges that the plaintiff never gave the defendants, or any of them, notice that he claimed to be the owner of the note or interest coupons or the mortgage until May 12, 1902, more than two years after the indebtedness had been paid and the mortgage had been released and canceled; that by his conduct in permitting the company to collect the interest coupons the plaintiff held it out to the defendants Woolverton and Kirk as his agent with authority to collect and discharge the debt, and that, relying upon its ostensible authority to receive payment, the said Kirk paid the full amount of the debt to it; that during all of the time from August 1, 1895, to August 1, 1900, and for about twenty months after the last-mentioned date, the company was solvent and able to respond in damages; that on or about March 14, 1902, it was found to be insolvent, and a receiver was appointed to

wind up its affairs; that the receiver has no assets out of which the defendants might have reimbursement for the moneys paid to the company in discharge of the indebtedness; that plaintiff did not notify the defendants of his purchase of the note and mortgage until the company had been found to be insolvent; that the defendants could and would have secured reimbursement for the payments to the company as aforesaid, or have obtained security therefor, had they received notice in a reasonable time that the company had no authority to receive the payment; and that by reason of plaintiff's negligence in failing to notify defendants of the fact that the company was not his agent in the premises plaintiff is now estopped to say that the company did not have authority to act for the plaintiff and to receive payments made to it in the discharge of said indebtedness and to discharge the mortgage.

468 To each of the defenses a general demurrer was interposed by the plaintiff. This, after argument, the court sustained, and, the defendants declining to plead further, a decree was entered granting the relief prayed for in the complaint. From this decree the defendants have appealed.

Counsel have confined their discussion in their briefs to the questions arising upon the action of the district court in sustaining a general demurrer to the last three defenses, it being assumed that the first defense, though good in form as a general plea of payment, would be supported in a hearing on the merits only by the facts specifically pleaded in the other defenses. Therefore, the correctness of the view of the court as to the sufficiency of that defense is eliminated from the case, and it will not be necessary to consider its action in this connection.

The questions presented for decision are: 1. Is the note in suit negotiable? 2. If not, did plaintiff take subject to the defense of payment made by the grantee of the Woolvertons prior to actual notice of the assignment? 3. Do the facts stated show an agency of the company to receive payment? And 4. Is the plaintiff estopped to demand payment?

1. As to the negotiability of the note in suit. It will be noted that by its terms the principal sum named therein is to bear six per cent interest, payable semi-annually, the installments being evidenced by coupons, each for forty-five dollars. There is added this clause: "This note and these coupons are to draw interest at the rate of twelve per cent per annum

after maturity, and are secured by a mortgage of even date herewith," etc. Does the latter clause render it non-negotiable?

Prior to the adoption of the present code, which became operative on July 1, 1895, the common-law rule of interpretation under the law-merchant was in force in this state, and it was accordingly held that a stipulation for the payment of an attorney's fee in a bill of exchange did not destroy its negotiability. This court followed the line of decisions which sustain ⁴⁶⁷ both the validity of the stipulation and the negotiability of the instrument in *Bank of Commerce v. Fuqua*, 11 Mont. 285, 28 Am. St. Rep. 461, 28 Pac. 291, 14 L. R. A. 588. This holding was based upon the theory that the condition or stipulation for the payment of an attorney's fee could not, and did not, attach until after maturity, when the instrument, otherwise meeting the requirements of the law-merchant as to definiteness and certainty in its terms, had ceased to be negotiable. The code contains provisions, however, which obviously were designed to set at rest all doubts and uncertainties arising from conflicting decisions of courts under the common-law rule. These are found in sections 3990 to 3997 of the Civil Code. So far as pertinent to the present discussion, they are as follows:

"A negotiable instrument is a written promise or request for the payment of a certain sum of money to order or bearer, in conformity to the provisions of this article": Civ. Code, sec. 3991.

"A negotiable instrument must be made payable in money only, and without any condition not certain of fulfillment": Civ. Code, sec. 3992.

"A negotiable instrument may contain a pledge of collateral security with authority to dispose thereof": Civ. Code, sec. 3996.

"A negotiable instrument must not contain any other contract than such as is specified in this article": Civ. Code, sec. 3997.

Section 3996 was amended by the act of 1899 (Sess. Laws 1899, p. 124) by an addition thereto of the clause, "also a provision for reasonable attorney fee or both." The amended section, however, does not apply to the note in suit (*Bullard v. Smith*, 28 Mont. 387, 72 Pac. 761), so that its character must be determined by the provisions of the code as they stood prior to the amendment. Indeed, it is manifest that the

amendatory act did not work a change in the provisions of the code, except in the one particular that it authorizes a stipulation for a reasonable attorney's fee in addition to a stipulation for collateral security, with authority to dispose thereof. The ⁴⁶⁸ amendment was evidently made for the purpose of obviating the result of the decision of this court in the case of *Stadler v. First Nat. Bank*, 22 Mont. 190, 74 Am. St. Rep. 582, 56 Pac. 111, for it was enacted by the legislature which was sitting at the time the decision was rendered (*Bullard v. Smith*, 28 Mont. 387, 72 Pac. 761), and goes no further than to make a promissory note containing a stipulation for an attorney's fee negotiable. The history of the amendment clearly justifies this conclusion.

In *Stadler v. First Nat. Bank*, 22 Mont. 190, 74 Am. St. Rep. 582, 56 Pac. 111, it was held that this stipulation rendered a promissory note non-negotiable, because such a stipulation was violative of sections 3992 and 3997, *supra*, in that the stipulation was not certain of fulfillment, and was also a contract other than a specific promise to pay the principal sum named in the note, with interest. The decision was based upon the only construction of which the provisions of the code are susceptible, as well as upon the decided cases, both state and federal, involving the construction of identical statutory provisions. The case before us is distinguishable from that case only in the character and purpose of the particular stipulation. The provisions of the statute are clearly prohibitory, and apply to all sorts of conditions not certain of fulfillment, whether they attach before or after maturity, and to all sorts of contracts other than the principal promise and those stipulations which fall within the exceptions provided for in the statute.

Many cases are cited by the respondent to support his contention that the particular stipulation does not destroy the negotiability of the note in suit; but all, with one exception, seem to be from states which have not undertaken to fix the rule of negotiability by legislative enactment. It will not be necessary to cite and distinguish these cases. Counsel for respondent relies on *Merrill v. Hurley*, 6 S. Dak. 592, 55 Am. St. Rep. 859, 62 N. W. 958, as strongly persuasive in favor of the negotiability of the note, if not conclusive. Particular stress is laid upon the fact that the same court which had decided the case of *Hegeler v. Comstock*, 1 S. Dak. 138, 45 ⁴⁶⁹ N. W. 331, 8 L. R. A. 393, in the later case held a promis-

sory note containing conditions similar to those involved in the case of *Hegeler v. Comstock*, 1 S. Dak. 138, 45 N. W. 331, 8 L. R. A. 393, not to be obnoxious to the provisions of the statute. *Hegeler v. Comstock*, 1 S. Dak. 138, 45 N. W. 331, 8 L. R. A. 393, was cited and approved in *Stadler v. First Nat. Bank*, 22 Mont. 190, 74 Am. St. Rep. 582, 56 Pac. 111; but counsel say the latter should not be followed in this case, if *Merrill v. Hurley*, 6 S. Dak. 592, 55 Am. St. Rep. 859, 62 N. W. 958, was correctly decided. In *Merrill v. Hurley*, 6 S. Dak. 592, 55 Am. St. Rep. 859, 62 N. W. 958, the supreme court of South Dakota practically overrules and destroys the effect of *Hegeler v. Comstock*, 1 S. Dak. 138, 45 N. W. 331, 8 L. R. A. 393. Although the court undertakes to distinguish the former from the latter, the writer confesses that, in his opinion, they are not, on principle, distinguishable, and that the result of the later decision is to overrule the former. Both of them abound in citations of decisions of courts which are controlled by the common-law rule, and in both of them the purpose and effect of the statutory provisions seem to have been, in a measure, at least, entirely overlooked.

In *Hegeler v. Comstock*, 1 S. Dak. 138, 45 N. W. 331, 8 L. R. A. 393, the uncertain condition held sufficient to destroy the negotiability of the particular instrument was found in the clause, "with interest from date until paid at the rate of ten per cent per annum, eight per cent, if paid when due." The note in suit in *Merrill v. Hurley*, 6 S. Dak. 592, 55 Am. St. Rep. 859, 62 N. W. 958, though it contained the clause, "If any part of the principal is not paid at maturity, it shall bear interest at the rate of twelve per cent per annum, payable annually; and if any interest remains unpaid twenty days after due, the principal shall become due and collectible at once without notice, at the option of the holder"—was held not to be uncertain, or to contain an additional contract within the prohibition of the statute. In our view, the cases cannot be reconciled, and, by failing to observe the express provisions of the statute and following the analogies of the decisions of courts which are controlled by the common-law rule of interpretation, the court seems to have fallen again into the confusion which it is the purpose of the statute to remove. As was said in *Adams v. Seaman*, 82 Cal. 636, 23 Pac. 53, 7 L. R. A. 224: "These code provisions were evidently intended to remove, and they do remove, all doubt which conflicting decisions ⁴⁷⁰ had thrown over such questions as the one arising

in the case at bar." Though this latter case and the case of *Stadler v. First Nat. Bank*, 22 Mont. 190, 74 Am. St. Rep. 582, 56 Pac. 111, had to do with a stipulation for an attorney's fee, liability for which could not attach until after maturity, yet no substantial distinction can be pointed out between such a stipulation and any other which attaches only after maturity, or any contract other than the agreement to pay the principal sum demanded or promised.

The cases cited for illustration and as persuasive authority in the two South Dakota cases do not aid in the solution of the question before us, for the reason that, in our opinion, its solution depends wholly upon the construction to be given to the statute, as is stated in the case of *Adams v. Seaman*, 82 Cal. 636, 23 Pac. 53, 7 L. R. A. 224. The correct conclusion was reached, after an examination of the authorities, in the case of *Stadler v. First Nat. Bank*, 22 Mont. 190, 74 Am. St. Rep. 592, 56 Pac. 111, and we deem it controlling in this case. It is not certain that the condition referred to will be fulfilled, and it is a contract other than one authorized by the statute. The note is therefore non-negotiable.

For another reason it is non-negotiable. It refers on its face to the mortgage. Section 2207 of the Civil Code provides: "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." Under the rule of construction here declared, the conditions and stipulations embodied in the one must be construed to enter into and constitute a part of the other. So that, if the mortgage referred to in the note contains conditions which render the note uncertain as to the amount to be paid and the time of payment, these must be read into the note. The two must be read and construed together to ascertain the nature of the agreement upon which the negotiable character of the note depends. The reference to the mortgage brings to the notice of everyone dealing with the note all the conditions attached, so that, even though it should be held negotiable so far as concerns the conditions expressed upon its face, its negotiable character must be determined by the provisions of the mortgage. This section of the statute⁴⁷¹ sets at rest any question which might otherwise exist as to the rule of construction applicable. The note and mortgage refer to each other. They are contracts relating to the same subject matter. They are between the same parties. They are both parts of substantially one transaction. Therefore,

they constitute one contract: *Meyer v. Weber*, 133 Cal. 681, 65 Pac. 1110.

Apart from the statute, there is a conflict in the decisions, the courts of some states applying the rule declared by the statute, but others holding that the conditions contained in the mortgage do not affect the character of the note secured thereby. In this state the mortgage is but an incident, and passes to the assignee of the note: Civ. Code, sec. 3825. This, however, does not affect the application of the rule, for it is the general rule in this country that a mortgage does not convey the legal title, but is a mere lien to secure the performance of the contract to which it is incident. The following authorities illustrate the application of the rule: *Brooke v. Struthers*, 110 Mich. 562, 68 N. W. 272, 35 L. R. A. 536; *Daniel on Negotiable Instruments*, secs. 156, 835; *Donaldson v. Grant*, 15 Utah, 231, 49 Pac. 779; *Muzzy v. Knight*, 8 Kan. 456; 1 *Jones on Mortgages*, sec. 71; *Strong v. Jackson*, 123 Mass. 60, 25 Am. Rep. 19; *Garnett v. Myers*, 65 Neb. 280, 94 N. W. 803.

The mortgage in this case contains a number of conditions, among them that the mortgagors will pay all taxes imposed upon the mortgaged property or against the holder of the mortgage; that they will pay, when due, all liens and encumbrances upon the premises, and premiums for insurance therein provided for, or, in default of such payment by the mortgagors, that the mortgagee or his successors may pay the same, or any part thereof, whereupon the amount so paid shall bear interest at twelve per cent per annum, and shall be secured by the mortgage in the same manner as the principal debt thereby secured; that they will keep the property in repair; that they will commit no waste; that they will keep the property insured, ⁴⁷² or, in case of failure, that the mortgagee may do so at the owner's expense, all premiums so paid to become a part of the indebtedness secured; that in default of payment of interest when due, or in the performance of any covenant therein, the principal and interest shall become due at the option of the mortgagee, who may proceed to foreclose; that no judgment rendered upon the note shall be a bar to foreclosure unless payment be made; and that, if suit for foreclosure be brought, one hundred and fifty dollars shall be allowed as an attorney's fee, to be added to the amount of the mortgage. Construing these conditions as a part of the note, it is brought clearly within the decision of *Stadler v.*

Bank, 22 Mont. 190, 74 Am. St. Rep. 529, 56 Pac. 111, and the cases last cited, and is non-negotiable.

Again, the complaint alleges that the note and mortgage were for a valuable consideration "sold, assigned, transferred, and set over" to the plaintiff by the company. A negotiable instrument, payable to order, must be indorsed by the payee, in order to preserve its negotiability in the hands of a subsequent holder. A transfer without indorsement destroys its negotiable character, and the assignee takes it subject to all such defenses as might have been available against it in the hands of the payee: *Sathre v. Rolfe*, 31 Mont. 85, 77 Pac. 431; *Helena Nat. Bank v. Rocky Mt. Bell Tel. Co.*, 20 Mont. 379, 63 Am. St. Rep. 628, 51 Pac. 829; *Foreman v. Beckwith*, 73 Ind. 515; 1 *Daniel on Negotiable Instruments*, sec. 741.

The contention is also made by the appellants that a note, though negotiable in form, if secured by mortgage, is not negotiable in this state, even though it contains no reference to the mortgage, and without regard to any conditions contained in the latter. This contention is based upon the provisions of our statute (section 1290 of the Code of Civil Procedure), which declares that "there is but one action for the recovery of debt, or the enforcement of any right secured by mortgage upon real estate or personal property." In support of this contention counsel cites, among other cases, *Brophy v. Downey*, 26 Mont. 252, 67 ⁴⁷³ Pac. 312, and *Largey v. Chapman*, 18 Mont. 563, 46 Pac. 808. These cases are not directly in point, as the question here involved was not before the court in either of them. Counsel in the argument did not dwell upon this phase of the case, nor press it for decision. Inasmuch as the question involved is one of importance, we prefer to reserve a decision of it until a case arises in which we may have the advantage of full argument. What we have already said as to the first three contentions made by appellants is determinative of this feature of the case.

Did the plaintiff take the note subject to the defense of payment by Kirk prior to actual notice of the assignment? Section 571 of the Code of Civil Procedure provides: "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any setoff or other defense existing at the time of, or before, notice of the assignment; but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith and upon good consideration, before maturity." This section

was considered by this court, and construed in connection with sections 690, 691, 692, and 698 of the Code of Civil Procedure, and also section 1982 of the Civil Code, relating to the transfer of non-negotiable contracts for the payment of money or personal property, in *Stadler v. First Nat. Bank*, 22 Mont. 190, 74 Am. St. Rep. 592, 56 Pac. 111. The conclusion reached was that section 571 was rendered necessary by the enactment of section 570, which requires all actions to be brought and prosecuted in the name of the real party in interest. At the common law the assignee of a non-negotiable contract could not sue in his own name, but in the name of the assignor only. The change having been wrought by section 570, it became necessary to enact some such provision as section 571 to declare and protect the rights of the defendant as they existed at the common law, notwithstanding the provision of section 570. It was further held that section 571 is not in conflict with section 1982 of the Civil Code, and that neither in any way enlarges the scope of the other or affects the purpose which it ⁴⁷⁴ was intended to accomplish. The purpose of the latter is, as was there held, to protect the assignee of a non-negotiable contract against counterclaims, including setoffs, alleged as defenses, unless they fall within the provisions of sections 690, 691, 692, and 698, *supra*; that is, unless they are in existence and available at the date of the assignment. Its purpose is not to affect in any way or change the rights of the defendant arising out of new dealings or agreements with reference to the particular contract had with the creditor subsequent to the assignment, but prior to notice thereof to the defendant. As has been said, the right to avail of these defenses is protected by section 571, and, whatever the rights of the defendant would have been at the common law as against the assignee, they have been preserved under this section. The court, speaking through Mr. Justice Pigott, quotes with approval from *Beckwith v. Union Bank*, 9 N. Y. 211: "Section 112 was intended only to introduce such alterations in the mode of protecting them [the substantial rights of the parties] as were rendered necessary by the provisions of sections 111 and 113, which require in most cases the real party in interest to be the plaintiff. The first branch of the section will have its full and appropriate meaning if we regard it as providing that 'in the case of an assignment of a thing in action the action by the assignee shall be without preju-

dice to any setoff or other defense existing at the time of, or before notice of, the assignment,' which would have been available to the defendant had the action been brought in the name of the assignor. In other words, the provision is that the substantial rights of the defendant shall not be affected by the substitution of the assignee as plaintiff in place of the assignor." Then, after observing that section 112 of the New York Code is identical with section 571, *supra*, and that sections 111 and 113 are similar to section 570, *supra*, the opinion quotes from *Myers v. Davis*, 22 N. Y. 489, as follows: "The alteration of the practice allowing the beneficial owner of a chose in action, not negotiable at law, to sue thereon in his own name, does not change the actual rights of the parties to ⁴⁷⁵ any assignment of it. The defendants in this action are therefore entitled to the same defense which they would have had if the former rule had continued to prevail, and this action had been brought in the name of Watrous and Lawrence (assignors), and to no other or different defense. The assignee would have been protected in his equitable rights, notwithstanding the non-negotiable nature of the contract, to the same extent that he is entitled to have them protected now that he can prosecute in his own name. The change effected by the code is simply as to the form in which the action is to be carried on."

From these provisions, thus construed, this rule is therefore deduced: That the assignee of a non-negotiable contract made for the "payment" of money or personal property, under section 1982, *supra*, takes all the rights of the assignor, subject only to the equities and defenses existing in favor of the maker at the time of the assignment, and that matters arising out of subsequent dealings between the maker and assignor, not relating to the contract, but which would be defenses in an action by the assignor, are not available as against the assignee, even though notice of the assignment be not given to the maker; but that in order to cut off defenses arising out of dealing with relation to the contract itself between the maker and assignor after the assignment—such as payment, release, etc.—notice of the assignment is necessary; so that under section 571, *supra*, if the maker, without notice of the assignment, in good faith pays the assignor the amount of the debt or obligation, and takes an acquittance, this constitutes a complete defense to a suit by the assignee.

2. What was the effect of the payment to the company by Kirk after record of the assignment of the note and mortgage to the plaintiff?

A mortgage is a conveyance within the meaning of the record laws of this state (Civil Code, sections 1640-1642), though it is a conveyance of a chattel interest only: Civ. Code, sec. 3810 et seq.; *Hull v. Diehl*, 21 Mont. 71, 52 Pac. 782; *Mueller v. Renkes*, 31 Mont. 100, 77 Pac. 512. Title to it ⁴⁷⁸ passes to an assignee by assignment of the debt or obligation secured by it (Civil Code, section 3825); for the mortgage is but an incident—a security—and, independent of the debt, has no assignable quality. Such an assignment is a mere nullity: *Rader v. Ervin*, 1 Mont. 632; *Polhemus v. Trainer*, 30 Cal. 686. Where there is no written evidence of the debt or obligation, the mortgage is evidence both of the debt and the security for its payment. Nevertheless the debt is the principal thing, and the title to the mortgage must follow an assignment of it: Civ. Code, sec. 3825.

The appellants contend that, though the assignment of the mortgage to Cornish was recorded long before the purchase and payment by Kirk to the company, this gave constructive notice to those persons only who derived title to the mortgage from the company, and therefore that the record was not notice to Woolverton, or to Kirk, so as to invalidate Kirk's payment to the company. The ground of this contention, as counsel asserts, is that section 3823 of the Civil Code expressly declares that the record of the assignment gives notice only to persons deriving title from the assignor. This section provides: "An assignment of a mortgage may be recorded in like manner as a mortgage, and such record operates as notice to all persons subsequently deriving title to the mortgage from the assignor."

Section 3824, however, provides further: "When the mortgage is executed as security for money due, or to become due, on a promissory note, bond or other instrument, designated in the mortgage, the record of the assignment of the mortgage is not, of itself, notice to a mortgagor, his heirs, or personal representatives, so as to invalidate any payment made by them, or either of them, to the person holding such note, bond or other instrument." Section 3823 does not declare that the assignment shall be notice to such persons only as derive title from the assignor; while from the language of section 3824 there arises a strong implication that such a

record does operate as notice to a mortgagor, so as to invalidate any payment made by him, his heirs or personal representatives, to anyone not ⁴⁷⁷ holding the note, bond, or other instrument. Under section 1640, *supra*, the record is notice to all persons of the contents of the assignment.

Construing all these provisions together, the conclusion seems inevitable that the record operates as notice to all persons dealing with the assignor in any capacity whatever, with the exception of those designated in section 3824; and even these are protected only when the assignor holds the evidence of the debt. Such being the case, the payment to the company by the Woolvertons would have been ineffectual to discharge the mortgage in the absence of a showing by appropriate allegation that the company held the note. Much less, then, was the encumbrance discharged by payment made by Kirk, for, so far as the allegations show, the company was not at the date of the payment in possession of the note; nor is he included within the class who might have discharged the mortgage by payment to the holder of the note prior to actual notice of the assignment. His payment, therefore, must be regarded as having been made at his own risk, and as being wholly ineffectual to discharge the mortgage.

The construction of these provisions is attended with some difficulty; but the conclusion stated is supported by the supreme court of California under identical statutes (*Rodgers v. Peckham*, 120 Cal. 238, 52 Pac. 483; *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542), and by the courts of other states having similar provisions: 1 *Jones on Mortgages*, sec. 480; *Van Keuren v. Corkins*, 66 N. Y. 77; *Brewster v. Carnes*, 103 N. Y. 556, 9 N. E. 323; *Olson v. Northwestern Guaranty Loan Co.*, 65 Minn. 475, 68 N. W. 100; *Williams v. Keyes*, 90 Mich. 290, 30 Am. St. Rep. 438, 51 N. W. 520; *Larned v. Donovan*, 155 N. Y. 341, 49 N. E. 942; *Viele v. Judson*, 82 N. Y. 32.

In purchasing the mortgaged property from Woolverton, Kirk purchased it with notice of the contents of the assignment by the company to the plaintiff, for he was bound to read the record and ascertain the facts shown by it. It was a clear indication ⁴⁷⁸ to him that the assignment had been made, and that he could not discharge the mortgage by paying the debt secured by it to the company. Nor was the company authorized to release the mortgage upon payment to it by him, so as to make the defendant Metheny an innocent

purchaser for value, free from the encumbrance of the mortgage. Metheny, in dealing with the mortgaged property, had full notice of the fact that payment to the company would not discharge the mortgage. He was therefore not entitled to rely upon the release executed by the company, but was equally bound with Kirk by the knowledge derived from the record.

The mortgage in the hands of the plaintiff was therefore a valid lien upon the property in the hands of Metheny, unless the facts alleged in either the third or fourth counts of the answer, or both of them, constitute a defense.

3. The allegations of the third paragraph of the answer, intended to show an agency in the company to collect the indebtedness and discharge of the mortgage, are wholly insufficient for that purpose. In substance, it is alleged that the plaintiff gave no notice to the defendants of his ownership of the mortgage, and, besides, permitted the company to collect the installments of interest from time to time as they fell due. As we have seen, the assignment was recorded. This was notice to both Kirk and Metheny that they could not safely pay to anyone but the plaintiff or his duly authorized agent. The mere fact that the company acted as the agent of the plaintiff in collecting the interest and delivering the canceled coupons is not sufficient to show authority to collect the principal and discharge the mortgage: *Stark v. Olsen*, 44 Neb. 646, 63 N. W. 37. If, in addition to this fact, it were alleged that the company, at the time of payment, had the note in its possession, the inference might be permissible that it was the agent to collect it. In dealing with a supposed agent, however, Kirk was bound to ascertain the scope of its authority; otherwise he assumed the risk, and he and his grantee must ⁴⁷⁹ suffer the consequences: *Dodge v. Birkenfield*, 20 Mont. 115, 49 Pac. 590.

In *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157, it is said: "Neither was the defendant warranted by the fact of the attorney being authorized to collect the interest in inferring that he was also authorized to receive the principal. Such authority, in the absence of direct proof, may, in some cases, be inferred from the attorney having possession of the bond and mortgage, but in such cases it is incumbent upon the debtor who makes payments to the attorney to show that the securities were in his possession on each occasion when the payments were made, for the withdrawal of the securities

would be a revocation of the authority." In the same case it is also said: "If money be due on a written security, it is the duty of the debtor, if he pay to an agent, to see that the person to whom he pays it is in possession of the security. For, though the money may have been advanced through the medium of the agent, yet, if the security do not remain in his possession, a payment to him will not discharge the debtor."

Cornish, the plaintiff, had done all in his power to notify all persons dealing with the company with reference to the mortgage that he was the owner of it. Under the circumstances, payment by Woolverton would not have been effectual, for, so far as the answer shows, the company was not in possession of the security. Much less can Kirk and Metheny claim that the debt was discharged by Kirk's payment. That payment must be made a second time by Kirk is a distinct hardship upon him; but, so far as the allegations of the answer show, it would be equally as great a hardship to deny the plaintiff the right to collect the money paid by him for the mortgage. The plaintiff did not fail to take the precautions necessary to protect himself. Kirk was guilty of negligence in this behalf, and of the two, he, being in fault, must suffer.

4. Nor do we think the facts alleged in the fourth paragraph of the answer sufficient to estop the plaintiff. Having given notice of the assignment in the manner provided in the ⁴⁸⁰ statute, he was not thereafter bound to do anything to protect the defendants against the criminality and fraudulent conduct of the officers of the company. Nor, after the company became insolvent, was he compelled to proceed at once to enforce the collection of the debt. So far as the record shows, he knew no more of the condition of the affairs of the company than did the defendants; and, if he had known, it did not follow that he knew of the payment by Kirk, and the release of the mortgage by the company. His recorded assignment being notice of his rights, he was not bound to take notice of subsequent dealings of the company with any of the defendants with reference to the mortgage; and while his delay in pursuing his debtor may seem peculiar, or even suspicious, this is not sufficient to estop him. He had the full time allowed by the statute of limitations in which to bring his action. There is nothing alleged in the answer tending to show that he failed to speak when he should, or

that he actively or passively misled the defendants, or any of them, to their prejudice by anything that he did or failed to do.

For these reasons we think the action of the court below in sustaining the demurrer was correct, and that the judgment should be affirmed.

Mr. Justice Milburn and Mr. Justice Holloway concur.

The Negotiability of a Note as affected by a provision for an additional rate of interest after maturity is considered in *Merrill v. Hurley*, 6 S. Dak. 592, 55 Am. St. Rep. 859; *Kendall v. Selby*, 66 Neb. 60, 103 Am. St. Rep. 697; *Cherry v. Sprague*, 187 Mass. 113, 105 Am. St. Rep. 381; *Clark v. Skeen*, 61 Kan. 526, 78 Am. St. Rep. 337. And its negotiability as affected by a provision for attorneys' fees in case of a suit is considered in *Cherry v. Sprague*, 187 Mass. 113, 105 Am. St. Rep. 381; *Stadler v. First Nat. Bank*, 22 Mont. 190, 74 Am. St. Rep. 584, and cases cited in the cross-reference note thereto; *White v. Harris*, 69 S. C. 65, 104 Am. St. Rep. 791. It has been recently held that a note is not rendered non-negotiable by an agreement to pay the sum specified "with exchange": *Haslach v. Wolf*, 66 Neb. 600, 103 Am. St. Rep. 736.

A Note and the Mortgage given to secure it are usually construed together, when they are executed at the same time and as one transaction; and such provisions in the mortgage as that on a failure to comply with its terms the whole debt shall become due, and that in case of default the debt shall draw an increased rate of interest, have been held not to render the note non-negotiable: See *Consterdine v. Moore*, 65 Neb. 291, 101 Am. St. Rep. 620, and note; *Kendall v. Selby*, 66 Neb. 60, 103 Am. St. Rep. 697.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

BERLET v. WEARY.

[67 Neb. 75, 93 N. W. 238.]

PROCESS, CIVIL—Exemption of Legislators from Service.—Members of the state legislature are not exempt from the service upon them of ordinary civil process at any time. (p. 627.)

PROCESS—Members of Legislature—Exemption from Service. A member of the legislature is not exempt from the service of summons upon him in a civil case, at the seat of government during the legislative session. (p. 628.)

J. H. Broady, P. F. Clark and C. S. Allen, for the plaintiff in error.

Love & Frampton, for the defendant in error.

⁷⁵ **LOBINGIER, C.** This action was commenced in the district court for Lancaster county, December 31, 1900, on an account for merchandise alleged to have been sold by plaintiff to defendant. The latter filed objections to the jurisdiction and a motion to quash the service, alleging that he was a member of the Nebraska state Senate, which convened on January 1, 1901, and that he was in Lancaster county on the day previous for the sole purpose of attending the legislative session. The motion and objections were overruled and defendant then answered, again claiming privilege from service in Lancaster county, admitting the purchase of most of the merchandise, but not from plaintiff, alleging that the items charged in the account were "unreasonable, unjust and exorbitantly high," and that part ⁷⁶ of the goods were damaged when received. The answer also contained a general denial. There was a trial to a jury which found for the plaintiff, but the only evidence contained in the bill of exceptions re-

lates to the matters set forth in the objections to jurisdiction and motion to quash, and the petition in error from the judgment rendered on the verdict is restricted in its assignments to the same matters.

Defendant contends that he was not voluntarily in Lancaster county on the day when he was served, but was there in pursuance of official duty; that his presence might have been compelled by a call of the House; and that while he might have been served at his home in Nemaha county, the service in Lancaster county was unauthorized and invalid. This contention calls for an investigation as to the extent of a legislator's immunity from judicial process. It is conceded that there are no constitutional or statutory provisions in this state which exempt a legislator from the service of civil process, and the exemption here claimed, if it exists at all, must be derived from the common law. We are first to inquire, then, What was the common-law rule?

From time immemorial members of parliament were privileged from arrest during the sessions of that body and for a reasonable period before and after, so as to permit them to attend and return home. The privilege appears to have originated in the necessity of maintaining the independence of the legislature as against the aggression of the crown and of preventing the coercion of members by the use or abuse of criminal process. The privilege was not, however, restricted to such process, but extended to all cases where the member's person might be taken into custody. So long, therefore, as imprisonment for debt was in vogue, the peers and commons were exempt from this also, and from such of the civil writs as were executed by seizing and confining the person of the defendant. Thus, as late as 1841, it was held to be irregular to issue a *capias ad satisfaciendum* (which was executed by imprisoning the "defendant until the debt and costs were paid) against a member of the house of commons in an action of *assumpsit*: *Cassidy v. Stewart*, 2 M. & G. (Eng.) 437.

The freedom of members from process of this kind, whether criminal or civil, rests upon the highest grounds of public policy. As was said by Lord Denman, C. J., in *Stockdale v. Hansard*, 9 Ad. & E. (Eng.) 1, 114: "The proceedings of parliament would be liable to continual interruption at the pleasure of individuals, if everyone who claimed to be a creditor could restrain the liberty of the members." Another ground, as pointed out by a learned constitutional historian, is

"the supreme necessity of attending to the business of parliament, the king's highest court": 3 Stubbs on Constitutional History of England, p. 512, sec. 452. But this immunity and the reasons therefor appear to have existed only as to process which required the detention of the person. After a diligent search we have been unable to find a single English case which decides that a member of parliament or other legislative officer is exempt from the service of a mere summons at any time. That such exemption was sometimes claimed by the members themselves is true, but we find no instance where it was recognized and enforced by the courts. And as was said by the eminent chief justice in the case last cited (page 114): "When this privilege was strained to the intolerable length of preventing the service of legal process, or the progress of a cause once commenced against any member during the sitting of parliament, or of threatening any who should commit the smallest trespass upon a member's land, though in assertion of a clear right, as breakers of the privileges of parliament, these monstrous abuses might have called for the interference of the law, and compelled the courts of justice to take a part." Mr. Justice Wylie, in his learned and exhaustive opinion in *Merrick v. Giddings*, *McAr. & M. (D. C.)* 55, mentions two cases (*Doune v. Welsh* and *Ryver v. Cosins*) in the reign of Edward IV (1461-1483), where "it was held that the privilege from arrest during the session of ⁷⁸ parliament did not protect him [the member] from being impleaded, but only that he should not be arrested." In *Benyon v. Evelyn*, *Orlando Bridgman's Judgments*, 324, decided about the middle of the seventeenth century, it was declared to be "lawful to sue out an original writ against a member of the house of commons although parliament is sitting." It is true that some of the text-writers appear to announce a different rule as applicable to this period. In 4 *Coke's Institutes*, 24, there is a passage where the author, in speaking of a member of parliament, says: "The serving of the citation did not arrest or restrain his body, and the same privilege holdeth in case of subpoena." This passage, however, has been much criticised and declared to be unwarranted from the record on which the author relies. "The truth is," observed Chief Justice Bridgman in *Benyon v. Evelyn*, *Bridgman's Judgments*, 324, "that Lord Coke's treatise of the jurisdiction of parliament is a post-humous work; and though I shall attribute as much to

his learning in the law as to any sages in the law whatsoever, yet there not being that freedom in former times of having copies of the records at large as hath been since, when he comes to cite them he is guided by abstracts, which occasions miserable mistakes, and by the *modus tenendi parliamentum*, which, as to the time of making it, was most certainly a counterfeit piece. So that there are a multitude of errors in his chapter concerning parliaments, and in particular both those records are grossly mistaken": See, also, Hatsell's *Precedents*, p. 6; Merrick v. Giddings, McAr. & M. (D. C.) 55, 59. So in Stubbs on Constitutional History of England, volume 3, section 452 et seq., the author speaks of members of parliament as privileged "from being impleaded in civil suits, from being summoned by subpoena or to serve on juries," etc.; but, while he mentions many cases of exemption from criminal process, he refers to no instance of immunity from the mere service of civil process, and it is evident that he is here speaking of privileges claimed by the members, rather than those recognized and enforced by the courts.

⁷⁹ But whatever may have been the law at this time and whatever the claims of the members, parliament itself at an early period undertook to restrict the exemption to process which restrained the liberty of the member. In 1649 the house of commons ordered that in case of a legal proceeding against a member he should receive written notice of its pendency, and that then "the member is enjoined to give appearance and proceed as other defendants in case of like suits or actions ought to do, or in default thereof, both their estates and persons shall be liable to any proceedings in law or equity as other members of the commonwealth": See *Journal of House of Commons* quoted in *Hopkin v. Jenckes*, 8 R. I. 453, 457, 5 Am. Rep. 597. In 1700 parliament passed an act providing for the commencement of actions and the issue and service of process against members of parliament "at any time from and immediately after the dissolution or prorogation of any parliament, until a new parliament shall meet, or the same be reassembled and from and immediately after any adjournment of both houses of parliament for above the space of fourteen days, until both houses shall meet or reassemble." In 1769 a statute was enacted which provided that: "Any person or persons shall and may, at any time, commence and prosecute any action

or suit in any court of record, or court of equity, or of admiralty, and in all causes matrimonial and testamentary, in any court having cognizance of causes matrimonial and testamentary, against any peer or lord of parliament of Great Britain, or against any of the knights, citizens, and burgesses, and the commissioners for shires and burghs of the house of commons of Great Britain for the time being, or against their or any of their menial or any other servants, or any other person entitled to the privilege of parliament of Great Britain; and no such action, suit, or any other process or proceeding thereupon, shall at any time be impeached, stayed, or delayed, by or under colour or pretence of any privilege of parliament."

⁸⁰ Thus the law stood at the separation of the colonies from the mother country. If, as has been declared in some jurisdictions, the English statutes enacted prior to the separation are to be treated as part of the common law (6 Am. & Eng. Ency. of Law, 2d ed., p. 279; Sedgwick on Statutory Construction, 14; Ex parte Blanchard, 9 Nev. 101), it is plain that the common law of the United States affords no immunity to legislators from the service of ordinary civil process. This, at least, appears to be recognized in the authorities.

In *Peters v. League*, 13 Md. 58, 71 Am. Dec. 622, where a member of the Baltimore city council claimed exemption from the service of an attachment while in the discharge of his duties, the court said (page 64): "It is worthy of remark that peers and members of parliament were liable at common law to be sued, though they could not be arrested on writs of *capias*. Here the process was an attachment, with a summons to the party as garnishee; therefore the supposed analogy between members of the Baltimore city councils and of parliament would not aid the appellant."

Judge Cooley, in his *Constitutional Limitations*, fifth edition, page 161, says: "By common parliamentary law, the members of the legislature are privileged from arrest on civil process during the session of that body, and for a reasonable time before and after, to enable them to go to and return from the same. By the constitutions of some of the states this privilege has been enlarged, so as to exempt the persons of legislators from any service of civil process."

It was the view of this eminent commentator, therefore, that the common-law privilege needed to be "enlarged" be-

fore it could include exemption from the service of ordinary civil process. Among the states in which the privilege was thus "enlarged" were Connecticut, South Carolina and Virginia, and under these remedial statutes were decided the cases of *King v. Coit*, 4 Day (Conn.), 129; *Tillinghast v. Carr*, 4 McCord (S. C.), 152; *M'Pherson v. Nesmith*, 3 Gratt. (Va.) 237; though in the ⁸¹ last named, it was held that an exemption from all other process whatsoever would not prevent the issue of the writ, but merely suspend the service during the privilege. Under the constitutions of most of the other states, as well as of the federal government, however, the common-law rule as parliament had left it by the statute of 1769, was re-enacted: See 1 Stimson on American Statute Law, p. 68. From the earliest constitutions of the older states it has been carried forward until it has reached our own, where it appears as section 12 of article 3. And in *State v. Elder*, 31 Neb. 169, 184, 47 N. W. 710, 10 L. R. A. 796, this court, in construing and commenting on that clause, declares that "the provision of the constitution is merely a re-enactment of the common law."

We are cited to *Bolton v. Martin*, 1 Dall. (U. S.) 296, where the court of common pleas of Philadelphia county held that a member of the convention called for the purpose of ratifying the federal constitution, was exempt from the service of a summons during the session of that body. The opinion does not profess to follow any English case, but relies upon a passage in Blackstone's Commentaries, the status of which is thus explained in the instructive opinion heretofore quoted in *Merrick v. Giddings*, McAr. & M. (D. C.) 55, 63: "At that time seven, perhaps eight, editions of Blackstone's Commentaries had been issued. The two first editions were issued prior to the year 1770; the first was issued in 1765 from the Clarendon Press, Oxford. So, also, was the second. Both of these contain the passage as cited by Judge Shippen and quoted above; but after the passage by parliament of the act of 10th of George III, chapter 50, in the year 1770, Mr. Justice Blackstone with his own hand struck out that passage, and changed its reading to the present form, which is as follows: 'Neither can any member of either house be arrested and taken into custody, unless for some indictable offense, without a breach of the privilege of parliament,' omitting the words, 'or served with any process,' on which Chief Justice Shippen relied for his decision

in *Bolton v. Martin*, 1 Dall. (U. S.) 296, eighteen years after the change had been made, and ⁸² after numerous large editions of the work, with the passage corrected, had been given to the world. Nor was this the whole of the change made by the eminent commentator at that time, for immediately succeeding the sentence on which we have been remarking, he inserted an additional paragraph which is too long to quote. . . . It is but a reasonable exercise of charity, however, to presume that Chief Justice Shippen, in making up his decision in that case, relied upon a copy of one of the early editions of the Commentaries which he had probably studied in his youth and believed to be as unchanged and unchangeable as the Koran."

We are also referred to a statement in the opinion in *Gyer v. Irwin*, 4 Dall. (U. S.) 107, that "a member of the general assembly is, undoubtedly, privileged from arrest, summons, citation or other civil process, during his attendance on the public business confided to him." Upon examination, it will be found that this passage is a mere dictum, for no such question was presented in the case. A legislator's attorney had confessed judgment in an action pending in the former's home county, and the supreme court of Pennsylvania, on appeal, said that the action could not have been forced to trial in the member's absence, but that his attorney, by confessing judgment, had waived the privilege. No other point was involved in the case. The court nowhere referred to *Bolton v. Martin*, 1 Dall. (U. S.) 296, and even the dictum that the member's absence entitled him as a matter of right to a continuance, was disapproved in *Nones v. Edsall*, 1 Wall. Jr. 189. The doctrine of *Bolton v. Martin* above referred to, was, however, applied to members of the legislature in the subsequent *nisi prius* cases of *Gray v. Sill*, 13 Week. Not. Cas. 59, and *Ross v. Brown*, 7 C. C. Rep. (Pa.) 142.

In 1840, the territorial supreme court of Wisconsin decided, in *Doty v. Strong*, 1 Pinn. 84, that the immunity from arrest guaranteed to members of Congress by the federal constitution included also exemption from ⁸³ the service of ordinary civil process, and applied to a delegate from that territory. The writer of the opinion states that the only "authority" which he has been able to find on the subject is *Gyer v. Irwin*, 4 Dall. (U. S.) 107, which, as we have seen, did not involve or decide the question at all. There was a

dissenting opinion by the chief justice. The following year, in *Anderson v. Rountree*, 1 Pinn. 115, the same court announced the same construction of the territorial statute which exempted members of the legislature from arrest. The opinion is written by the same judge (Miller) as in *Doty v. Strong*, 1 Pinn. 84, and in the interval he seems to have found a reference to *Bolton v. Martin*, 1 Dall. (U. S.) 296, which, as we have seen, was based upon a misapprehension of Blackstone's Commentaries. Judge Miller does not appear even to have seen a report of the case, but merely to have read a reference to it in Story's Commentaries on the Constitution. The construction of the word "arrest," so as to include the service of summons, seems to be peculiar to this territorial court and to be without support elsewhere. Judge Cooley (*Cooley's Constitutional Limitations*, 5th ed., p. 161, note) says that exemption from arrest is not violated by the service of citations or declarations in civil cases. That the construction was a strained and unnatural one, not likely to endure the test of time, seems to have been recognized even then in Wisconsin; for when the state was admitted, seven years later, the framers of its constitution appear to have thought it necessary, in order to make it the law of that jurisdiction, to insert in that instrument an express provision that members of the legislature should not "be subject to any civil process during the session": Wis. Const., art. 4, sec. 15. In *Miner v. Markham*, 28 Fed. 387, the circuit court sitting in Wisconsin decided that a member of Congress was privileged from service of a summons while on the way to the seat of government. The court conceded that the cases were not harmonious, but adopted the state court's construction, which had existed from territorial ⁸⁴ times, and which, as we have just seen, was embodied in the first constitution.

The foregoing are all of the cases which we have been able to find, either from the aid of the briefs of counsel or otherwise, which lend any support to the doctrine that a legislator is privileged from the service of a summons. It will be seen that there is among them only one court (and that a territorial one) of last resort which has actually so decided, that its conclusion was reached with little or no opportunity for investigation of the authorities, and that its construction of the word "arrest" is unprecedented and unsound. On the other hand, the doctrine that a member of the legislature, like other citizens, is amenable to the

service of a summons, finds ample support in the authorities.

In *Catlett v. Morton*, 4 Litt. (Ky.) 122, the court held that despite the constitutional guaranty of privilege from arrest, members of the legislature "are subject to the execution of any other process, as other citizens are." This case was decided nearly eighteen years before the Wisconsin cases above referred to, and though directly opposed to their conclusions, is not noticed in either of them. The doctrine was reaffirmed in *Johnson v. Offutt*, 4 Met. (Ky.) 19, though there had meanwhile been a change in the statute.

In *Gentry v. Griffith*, 27 Tex. 461, a similar constitutional guaranty was construed with similar conclusions, and the court used the following language, which might well be applied to the reasoning of the Wisconsin case: "It would be difficult to distort any of these definitions so as to make them applicable to the simple service of citation, or giving notice to answer in a civil action."

Rhodes v. Walsh, 55 Minn. 542, 57 N. W. 212, 23 L. R. A. 632, is also an instructive case, where the court, in an able opinion, holds that there is no exemption from ordinary process for members of the legislature.

The Wisconsin decisions as to the immunity of members of Congress also seem to stand alone. The contrary ⁸⁵ was held in *Merrick v. Giddings, McAr. & M.* (D. C.) 55, and *Howard v. Citizens' Bank etc. Co.*, 12 App. Cas. (D. C.) 222, and exhaustive opinions are written in both. In *Bartlett v. Blair*, 68 N. H. 232, 38 Atl. 1004, the court, while declining to construe the federal constitution in advance of an adjudication by the supreme court, refused to quash the service of a writ at the residence of a member of Congress who was absent in attendance upon a session of that body.

But if the weight of authority were not so pronounced as it thus appears to be, and we felt at liberty to adopt the rule announced in the Pennsylvania and Wisconsin cases, we could not even then find sufficient support for plaintiff in error's contention that, though amenable to civil process, it could only be served upon him in his home county. None of the cases relied upon by him and none of those above reviewed so hold; nor do they, in our view, lend any support to his theory of the case. So far as they touch the question at all, they decide that the legislator is absolutely privileged from service—not that he is privileged in one place and amenable

in another. Thus in *Gray v. Sill*, 13 Week. Not. Cas. 59, the member was served while at home during the recess of the legislature. Under the rule contended for by plaintiff in error this would have been a valid service; but it was not so held. We see no room for any middle ground between the *Pennsylvania* and *Wisconsin* cases on the one hand and the authorities elsewhere on the other. Either the member is exempt from service or he is not. And if he is not exempt, he is amenable to the provisions of section 60 of the code, which, as always construed, authorizes him to be summoned in any county where he may be found. Moreover, we think that not only do the authorities relied on by plaintiff in error fail to assist him in his precise contention, but that also some of the authorities above referred to decide the exact point against him. *Johnson v. Offutt*, 4 Met. (Ky.) 19, is declared in plaintiff in error's reply brief to involve "nothing but whether the constitution ⁸⁸ prevents any suit anywhere against a member of the legislature." But as we read the case it involves an additional point, and that the precise one which plaintiff in error urges here. The defendant in that case was served in Franklin county, wherein is situated Frankfort, the seat of government, and defendant, in the language of the opinion, "moved to quash the service of summons, upon proof that he was a citizen and resident of Scott county, and representing that county as a member of the House of Representatives when the suit was brought, and the summons served and at the time of said motion, and that the legislature was then in session." This was the identical course pursued by plaintiff in error in the case before us, except that he could not show, as did the defendant in the case cited, that the legislature was in session at the time of the service. The overruling of his motion seems to us to determine the question which plaintiff in error raises here. Again, in *Rhodes v. Walsh*, 55 Minn. 542, 57 N. W. 212, 23 L. R. A. 632, the defendants were members of the legislature from various counties in Minnesota. The action was brought against them at St. Paul, in Ramsey county, during the session of the legislature, and each defendant sought to quash the service. It is true that it does not appear that any of these defendants conceded that they might have been served in their home counties, but there was quite as much room for the contention as exists here, and if there had been any support in the authorities for such a distinction, it seems

not a little singular that the point was not suggested either in argument or opinion.

In all our search we have found but one jurisdiction where the precise rule contended for by plaintiff in error obtains, and that is in Ohio, where it exists by virtue of the following section of the code: "A member of the Senate or House of Representatives, or an officer of either branch of the general assembly, shall be privileged from answering to any suit which may be instituted against him in a county other than the one in which he resides, upon a cause of action which accrued ten days before the first ⁸⁷ day of the session of the general assembly of which he is an officer or a member; and all proceedings in actions to which any such person is a party shall be stayed during such session, and during the time necessarily employed in going thereto and returning therefrom": Bates' Annotated Revised Statutes of Ohio, sec. 5031. In pursuance of an earlier but similar statute, one of the *nisi prius* courts of Ohio held, in *Orth v. McCook*, 2 Ohio Dec. 624, 4 West. Law Month. 215, that a member of the legislature could not be served at the seat of government, even though joined with other defendants who were served at their homes. As our own code was borrowed from Ohio, the omission of the section above quoted seems doubly significant. We cannot here establish by judicial decision a rule which appears to have required legislative enactment in Ohio, especially when our own legislature has failed to adopt it.

But it is urged in plaintiff in error's briefs that the exemption of legislators rests upon grounds analogous to those which afford immunity to witnesses and suitors while in attendance upon judicial proceedings, and that considerations of public policy require us to adopt the same rule as to legislators. The immunity of witnesses in such cases is, in this state, expressly provided by statute: Code Civ. Proc., sec. 363. So the immunity of suitors constitutes an ancient and well-recognized rule of the common law. In *Cole v. Hawkins*, 2 Strange (Eng.), 1094, decided in 1738, it was held to be contempt to serve a suitor with process while he was in attendance upon a cause, and the court said: "The privilege was designed . . . to prevent any interruption of the business of the court." This is probably not the earliest case on the subject, but it illustrates the antiquity of the rule, which appears to prevail in all jurisdictions where the com-

mon law is in force: See *Palmer v. Rowan*, 21 Neb. 452, 59 Am. Rep. 844, 32 N. W. 210. But the doctrine has never, so far as we are able to find, been extended to legislators. Even in the two jurisdictions where the immunity of legislators from the service of summons has been declared, ⁸⁸ it rests upon grounds entirely different from their supposed analogy to parties and witnesses. Indeed, while we are cited to *Jacobson v. Hosmer*, 76 Mich. 234, 42 N. W. 1110, on the point that a party has a right to be sued at his own domicile, if we were to adopt strictly the Michigan rule and construe plaintiff in error's rights according to the analogy of parties, we would be obliged to hold that he was not in any event exempt from service while merely waiting for the legislative session to begin; for in that state a party is amenable to service while waiting for his case to be called: *Case v. Rorabacher*, 15 Mich. 537. Moreover, if we were, by judicial legislation, to extend to senators and representatives that exemption from the service of summons which is enjoyed by parties and witnesses, we would be logically bound by the same reasons and arguments to extend it also to the executive branch. In this state that department consists of eight officers (Const., art. 5, sec. 1), who remain at the seat of government at least two, and often four, years. Are we to hold, then, that each of these officials is exempt from the service of summons in the county where he is usually found during all of this period? And if we extend the doctrine at all, why should we stop with state officers? Why do not the arguments made as to legislators apply with equal force to local executive officers, like sheriffs? Are not such officials entitled, to the same extent as members of the legislature, to immunity from civil process while attending to the public business outside of their own counties?

We do not say that it would not be desirable to adopt such a rule for all public servants. We are simply pointing out that no such rule exists, either at common law or by statute. But it may well be doubted whether the half-way doctrine contended for by plaintiff in error would at all meet the objection urged against the policy of allowing service upon legislators during the session. The objection usually made is that it diverts the attention of the member from legislative business to private matters. And this would be equally true if service were allowed at home. ⁸⁹ Indeed, the distraction would seem to be less in the case of an action

pending at the seat of government where the member could give it some attention without necessarily absenting himself from the legislative session. And, as was well said in *Catlett v. Morton*, 4 Litt. (Ky.) 122, 124: "It has been argued that considerable inconvenience might result from this doctrine to the members of the general assembly, because thereby they might be compelled to litigate their controversies at the capital, instead of in their proper counties. It may be replied, that every citizen who visits Frankfort, and all the other officers of government who do not reside here, are liable to the same inconvenience."

But if the legislature deems it for the best interests of the state to exempt its members from the service of summons at the seat of government during its sessions, the remedy is entirely in its hands. It may enact into law the rule contended for by plaintiff in error without the aid or consent of either of the co-ordinate branches of the government, and its action in this regard would be legitimate and proper. But for us to announce that rule in advance of such action, and in the face of the authorities above reviewed, would, it seems to us, be little short of revolutionary. We therefore recommend that the judgment be affirmed.

Hastings and Kirkpatrick, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

Exemption from Service of Civil Process of members of the legislature is discussed in the monographic note to *Worth v. Norton*, 76 Am. St. Rep. 534. As to the exemption of nonresident witnesses and suitors during their attendance at court, see *Murray v. Wilcox*, 122 Iowa, 188, 101 Am. St. Rep. 263.

STEVENSON v. MORGAN.

[67 Neb. 207, 93 N. W. 180.]

CONSTITUTIONAL LAW—Statute Declared Unconstitutional—Effect on Bond.—A bond given in pursuance of a statute afterward pronounced unconstitutional is not necessarily rendered invalid by such decision. (p. 630.)

CONSTITUTIONAL LAW—Statute Declared Unconstitutional—Effect on Bond—Consideration.—If a bond executed in pursuance of a statute is otherwise valid, and rests upon a consideration independent of such statute, it may be enforced, although the statute is afterward declared unconstitutional. (p. 632.)

CONSTITUTIONAL LAW—Validity of Bond Given Under Statute Declared Unconstitutional.—If a bond is given on an appeal from a judgment in forcible entry and detainer, recovery may be had thereon, although the statute under which such bond was given was afterward declared unconstitutional, provided the obligor has thereby been enabled to retain possession of the premises. (p. 633.)

Weaver & Giller and Kennedy & Learned, for the plaintiffs in error.

G. W. Doane, for the defendant in error.

²⁰⁸ **LOBINGIER, C.** This is an action on a bond given by plaintiffs in error in order to perfect an appeal to the district court in a forcible entry and detention proceeding. More than two years after the execution of the bond this court, in *Armstrong v. Mayer*, 60 Neb. 423, 83 N. W. 401, declared unconstitutional the statute which provided for such appeals and for bonds in pursuance thereof. But the appellant in that proceeding had retained possession up to the time when this action was brought, and judgment having been rendered against him and his surety thereon, the cause is brought here by petition in error, the sole contention being that by reason of this annulment of the statute the bond affords no cause of action.

The diligence of counsel has materially lightened the labors of the court in determining this question, and the ably prepared briefs contain most of the authorities which relate to it. We were at first of the opinion that there was some conflict among these, but a comparison of the cases convinces us that they may be harmonized and that the question before us does not involve serious difficulty.

²⁰⁹ We are cited to *Brookman v. Hamill*, 43 N. Y. 554, 3 Am. Rep. 731, and *Poole v. Kermit*, 59 N. Y. 554, in support of the contention that a bond given in pursuance of a stat-

ute afterward pronounced unconstitutional is invalid. In these cases each bond was given to procure the release of a vessel from an attachment for wharfage claims. It will be seen that there could have been no consideration for the making of such an instrument unless the statute providing for it was valid, since the benefit obtained, viz., the release of the vessel, was one which the obligor was entitled to in any event, except as the statute authorized detention. In neither of these cases does the court overrule or question its earlier decision in *Van Hook v. Whitlock*, 26 Wend. (N. Y.) 43, 37 Am. Dec. 246, where it held that though a statute providing for a corporate assignment for the benefit of creditors was unconstitutional and void as to creditors generally, still those who had accepted benefits in the form of dividends under the statute were estopped from taking advantage of its invalidity. Nor in the cases first cited is it intimated that the bonds in question might not have been sustained as common-law contracts had there been a sufficient consideration; for this principle is as well established in New York as elsewhere: *Toles v. Ade*, 84 N. Y. 222; *Ryan v. Webb*, 39 Hun (N. Y.), 435; *Goodwin v. Bunzl*, 6 Civ. Pr. Rep. (N. Y.) 226. We cannot, therefore, interpret the cases relied on as holding that any statutory bond becomes invalidated when the statute is annulled. These must be understood as applicable only to such bonds as were there in controversy, which were dependent for a consideration entirely upon the validity of the statute.

Plaintiffs in error also rely on *Byers v. State*, 20 Ind. 47, where recovery was denied on a bond given in the course of bastardy proceedings in order to prevent defendant's incarceration. The court held that the sections of the statute which required such a bond were unconstitutional, and said (page 49): "Such a bond is without a valid consideration; and that fact is a bar to an action upon ²¹⁰ it." It will be seen that here also the annulment of the statute left the instrument sued on without any legal basis of recovery. The fact that by executing it the defendant was enabled to retain his liberty afforded him no privileges which he was not all the time entitled to, since, as it developed, there was never any authority for his imprisonment. But in the earlier case of *Spader v. Frost*, 4 Blackf. (Ind.) 190, a bond which procured the release of one lawfully imprisoned was held good as a common-law obligation, though the court recognized that it

might have been insufficient under the statute. A similar doctrine is announced in other Indiana cases and is not disapproved, but, on the contrary, is expressly recognized in the case cited by defendant in error: *State v. Lynch*, 6 Blackf. (Ind.) 395; *Marshall v. State*, 8 Blackf. (Ind.) 162; *Thompson v. Wilson*, 1 Blackf. (Ind.) 358. Moreover, a distinction is drawn between "bonds which may be enforced as common-law obligations between individuals" and "bonds executed to the state for the appearance of persons charged with criminal offenses": *State v. Fraser*, 165 Mo. 242, 261, 65 S. W. 569; *Dickenson v. State*, 20 Neb. 72, 29 N. W. 184. In the latter case, Cobb, J., makes a distinction between bonds like that involved in *Byers v. State*, 20 Ind. 47, and "appeal and forthcoming bonds," which include the one in controversy.

The cases from New York and Indiana are the only ones to which we are cited where bonds were held void after statutes authorizing them had been declared unconstitutional. We may now refer to some instances where recovery has been allowed on such bonds. In *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187, the action was on a bond authorized under the Virginia secession ordinance, which provided that by giving a bond a debtor might prevent the enforcement of execution against him. The court in the case cited pronounced the statute void, but held that inasmuch as the obligor had enjoyed its benefits by obtaining a stay of execution he was estopped to question its validity. The ²¹¹ language used is peculiarly applicable here: "It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself for his benefit of an unconstitutional law, he cannot, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect." In *Ferguson v. Landram*, 1 Bush (Ky.), 548, 5 Bush (Ky.), 230, 96 Am. Dec. 350, it was held that a statute authorizing the issuance of certain bonds was unconstitutional, but that those who had participated in procuring its passage and accepted benefits therefrom were estopped to deny its validity. See, to the same effect, *Van Hook v. Whitlock*, 26 Wend. (N. Y.) 43, 37 Am. Dec. 246, already cited.

These cases are sufficient, we think, to illustrate the distinction between a bond which depends for its consideration solely upon the requirements of the statute, as in the cases cited by plaintiffs in error, and one which rests upon a consideration of its own. In the latter, the benefits already enjoyed by the obligor are not taken away by the annulment of the statute, and, in the language of Pound, C., in *State v. Paxton*, 65 Neb. 110, 90 N. W. 983, it "may nevertheless be upheld as a common-law contract, if otherwise unobjectionable": See, also, 5 *Cyclopedia of Law and Procedure*, 748, note 13; 8 *Century Digest*, sec. 40. This distinction is recognized in *Brounly v. Daniels*, 23 Neb. 162, 36 N. W. 463, which was an action on a bond given in a supposed appeal from the county court in a case where no judgment had actually been rendered. It was held, in effect, that there was no consideration for the bond because no execution could have been issued. But the court also recognizes and reaffirms the earlier cases of *Gudtner v. Kilpatrick*, 14 Neb. 347, 15 N. W. 708, and *Adams v. Thompson*, 18 Neb. 541, 26 N. E. 316, which hold, in substance, that after the benefits of such a bond ²¹² have been accepted and enjoyed, the obligor is estopped to question its recitals that an appeal has been perfected. To these have since been added *Duntermann v. Storey*, 40 Neb. 447, 58 N. W. 449; *Flannagan v. Cleveland*, 44 Neb. 58, 62 N. W. 297. See, also, *Thompson v. Rush*, 66 Neb. 758, 92 N. W. 1060. The basis of distinction between these two lines of cases is the consideration. If it exists, the instrument may be enforced like any other contract, and the annulment of, or departure from, a statute providing for it is not fatal. If, on the other hand, the consideration is absent, the instrument, like any other nudum pactum, affords no basis for recovery.

In the case at bar the principal obligor on the bond was enabled by means of it to retain possession of the premises. At the time of the trial below, in February, 1901, he had occupied them for nearly three years following the execution of the bond. As one condition of the bond sought to be enforced was payment of rent, it will be seen that the obligor's promise was supported by a sufficient consideration, and this without taking into account the fact that he also obtained pro forma, at least, a review of the justice's judgment in the district court. Indeed, it cannot be doubted that if the instrument in controversy be denied the character of

a bond at all and be treated simply as an agreement to pay rent in consideration of the occupancy of the premises, recovery must be allowed. We can reach no other conclusion than that the case at bar belongs to the class, above reviewed, where the bond rests upon a consideration of its own and where the unconstitutionality of the statute cannot affect the right of recovery.

We are cited to *Steele v. Crider*, 61 Fed. 484, but so far as this holds that a bond given to perfect an appeal where none can be taken is invalid, it conflicts with *Gudtner v. Kilpatrick*, 14 Neb. 347, 15 N. W. 708, and *Love v. Rockwell*, 1 Wis. 382. The same may be said of *Jabine v. Oates*, 115 Fed. 861. We are also cited to *Caffrey v. Dudgeon*, 38 Ind. 512, 10 Am. Rep. 126, and *State v. Winninger*, 81 Ind. 51, holding that bonds taken by a justice of the peace in cases beyond ²¹³ his jurisdiction are void. The distinction between these cases and the one at bar is obvious. There the taking of the bond was, in effect, prohibited; for the justice was forbidden to act in matters beyond his jurisdiction. In this case the annulment of the statute merely leaves the bond without a statutory authority, and does not make its execution illegal or leave it in any worse plight than if the statute had never been enacted. We therefore recommend that the judgment be affirmed.

Hastings and Kirkpatrick, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

Defective Statutory Bonds given by public officers for the faithful performance of their duties are often enforced as common-law obligations: See the monographic note to *Estate of Ramsay v. People*, 90 Am. St. Rep. 200. That the plaintiff in replevin and his sureties are estopped to question the validity of a bond under which possession of the property has been obtained, see *Douglass v. Unmack*, 77 Conn. 181, 107 Am. St. Rep. 25.

WARNER v. MODERN WOODMEN OF AMERICA.

[67 Neb. 233, 93 N. W. 397.]

MUTUAL BENEFIT ASSOCIATION—Insurance, Interest of Member in.—One to whom, as a member of a mutual benefit insurance association, a certificate issues, stating that, as such member, he is entitled to participate in the benefit fund to an amount specified, to be paid at his death to his heirs, has no property interest in the certificate or the fund. (p. 637.)

MUTUAL BENEFIT ASSOCIATIONS—Administrators have No Interest in.—On the death of a member of a mutual benefit association to whom a certificate has issued, stating that he is entitled to participate in its fund to an amount specified, to be paid at his death to his heirs, his administrator cannot maintain any action on the certificate, though the decedent left no heirs and no person entitled to recover on the certificate as such, nor is there any person whom he could have designated as a beneficiary thereunder. The certificate did not constitute any part of the estate of the decedent. (p. 637.)

MUTUAL BENEFIT ASSOCIATION—Beneficiaries.—A Person not of the Class for whose benefit a mutual benefit association is organized cannot be a beneficiary. (p. 638.)

MUTUAL BENEFIT ASSOCIATION, Reverting of the Fund to.—Where there is a failure to designate a beneficiary, or a void designation, or the death of the beneficiary occurs before that of the assured, and no new beneficiary is named, the association is not liable, and if no disposition of the fund is provided in the contract with the association, it reverts to the society. (p. 641.)

Ricketts & Ricketts, for the plaintiff in error.

John G. Anderson, Adolphus R. Talbot and Thomas S. Allen, for the defendant in error.

²³⁴ BARNES, C. On or before the twentieth day of April, 1896, one Leoan Richardson became a member of the local camp of the Modern Woodmen of America situated at Maquon, Illinois, and on that day made application to said camp for a benefit certificate therein for the sum of one thousand dollars. Upon the payment of the required charges and fees such certificate was issued and delivered to him; and the association thereby promised to pay said sum, on the death of the said Richardson, to his legal heirs, the beneficiaries named therein. Richardson, during his lifetime, complied with all of the rules, conditions, regulations and by-laws of the association, and paid all dues and assessments made or demanded of him. On the twenty-seventh day of June, 1900, he departed this life in Seward county, in this state, leaving no last will and testament. He had never designated any change in the beneficiary under his said certifi-

cate; and after his death it was ascertained that he left no children, relatives, kindred, legal heirs or others sustaining such relation to him as would entitle them to become beneficiaries under the terms of the certificate and the by-laws of the association. Thereupon the plaintiff herein was appointed administrator of his estate, and commenced this action in the district court of Lancaster county upon said certificate to recover the amount due thereon as a part of said estate. It was alleged in the petition that the defendant is a corporation, duly organized under the fraternal insurance laws of the state of Illinois; that it has a large number of lodges organized in the state of Illinois, and other states; that the primary purpose and object of the principal organization is to issue benefit certificates to members of its several lodges in the nature of life benefit certificates of life insurance, payable on the death of the member to the beneficiaries named in the certificate; that the persons who may become beneficiaries, are defined in section 40 of the by-laws of said association as follows:

"Sec. 40. Benefit certificates shall be made payable ²³⁵ only to the family, widow, heirs, blood relatives, affianced wife, or persons dependent upon the member, and to such others whom the applicant shall designate in his application."

It was alleged that it was also provided in section 41 of the defendant's by-laws that the certificate holder may change the beneficiary designated in the original application, but that it confines the beneficiaries to those named in section 40 above quoted; that the beneficiaries named in section 40 are in substantial accord with the beneficiaries named in the fraternal insurance laws of the state of Illinois, under which the defendant is organized; and that the certificate contained the following recital:

"This certificate issued by the Modern Woodmen of America, a corporation organized and doing business under the laws of the state of Illinois, witnesseth: That Neighbor Leoman Richardson, a member of Maquon Camp, No. 3618, located at Maquon, Illinois, is, while in good standing in this fraternity, entitled to participate in its benefit fund, to an amount not to exceed \$1,000, which shall be paid, at his death, to his legal heirs, related to him as heirs, and subject to all the conditions of this certificate and by-laws of this order, and liable to forfeiture if said member shall not com-

ply with said conditions, laws, and such by-laws and rules as are, or may be, adopted by the head camp of this order from time to time, or the local camp of which he is a member."

The death of Richardson was properly alleged in the petition, the appointment of the plaintiff herein as administrator was set forth therein, and all of the facts necessary to constitute a cause of action, if one could be maintained by the plaintiff, were pleaded. And it was further alleged "that by reason of the premises there is a resulting trust in favor of the plaintiff as administrator of the intestate, and there is now due and owing this plaintiff, in his representative capacity, from the defendant on said benefit certificate, the sum of one thousand dollars, together with interest thereon at the rate of seven per cent per annum from the first day ²³⁶ of November, 1900," for which the plaintiff prayed judgment. To this petition the defendant filed a demurrer, based on the following grounds: 1. The plaintiff has not legal capacity to sue; 2. The petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant. The trial court sustained the demurrer. The plaintiff elected to stand upon his petition, refused to further plead, and thereupon a judgment was rendered dismissing the plaintiff's action, and from that judgment the plaintiff prosecutes error to this court. This brings before us the single question as to whether or not the plaintiff, as administrator of the estate of the deceased, is entitled to maintain this action against the defendant herein to recover the sum alleged to be due upon the benefit certificate set forth in his petition.

Plaintiff in error bases his whole contention on the theory that by reason of the facts hereinbefore stated a trust fund was created which he was entitled, in his representative capacity, to recover. His argument is, in substance, as follows: The defendant was the trustee of the fund which it is alleged was created by the benefit certificate; the deceased was the trustor, and his legal heirs were, by such certificate, made the beneficiaries or the cestuis que trustent; that, there being a failure of beneficiaries contemplated by the parties, he, as administrator of the estate of the trustor, would be entitled to recover the trust fund.

This contention cannot be sustained, for several reasons. The purposes and objects of this beneficiary organization are

vastly different from those of ordinary life insurance companies. The so-called old-line insurance companies, immediately on issuance of a policy, confer on the beneficiary a valuable right, which cannot be divested without his consent. Such policies may be pledged or assigned by the beneficiary as security for the debts of the insured. These policies often by law have a marketable or cash surrender value, making them a form or kind of ²³⁷ property. This is not the case with certificates in fraternal beneficiary societies. They are mere expectancies. The beneficiary has no vested rights in them, and the insured any time, at his option, may change the beneficiary, provided only he keeps within the limitation established by the rules of the society and complies with its laws respecting such change. These certificates have no cash surrender value. The intestate had no property in the fund. The fund, in fact, was never his property. He had power of appointment, only, and such power did not create any property in him. The only interest he had in the association was his membership interest: *Fisher v. Donovan*, 57 Neb. 361, 77 N. W. 778, 44 L. R. A. 383. The purpose of these certificates excludes the claim that there was any property interest therein in the insured member: *Fisher v. Donovan*, 57 Neb. 361, 77 N. W. 778, 44 L. R. A. 383; *Northwestern Masonic Aid Assn. v. Jones*, 154 Pa. St. 99, 35 Am. St. Rep. 510, 26 Atl. 253; *Rollins v. McHatton*, 16 Colo. 203, 25 Am. St. Rep. 260, 27 Pac. 254; *Hellenberg v. Order of B'nai B'rith*, 94 N. Y. 580; *Bacon on Benefit Societies*, 237-241; *Eastman v. Provident Mutual Relief Assn.*, 62 N. H. 555; *Keener v. Grand Lodge A. O. U. W.*, 38 Mo. App. 543; *Maryland Mutual Benefit Soc. v. Clendinen*, 44 Md. 429, 22 Am. Rep. 52; *Arthur v. Odd Fellows' Ben. Assn.*, 29 Ohio St. 557.

It follows that if Richardson had no property in the certificate in question, he had no right or interest therein upon which he could impress a trust; it became, upon his death, no part of his estate, and his administrator could have no right, title or interest therein. The defendant was organized to issue certificates of indemnity, calling for the payment of a certain sum, known and defined, in case of death, to the family, widow, heirs, blood relations, affianced wife, or persons dependent upon the member only. The by-laws of the defendant provide that "the objects of this fraternity

are to promote true neighborly regard and fraternal love, and bestow substantial benefits upon the family, widow, heirs, blood relations, affianced wife, or persons dependent upon the member and such ²³⁸ others as may be permitted by the laws of the state of Illinois." These provisions are strictly in accordance with the statutes of that state under which the defendant association was organized. None of these designations include the administrator of the estate of the deceased member, his estate or his creditors. Section 94 of chapter 43 of the Compiled Statutes of this state (Annotated Statutes, sec. 6486) provides: "No fraternal society created or organized under the provisions of this act shall issue beneficiary certificates of membership to any person under the age of eighteen years, nor over the age of fifty-five years. Payment of death benefits shall only be made to the families, heirs, blood relations, affianced husband or affianced wife, or to persons dependent upon the member." Not only will it be presumed that the statutes of Illinois are the same as the statutes of this state, but the petition shows that they are identical. It is therefore plain that if the deceased during his lifetime had changed the beneficiary so as to include either his estate, the administrator thereof, or his creditors, such designation, under the by-laws and rules of the association and the statutes of the state where it was organized, together with the statutes of this state where he departed this life, would have been absolutely void, and would have conferred no rights whatever upon the persons designated therein. A person not of the class for whose benefit a mutual benefit association is organized, cannot be a beneficiary: *Fisher v. Donovan*, 57 Neb. 361, 77 N. W. 778, 44 L. R. A. 383; *Wolf v. District Grand Lodge*, 102 Mich. 23, 60 N. W. 445; *Britton v. Supreme Council*, 46 N. J. Eq. 102, 19 Am. St. Rep. 376, 18 Atl. 675; *National Mutual Aid Assn. v. Gonser*, 43 Ohio St. 1, 1 N. E. 11; *Alexander v. Parker*, 144 Ill. 355, 33 N. E. 183, 19 L. R. A. 187; *Norwegian Old People's Home Soc. v. Willson*, 176 Ill. 94, 52 N. E. 41.

If Richardson during his lifetime could by no act of his confer the right to recover the amount named in the certificate upon his estate, the administrator thereof, or his creditors, it is plain that his death could in no manner ²³⁹ operate to create such a right. It appears on the face of the petition that at the time of his death, diligent search

was made, and so far as could be ascertained, he had no legal heirs. We thus have a case where the situation is the same as though the death of the beneficiary had occurred before that of the insured, and no new beneficiary had been named by him. It is earnestly contended by the plaintiff that although the beneficiary was not in existence, still such fact would not defeat a recovery, and that as a matter of equity, the right to recover would be transferred to the administrator of the estate of the deceased member; and several cases are cited in support of this contention. A careful examination discloses that although in each of them the death of the beneficiary had occurred, and the member had made no other designation, there was some one in existence who could have been made a beneficiary under the terms of the certificate, and the statutes under which the association was organized.

In the case of *Ryan v. Rothweiler*, 50 Ohio St. 595, 35 N. E. 679, the insurance company abandoned all claim to hold the proceeds of the certificate. The question as to the right of the administrator to take the proceeds was waived. There was but one question for the court to decide, and that was, Which of the administrators had the better right to the fund? This question was finally decided by the application to the contract of the statute of the state, which was as follows: "But if there are no children upon the death of the wife, such policy shall revert to and become the property of the party whose life is insured, unless it has been transferred as hereinafter provided": 2 Bates' Annotated Statutes, sec. 3629.

In *Schmidt v. Northwestern Life Assn.*, 112 Iowa, 41, 84 Am. St. Rep. 323, 83 N. W. 800, 51 L. R. A. 141, the question before the court was who among the three claimants had the most equitable claim to the money. In that case the wife, who was named as the beneficiary, had murdered her husband, and was in the penitentiary for life. In the body of the opinion it was pointed out clearly that the statutes ²⁴⁰ of Iowa prescribed certain rules from which beneficiaries in such certificates may be named, and it was held that where there was a failure of beneficiary, as was decreed therein, a resulting trust was created in favor of some one within the class named in the statutes; that while the administrator of the murdered member is entitled to recover,

he can only hold the fund recovered as a trustee for claimants who might bring themselves within the class of beneficiaries named in the statutes. It can scarcely be contended that this case supports plaintiff's claim. The statutes, both of this state and of the state of Illinois, specify the classes from which may be selected the beneficiaries in such contracts as the one in suit, and thus exclude the estate, the administrator, and the creditors of the insured.

In *Rindge v. New England Mutual Aid Soc.*, 146 Mass. 286, 15 N. E. 628, the member had distinctly made a creditor his beneficiary, in violation of the statutes of the state and of the by-laws of the association. The court held that whereas the statutes of the state provided that the orphans of a member might be beneficiaries under such certificates, and the certificate itself provided that on the death of the named beneficiaries, prior to the death of the member, and the failure of the member to name other beneficiaries, the insurance should be for the benefit of the heirs of the member, that the administrator could maintain an action on the certificate for the benefit of the heirs.

In the case of *Shea v. Massachusetts Benefit Assn.*, 160 Mass. 289, 39 Am. St. Rep. 475, 35 N. E. 855, it was held that where the named beneficiaries cannot take the amount due, the certificate would be payable to claimants who might bring themselves within the classes of beneficiaries named in the by-laws, and as heirs were within such by-law provisions, an executrix might recover, but only for their benefit.

In *Burns v. Grand Lodge*, 153 Mass. 173, 26 N. E. 443, the original designation of the beneficiary was invalid. The constitution and by-laws of the defendant provided ²⁴¹ that in case of death of all the beneficiaries the money should be paid to the heirs at law of the insured, and therefore it was held that an action could be maintained upon the certificate to recover the amount due thereon for such heirs.

It will thus be seen that in all cases where a recovery has been had under circumstances similar to those in the case at bar, there has been some one in existence who might have been designated as a beneficiary under the by-laws of the association and the statutes under which it was organized. According to the plaintiff's petition, the deceased designated in his benefit certificate that his legal heirs should be the beneficiaries; at the time of his death he was unmarried;

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and he left no children, relatives or kindred, or others sustaining such relation to him as would entitle them to become beneficiaries under the by-laws of the defendant association. There being no one competent to become a beneficiary and the deceased having failed to execute the power of designation, there was a total lapse of the power. The certificate in this case was neither payable to the deceased, nor to anyone, except as named by him. He had named his legal heirs as beneficiaries. It is not alleged in the petition that no persons were in existence who could have become Richardson's legal heirs at the time he made his designation and the certificate was issued; the allegation is that at the time of his death no such heirs could be found. It is not claimed that he named any other beneficiary, and why he did not do so, it is unnecessary to inquire. He may have intended that his associate members should not be called upon to contribute the sum required to fulfill the contract. As we have before stated, it could not go to the administrator, nor be subject to the payment of the debts of the member. Where there is a failure to designate a beneficiary, or there is a void designation, or the death of the beneficiary occurs before that of the insured, and no new beneficiary is named, the association is not liable; and if no disposition of the fund is provided for in the contract with the association, it ²⁴² reverts to the society: *Hellenberg v. Order of B'nai B'rith*, 94 N. Y. 580; *McElwee v. New York Life Ins. Co.*, 47 Fed. 798; *Maryland Mutual Benefit Soc. v. Clendinen*, 44 Md. 429, 22 Am. Rep. 52; *Skillings v. Massachusetts Ben. Assn.*, 146 Mass. 217, 15 N. E. 566; *Highland v. Highland*, 109 Ill. 366; *Daniels v. Pratt*, 143 Mass. 216, 221, 10 N. E. 166; *Eastman v. Provident Mutual Relief Assn.*, 62 N. H. 555; *Swift v. San Francisco Stock etc. Board*, 67 Cal. 567, 8 Pac. 94.

In the case of *National Mutual Aid Assn. v. Gonser*, 43 Ohio St. 1, 1 N. E. 11, where a certificate of membership was issued by an association organized under the statutes of the state of Ohio for the purposes of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of the deceased member, the petition failed to bring Gonser within the operation of the terms of the certificate, or the statutes under which the association was organized, and the certificate failed for

want of a proper designation. It was held that the plaintiff could not recover, and the court would leave the parties to the contract where it found them.

We must not forget that, as a matter of fact, there was no trust fund actually in the hands of the association, with which to pay the certificate, at the time of Richardson's death. It is true that equity will presume that that is done which ought to be done, but this is an action at law to recover on a contract, and if a recovery is had at all, it must be authorized thereby, either by operation of law or by the express terms thereof. It is provided therein that after the death of the insured member, the fund to pay the beneficiary shall be raised by an assessment of the members of the association; that neither the estate of the deceased, his administrator, nor his creditors, have any interest in the contemplated fund; nor can any of them become the beneficiary under the contract, the laws of the state of Illinois, where the association was formed, or the laws of this state, where this action is pending. Therefore equitable principles cannot be invoked to set ²⁴³ aside the contract rights of the parties, and authorize a recovery which is prohibited by law, as well as by the certificate itself.

For the foregoing reasons we hold that the plaintiff as administrator of Richardson's estate has no cause of action against the association on the certificate in question, and that the judgment of the trial court, sustaining the defendant's demurrer and dismissing the action, was right, and we therefore recommend that said judgment be affirmed.

Oldham and Pound, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

For Authorities Bearing upon the Decision in the principal case, see the note to Leavitt v. Dunn, 44 Am. St. Rep. 409; Schmidt v. Northern Life Assn., 112 Iowa, 41, 84 Am. St. Rep. 323; Roquemore v. Dent, 135 Ala. 452, 93 Am. St. Rep. 33. The interest of the beneficiary named in a certificate in a beneficial association is usually not regarded as a vested interest: Middeke v. Balder, 198 Ill. 590, 92 Am. St. Rep. 284. See, in this connection, Brett v. Warnick, 44 Or. 511, 102 Am. St. Rep. 639; Franklin Life Ins. Co. v. Galligan, 71 Ark. 295, 100 Am. St. Rep. 73; United States Casualty Co. v. Kacer, 169 Mo. 301, 92 Am. St. Rep. 641.

LANGDON v. CONLIN.

[67 Neb. 243, 93 N. W. 389.]

ATTORNEYS AT LAW—Contract to Divide Fees—Public Policy.—A contract between an attorney at law and one not a lawyer, providing that the latter shall procure the employment of the former by third persons for the prosecution of suits to be commenced, and shall assist in looking after and procuring witnesses to be used in such suits, in consideration of a share of attorney's fees collected therein, is opposed to public policy and void. (p. 647.)

M. Langdon, C. J. Smyth and M. McLaughlin, for the plaintiff in error.

Anderson & Keefe, for the defendant in error.

²⁴⁴ **OLDHAM, C.** In this case the plaintiff in the court below brought his action against the defendant alleging, among other things, that the defendant was a resident and practicing attorney of Omaha, Nebraska; that "on or about the first day of November, 1893, plaintiff, at request of defendant, entered into the services of the defendant to get parties in this and adjoining counties, or from any place, who wished the services of an attorney for litigation or for advice, to employ said defendant as their attorney, and said plaintiff was also to assist the defendant in looking after and procuring proper and legitimate witnesses, whose testimony was to be used in said cases; that for such services the defendant was to pay to plaintiff twenty-five per cent of the fees charged by the defendant, Martin Langdon, in said cases; that said fee of twenty-five per cent was to be due and payable from the defendant to the plaintiff as soon as the attorney fees in said cases brought by virtue of the above contract were due and payable to the defendant, Martin Langdon; that the plaintiff was to enter upon his duties under said contract immediately after the same was entered into as above set forth; that the plaintiff did enter upon said services at once and continued to work for said defendant under said contract until about the first day of December, 1898; that on or about the tenth day of February, 1894, Bridget McGreavy, guardian of John McGreavy, insane, through the advice and influence of plaintiff, employed said defendant, Martin Langdon, as her attorney to bring an action for her as such guardian against W. G. Waters and

others, to set the conveyance aside, for her ward, made by him to said W. G. Waters and others, the land in said conveyance being situated in Cuming county, Nebraska." The petition that sets out that after Bridget McGreavy, as guardian, had employed the defendant, the plaintiff assisted defendant in procuring legitimate witnesses, testimony and evidence to be used in behalf of said Bridget McGreavy in the district ²⁴⁵ court of Cuming county, Nebraska; that the case was finally adjudicated and settled by the court from the attorney for the said Bridget McGreavy; that the plaintiff received the amount of seven hundred dollars as fee. It seems fee in said cause, and that by reason of the plaintiff and defendant, plaintiff was entitled to the sum of one hundred and seventy-five dollars of this fee from the defendant. The defendant filed an answer to this petition, denying that he ever entered into such a contract, and alleging that the contract was against public policy, and other special defenses which need not here be noticed. On issues thus formed there was a trial to a jury, verdict for plaintiff, judgment on the verdict, and defendant brings error to this court.

Numerous errors in the proceedings of the cause in the court below are called to our attention in the brief of plaintiff in error, only one of which it will be necessary to discuss; and that is whether or not this contract is against public policy and good morals and therefore void. The substance of the contract is that the plaintiff, not an attorney at law, made an agreement with an attorney and counselor at law by which he was to procure litigants to employ the attorney, and procure legitimate witnesses to testify in behalf of the clients which he had solicited and persuaded to employ the defendant, and that as compensation for such services he was to receive twenty-five per cent of the fees earned by the defendant. Courts should only declare contracts void as against public policy when expressly or impliedly forbidden by the paramount law, or by some principle of the common law, or by the provisions of a statute. What the public policy is must be determined by the constitution, the laws, the course of administration, and decisions of the courts of last resort of the states: *License Tax Cases*, 72 U. S. (5 Wall.) 462, 18 L. ed. 497; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674. Hence, to determine what the public

policy of this state is with reference to contracts of the nature of the one at issue it is necessary to first examine such legislative enactments of this state as are declarative of the rights and duties of attorneys and counselors at law.

Section 1, chapter 7 of the Compiled Statutes provides that "no person shall be admitted to practice as an attorney or counselor at law, or to commence, conduct or defend any action or proceeding in which he is not a party concerned, or give opinion, or subscribing his own name, or the name of the petitioner, in any court of record in this state, unless he has been previously admitted to the bar by order of the supreme court, or of two judges thereof," etc. Section 2 then provides for the examination of candidates for admission to the bar. Section 3 provides for the admission of practicing attorneys from other states. Section 4 requires that every attorney shall take an oath to support the constitution of the United States, the constitution of the state, and to faithfully discharge the duty of an attorney and counselor. Section 5 provides, among other things, that it is the duty of attorneys and counselors "to maintain the respect due to the courts of justice and to judicial officers. II. To counsel or maintain no other actions, proceedings, defenses, than those which appear to him legal and just, except the defense of a person charged with a public offense. . . . VI. Not to encourage the commencement or continuance of an action or proceeding from any motive of passion or interest." Section 6 provides for the disbarment of attorneys who are guilty of deceit or collusion, and consent thereto, with the intent to deceive a court, or judge, or a party to an action; and section 7 defines the powers of attorneys with reference to the execution of bonds for appeal and other papers necessary and proper for the prosecution of a suit, and confers the right to bind the client by agreement in respect to any proceeding within the scope of his proper duties and powers, and the right to receive money claimed by the client during the pendency of the action before his discharge. Section 8 provides a ²⁴⁷ lien for his services, and section 13 makes it the duty of an attorney to indorse his name on any original paper filed in the proceeding.

Even a cursory examination of these excerpts from the statute is sufficient to plainly indicate that it was the policy

of the legislature of this state to absolutely exclude everyone who has not complied with the provisions of chapter 7, *supra*, from engaging either directly or indirectly in the practice of law in any court of record in this state in any case in which such person is not a party in interest. It is also apparent that it was the policy of the legislature to fix a high standard of professional ethics to govern the conduct of attorneys in their relations with clients and courts and to protect litigants and courts of justice from the imposition of shysters, charlatans and mountebanks. It seems to us that the contract in issue is but a thinly veiled subterfuge by which the plaintiff, who it is conceded was not a member of the bar, and who had never complied with any of the provisions of chapter 7, *supra*, for the purpose of authorizing him to engage in the practice of law, undertook to break into the conduct of proceedings in a court of record, to which he was not a party, by attempting to form a limited and silent partnership with one who had complied with the provisions of the law and was entitled to the emoluments of the profession. Under a statute with no more stringent regulations governing the practice of law than our own, a contract on all-fours with the one in the instant case was declared void, as against public policy and good morals, in *Alpers v. Hunt*, 86 Cal. 78, 21 Am. St. Rep. 17, 24 Pac. 846, 9 L. R. A. 483. The case is supported in principle by the holdings in *Burt v. Place*, 6 Cow. (N. Y.) 431; *Munday v. Whissenhunt*, 90 N. C. 458.

Where, as in the case at bar, a part of the consideration of the contract in issue was an agreement to furnish evidence in litigation to be commenced, the supreme court of ²⁴⁸ New York, in *Lyon v. Hussey*, 82 Hun, 15, 31 N. Y. Supp. 281, said: "It is clear that such a contract is against public policy. The recognition of contracts of this character would be the introduction of all sorts of fraud and deception in proceedings before courts of justice, in order that parties might receive compensation out of the results of their successful manufacture of proofs to be presented to the court, thus holding out a premium upon subornation. The mere statement of the proposition seems to show that such a contract could never be recognized in any court of justice": See, also, *Lucas v. Allen*, 80 Ky. 681; *Getchell v. Welday*, 4 Ohio Dec. 65.

We are therefore of the opinion that the contract on which this cause of action is founded is against public policy and good morals, and recommend that the judgment of the district court be reversed and that plaintiff's petition be dismissed.

Barnes and Pound, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the petition dismissed.

An Agreement Between an Attorney and a person who is not an attorney that if the latter will procure the employment of the former by a certain litigant he shall be entitled to one-third of such compensation as the attorney may receive, is held contrary to public policy, and therefore unenforceable in Alpers v. Hunt, 86 Cal. 78, 21 Am. St. Rep. 17. The validity of contracts to furnish evidence is discussed in the monographic note to Wood v. Casserleigh, 97 Am. St. Rep. 145-151; and the validity of contracts between attorney and client is discussed in the monographic note to Shirk v. Neible, 83 Am. St. Rep. 159-187. Champerty and maintenance are discussed in the note to Thallheimer v. Brickerhoff, 15 Am. Dec. 317-322.

CRAWFORD COMPANY v. HATHAWAY.

[67 Neb. 325, 93 N. W. 781.]

WATERS—Riparian Rights.—The common-law rule of riparian proprietorship as to water rights, and not the civil-law rule of appropriation of water, prevails in Nebraska. (p. 653.)

WATERS—Riparian Rights.—At common law every riparian proprietor, as an incident to his estate, is entitled to the natural flow of the water of streams running through or by his land, undiminished in quantity and unimpaired in quality, although all the riparian owners have a right to the reasonable use of the water for the ordinary purposes of life, and any unlawful diversion thereof is an actionable wrong. (p. 654.)

WATERS—Riparian Rights—Vested Rights.—The right of a riparian owner as such to the water of a stream running through his land is property, and when vested can be destroyed or impaired only in the interest of the general public, upon full compensation and in accordance with established law. (p. 654.)

WATERS—Riparian Rights—Property Rights.—The riparian right to the use of water flowing in a natural watercourse is a property right, to protect which the owner may resort to any and all instrumentalities which may be employed for the protection of private property rights generally. (p. 659.)

WATERS—Riparian Rights—Property Right.—A riparian owner's right to the use of the flow of the stream running through or by his land is a property right inseparably annexed to the soil, and not an easement or appurtenance. (p. 661.)

WATERS—Riparian Rights—Appropriation for Public Use.—A statute authorizing and regulating the appropriation of the waters of the state for irrigation and other purposes, declared thereby to be a public use, is valid, and in making appropriations of water as contemplated by the statute, a riparian owner whose property rights in water are taken or impaired is entitled to compensation for his injury actually sustained, to be recovered in a suitable action. (p. 667.)

WATERS—Riparian Rights.—A riparian owner has a right only to enjoy the advantage of a reasonable use of the stream as it flows by his land, subject to a like right belonging to all other riparian owners. The riparian property interest in the water is usufructuary, and the use must in all cases be reasonable. (p. 669.)

WATERS—Riparian Rights—Irrigation—Appropriation—Damages.—The mere fact that a riparian owner is deprived of the full flow of the stream adjacent to his land by the appropriation of water therefrom for irrigation furnishes no basis for compensatory damages. Merely diminishing the volume of water in the stream does not deprive the owner of property for which he can lay claim to a pecuniary compensation. At most, the naked right to the full flow of the stream and its loss by diminishing the volume of water when appropriated for irrigation purposes can result only in *damnum absque injuria*. (p. 669.)

WATERS—Riparian Rights—Damages for Appropriation for Irrigation.—To entitle a riparian owner to compensation for water appropriated for irrigation, he must suffer an actual loss or injury to the use of the water which the law recognizes as belonging to him, and to deprive him of which is to take from him a substantial property right. It must be such a taking or damage as materially depreciates the value of the real estate of which such water forms a part. (p. 669.)

WATERS—Riparian Rights—Irrigation.—Ordinarily, the riparian property right in water is limited to the use of the water of the stream for domestic purposes, and, if applied to the irrigation of riparian lands, a reasonable use for such purposes in view of an equal right of use belonging to all other riparian proprietors, fixes the basis for compensation where there has been a deprivation of such right by the appropriation of the water for a public use. (pp. 669, 670.)

WATERS—Riparian Rights to the use of the water of a stream for irrigation purposes apply to riparian lands only. (p. 670.)

WATERS—Riparian Rights—Nonriparian Lands.—Riparian rights to a reasonable use of the water of a stream cannot be enlarged or extended by the acquisition of the title to lands contiguous to the riparian land, nor can a riparian owner, as such, rightfully divert to nonriparian lands water which he has a right to use on riparian land, but which he does not so use. (p. 670.)

WATERS.—Land to be Riparian must have the stream flowing over it or along its borders. (p. 670.)

WATERS.—Extent of Riparian Land cannot, in any event, exceed the area acquired by a single entry or purchase from the government. (p. 670.)

WATERS—Riparian Rights—Appropriation.—The two doctrines of water rights, namely, that of priority of appropriation and that of riparian ownership, may both exist in the same state at the same time. (p. 672.)

WATERS—Riparian Rights.—The common-law rule of riparian rights is underlying and fundamental and takes precedence of appropriation of water if prior in point of time. (p. 673.)

WATERS—Riparian Rights—Appropriation.—The appropriator of water acquires title by appropriation and application to some beneficial use, of which he cannot be deprived except in some of the modes prescribed by law. (p. 673.)

WATERS—Conflicting Water Rights—Priority.—The time when either a riparian right or an appropriator's right accrues must determine the superiority of title as between conflicting claimants. (p. 673.)

WATERS—Irrigation Legislation.—A statute regulating the appropriation of water for irrigation may abrogate the law of private riparian rights as theretofore existing, and may substitute therefor a law providing for the appropriation of the public waters of the state and their application to beneficial uses, but such statute does not have the effect of abolishing vested rights of riparian owners, and affects only such rights as may be acquired in future. (p. 673.)

WATERS—Appropriation—Vested Rights.—Whether an appropriator of water has acquired rights which are in their nature vested, and which, when once acquired, become a superior title, and give the better right to the use of such water than that of a riparian owner whose title is acquired subsequently, must depend on the facts and circumstances as disclosed in any particular case. (p. 675.)

WATERS—Appropriation—Prior Rights.—Every appropriator of water who has applied it to a beneficial use contemplated by law has acquired a vested interest therein which gives him a superior title to the use of the water over the riparian proprietor whose right has been acquired subsequently thereto, or who has lost his right once acquired, by either grant or prescription. (p. 679.)

WATERS AND WATER RIGHTS—Suit in Equity to Determine.—If a large number of persons claim the right to use or divert the water of a stream, some by virtue of riparian rights, others by appropriation, prescription, or otherwise, a suit in equity to determine such rights, and enjoin infringement, under color thereof, of rights acquired under irrigation legislation, may be maintained to avoid a multiplicity of suits. (p. 683.)

WATER AND WATER RIGHTS—Suit in Equity to Settle Conflicting Claims—Offer to do Equity.—Plaintiff in a suit in equity in the nature of a bill of peace to protect his water rights, and determine and define conflicting rights to claims upon the waters of the same stream, may offer to do equity by compensating riparian owners whose rights are affected by the construction and operation of a canal under his appropriation, and in this way the amounts due the several persons claiming rights by way of damages may become a proper subject of inquiry and adjudication therein. (p. 685.)

WATERS—Riparian Rights—Domestic Use.—The common law distinguishes between those modes of use of water, which ordinarily involve a taking of small quantities thereof, and but little interference with the stream, and those which necessarily involve a taking or diversion of large quantities and a considerable interference with its ordinary flow. The use of the stream in the ordinary way by a riparian owner for drinking and cooking purposes and for

watering his stock is a domestic use. This right of the riparian owner is preserved to him as against other appropriations of water for other uses by canals, ditches and pipe-lines, whereby large quantities of water would be abstracted. (p. 685.)

WATERS—Riparian Rights.—The common law does not give to the riparian owner an absolute and exclusive right to all the flow of the water from a stream in its natural state, but only the right to the benefit, advantage, and use of the water flowing past his land in so far as it is consistent with a like right in all other riparian owners. (p. 686.)

WATERS—Riparian Rights—Flood Waters.—A riparian owner having a vested right to the use of the water of a stream as against an appropriator is not entitled to an injunction to prevent the diversion of the flood or storm waters of the stream to a beneficial use. (p. 688.)

WATERS—Riparian Rights—Adverse User.—There is no such thing as a prescriptive right of a lower riparian owner to receive water of a stream as against upper owners. The riparian owner is entitled to the reasonable use and enjoyment of the water of the stream and to insist that the water come to his land to be so used and enjoyed. He may by prescription acquire a right to use and divert the water beyond that which the common law would give him, but he gets this right only by adverse user, and if he diverts water which otherwise would flow down to a lower owner, that use is adverse. (p. 688.)

WATERS—Riparian Rights—Prescriptive Right.—A lower riparian owner can acquire no prescriptive right to receive water as against upper like owners, and thus enable him to prevent reasonable use of it by them. (p. 688.)

F. G. Hamer, T. F. Hamer, A. G. Fisher and J. E. Porter,
for the appellant.

S. Maxwell, A. W. Crites and W. H. Fanning, for the
appellee.

J. S. Kirkpatrick and J. W. Dewerse, amici curiae.

³³¹ **HOLCOMB, J.** An opinion prepared in this cause by the then chief justice, with one in its nature supplementary thereto, have heretofore been handed down by the court: Crawford Co. v. Hathaway, 60 Neb. 754, 84 N. W. 271, and 61 Neb. 317, 85 N. W. 303. The importance of the questions involved in a decision of the controversy, vitally affecting, as they do, the material interests of the state, and especially that portion of it where irrigation is necessary to successful agriculture, has induced us to grant a further hearing, and again to examine and consider the principal controverted points arising in the case. A full statement of the nature of the litigation is found in the opinion first filed, and we need not here restate it. Briefly, the appellant, who was plaintiff below, began an action, equitable in character,

to have adjudicated the rights of different persons made parties to the action to the use of the water flowing in a stream called White river, and to enjoin the defendant Hall from a threatened interference with plaintiff's headgate and works connected with an irrigating canal being constructed by it. The plaintiff claimed the right to divert the waters of the stream mentioned for irrigation purposes, and to supply the town of Crawford, situated near its proposed canal, with water for municipal purposes. Defendant Hall, owning and operating a mill adjacent to the stream, which had been utilized for power purposes, denies plaintiff's alleged right of appropriation and claims a right to the continued use of the water ordinarily flowing in the stream as a riparian proprietor. Numerous other persons, claiming some right to the use of the water as riparian owners or by appropriation, were also made defendants, with a view of having adjudicated the rights of all the parties to the litigation. The trial court refused to take jurisdiction and try the cause on its merits, for the reason that the water rights of the respective parties had not first been determined by the state board of irrigation, under the provisions of the irrigation act of 1895. On defendant ³³² Hall's application on a cross-petition an injunction was granted against plaintiff restraining it from diverting the water of the stream into its irrigation canal, and the temporary injunction granted in its favor and against Hall was dissolved. From these several orders the plaintiff appeals.

The argument in this court has taken an exceedingly broad range. Narrowed to its simplest terms, the matters in dispute relate to conflicting rights and interests as between riparian owners, and those claiming as appropriators of the waters in the streams of the state for irrigation and other beneficial purposes. Incidental to the main question thus stated, there is involved the constitutionality of the irrigation act of 1895, creating and providing for a state board of irrigation, defining its duties, powers and authority, and especially the portion of the act which empowers such board to determine and adjust the amount and priority of right to the use of water by appropriation for irrigation purposes. There is also presented for consideration the correctness of the ruling of the trial court in dismissing the action begun by plaintiff without a hearing and judgment on its merits.

Appreciating the fact that great interests are affected, and the far-reaching consequences of a decision regarding the matters in controversy when finally determined, more than the usual time has been taken in order that such full consideration might be given the case as the importance of the question presented seems to demand. In the former opinions we decided, in substance, that the plaintiff could not rely upon a statute for the purpose of enforcing its alleged right as appropriator and at the same time urge the invalidity of a material portion thereof on the ground of its alleged unconstitutionality, it being obvious that the invalid portion, if found invalid, formed an inducement to the passage of the entire act upon which its rights must rest if sustained; and that the act of the legislature of February 19, 1877, did not abrogate the common-law rights of riparian owners as they theretofore existed in this state. ²³³ It is also held that sections 47 and 48, article 2, chapter 93a, of the Compiled Statutes of 1897, constituted no acceptance of any supposed grant to the state by the federal government of the waters on the public domain. While some other questions of a minor character were determined, those just referred to are the only ones having a material bearing on the principal propositions we shall consider in the further examination of the case.

Much of the several briefs of counsel for plaintiff, whose rights are to be decided by the law relating to the right of appropriation of water for irrigation, is devoted to an argument in support of the contention that the doctrine of the rights of riparian owners as known and enforced at common law is inapplicable to, and has never legally become a part of, the laws of this state, and is not in force therein. It is insisted that the waters of the state, by virtue of the laws and ordinances in force when it was admitted to the Union, are publici juris, always have been, and may lawfully be diverted from any stream where naturally flowing, appropriated by nonriparian owners, and employed for any beneficial use; that the law of prior appropriation of water as defined by the civil law is in force in this state, and not the common-law rule of riparian proprietorship. The argument is constructed on the theory that the civil-law doctrine of appropriation of water in natural streams as belonging to the public became a part of the laws of the territory

and state by reason of the Louisiana territory purchase from France, and that nothing since the acquisition of that territory has transpired which has had the effect of displacing the law as it then existed. It is said that while the enabling act for the admission of the state provided that the people inhabiting the territory forever disclaimed all right and title to the unappropriated public lands lying within the territory, and that the same should be and remain at the sole and entire disposition of the United States, yet the provision contained in the first state constitution declaring that the people of the state in their right of sovereignty are ³³⁴ to possess the ultimate property in and to all lands within the jurisdiction of the state, and all lands the title to which shall fail from a defect of heirs shall revert or escheat to the people, preserved to them and to the state sovereignty and jurisdiction over the waters of the streams flowing therein, and left in force the doctrine of appropriation as theretofore existing. The scope and effect of the provisions referred to, as we view the subject, accorded to the government the primary right of disposal of the public lands, the state maintaining its sovereignty in the exercise of the powers of eminent domain and right to property resulting from escheats and forfeitures.

Without conceding or controverting the proposition of the civil law of appropriation ever being in force in the territory now comprising the state, we feel altogether clear that, in the organization of its government, the common-law rule of riparian proprietorship was established as a part of its laws. By the argument along the lines indicated, we are asked to overrule the many prior decisions of this court on the subject of water and water rights as they relate to riparian proprietors, and declare the law to be as it is applied in the arid state immediately west of us, where the waters of all the streams flowing in and through the states are held to belong to the state, in trust for the people, and subject to appropriation by any person or corporation for a beneficial purpose, the act of appropriating the water being the test of the right thereto and the use thereof, rather than the ownership of the banks between which the stream flows. The argument is not convincing, nor will it justify us in departing from sound and well-recognized principles of law in the decision of the cause. To adopt the doctrine con-

tended for would be a most violent and radical departure from the trend of judicial decisions heretofore prevailing, and would overturn many well-settled and generally accepted principles respecting property rights, and result in an invasion of vested private property interests which is ³³⁵ beyond the lawful power of the court or the legislature. To say there is no such thing as a property right of a riparian owner to the use of the stream flowing along or by his land is to work a revolution in the jurisprudence of the state and violate fundamental principles which lie at the very foundation of the system.

In *Clark v. Cambridge etc. Improvement Co.*, 45 Neb. 798, 64 N. W. 239, it is held that, except as abrogated or modified by statute, the common-law doctrine with respect to the rights of private riparian proprietors prevails in this country, and that such right is property, which, when vested, can be impaired or destroyed only in the interests of the general public, upon full compensation, and in accordance with established law. In speaking of the subject the court says (page 806): "Although the contrary has been asserted in some of the arid Pacific states (see *Reno Smelting etc. Works v. Stevenson*, 20 Nev. 269, 19 Am. St. Rep. 364, 4 L. R. A. 60, 21 Pac. 417; *Stowell v. Johnson*, 7 Utah, 215, 26 Pac. 290), the common-law doctrine with respect to the rights of private riparian proprietors, except as modified by statute, prevails in this country: *Eidemiller Ice Co. v. Guthrie*, 42 Neb. 238, 60 N. W. 717, 28 L. R. A. 581; *Black's Pomeroy on Water Rights*, secs. 127, 130, and authorities cited. At common law every riparian proprietor, as an incident to his estate, is entitled to the natural flow of the water of running streams through his land, undiminished in quantity and unimpaired in quality, although all have the right to the reasonable use thereof for the ordinary purposes of life (3 *Kent's Commentaries*, 439; *Angell on Watercourses*, sec. 95; *Gould on Waters*, sec. 204; *Black's Pomeroy on Water Rights*, sec. 8), and any unlawful diversion thereof is an actionable wrong." And further on: "The right of a riparian proprietor, as such, is property, and when vested can be destroyed or impaired only in the interest of the general public, upon full compensation and in accordance with established law: *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674; *Yates v. City of Milwaukee*, 10 Wall. (U. S.) ³³⁶ 497,

19 L. ed. 984; Potomac Steamboat Co. v. Upper Potomac Steamboat Co., 109 U. S. 672, 3 Sup. Ct. Rep. 445, 4 Sup. Ct. Rep. 15, 27 L. ed. 1070; Delaplaine v. Chicago etc. R. Co., 42 Wis. 214, 24 Am. Rep. 386; Bell v. Gough, 23 N. J. L. 624. That the state may, in the exercise of the right of eminent domain, appropriate the water of any stream to any purpose which will subserve the public interests, is not doubted, and that the reclamation of the inarable lands of the state is a work of public utility within the meaning of the constitution is a proposition not controverted in this proceeding. But even the state in its sovereign capacity is, as we have seen, within the restrictions of the constitution, and can take or damage private property only upon the conditions thereby imposed."

In Plattsmouth Water Co. v. Smith, 57 Neb. 579, 78 N. W. 275, in a contest between riparian proprietors, where the water company was obtaining water from a watercourse flowing over its land to supply the city for domestic purposes, fire protection, etc., the doctrine is thus broadly stated: "Riparian owners upon streams of water are entitled, in the absence of grant, license or prescription, to the usual, natural flow of water in the streams, without material alteration."

In Slattery v. Harley, 58 Neb. 575, 79 N. W. 151, it is again held: "The common-law rules relative to the rights of private riparian proprietors are of force in this state, with the exceptions of statutory abrogations and changes."

With these explicit declarations respecting the rights of private riparian proprietors, made after mature deliberation, clear, indeed, should appear the soundness of a proposition which is advanced with a view of securing judicial sanction when the effect would be to overturn all the cases referred to, and many others we might cite. We do not feel justified in departing from a position so generally recognized and accepted as being correct, so well supported by reason and authority, and which it is believed is in soundness impregnable.

One branch of the argument pertaining to the subject ³³⁷ proceeds upon the theory that notwithstanding the different expressions of the court regarding riparian rights, only so much of the common law as is applicable, and not inconsistent with the constitution of the United States, with the

organic law of this state, or with any law passed or to be passed by the legislature thereof, has been adopted and is in force in this state (Comp. Stats., c. 15a, sec. 1), and that the common-law rule with respect to the rights of riparian proprietors is inapplicable to the conditions prevailing here, and for that reason riparian rights cannot be said to have ever existed. To support this view of the law, it is said that because of the arid or semi-arid conditions prevailing in the western portions of the state, and the consequent necessity for the appropriation and application of water artificially to the soil in order that agriculture may be carried on successfully, the doctrine of the rights of riparian proprietors has no application, and should be so declared by the court. The law of necessity is appealed to, and it is urged the appropriation of water and its application to the soil for irrigation purposes is absolutely indispensable, in order that the wants of the people in the regions referred to may be supplied, agriculture carried on with success, and the country made productive, and capable of sustaining the inhabitants now residing there, and the thousands yet to come. The court is mindful of the great importance of the subject as affecting the most vital interests of the people of the localities where irrigation has by experience been found essential to successful agriculture, and its direct bearing on the material welfare of the state at large. Nor can it be doubted that it has been the policy of the legislature for many years past to encourage the development of the irrigation interests of the state by all legitimate methods which it found within its power to call into existence. In solving the problems arising in the development of this most important industry, and extending to it all legitimate encouragement and recognition which may properly come from the judiciary, we cannot ³³⁸ lose sight of fundamental principles which should control our action, and govern in the disposition of all matters coming before the court for adjudication. Property rights, when vested, must be jealously guarded and upheld, or we do violence to the most rudimentary principles of justice. Admitting, for the sake of argument, that the law of public ownership of waters and the right of appropriation thereof for beneficial use by individual citizens and corporations is preferable to the private ownership of riparian proprietors in the western portion

of the state, where irrigation is necessary, it is at once obvious that these conditions can be held to apply only to a portion of the state, and in fact to a lesser area than where irrigation is proved to be not essential to successful agriculture. As is pertinently said in the first opinion (60 Neb. 754, 762, 84 N. W. 271): "But can anyone tell at what particular point in the state the common-law rule applicable to riparian owners would cease and the rule said to be better applicable to the less favored portions of the state would begin? Such a rule would merely tend to breed 'confusion worse confounded,' and would be an assumption of legislative powers by this court inhibited by the constitution." But it cannot be said that the common-law rule of riparian ownership is inconsistent with the use of water for irrigation purposes, for, as we shall see later on, the right to the use of water for irrigation purposes is one of the elements of property belonging to the riparian owner along with that of its use for domestic and water-power purposes. If the common-law rule as to real property, when rights of riparian proprietors are involved, is to be abrogated, then why not say that the common-law doctrine as to other elements of real property or appurtenances belonging thereto, such as emblements, fixtures and easements, shall also be abrogated? The same reason for the rule exists in the one as well as the other, and can be denied in either only by the assumption of arbitrary power based on neither tenable grounds nor sound principles, and which should find no lodgment in the juridical branch of government.

³³⁹ On this same subject the supreme court of Washington—where climatic conditions are somewhat analogous to those prevailing here—in the case of *Benton v. Johncox*, 17 Wash. 277, 61 Am. St. Rep. 912, 917, 49 Pac. 495, 39 L. R. A. 107, 110, says: "But how it can be held that that which is an inseparable incident to the ownership of land in the Atlantic states and the Mississippi valley is not such an incident in this or any other of the Pacific states, we are unable clearly to comprehend. It certainly cannot be true that a difference in climatic conditions or geographical position can operate to deprive one of a right of property vested in him by a well-settled rule of common law. The mere fact that the appellants will not be able to occupy or cultivate their lands as they heretofore have done unless they irrigate them

with water taken from the Ahtanum river is no sufficient reason for depriving the respondents, who settled upon that stream in pursuance of the laws of the United States, of the natural rights incident to their more advantageous location. The necessities of one man, or of any number of men, cannot justify the taking of another's property without his consent, and without compensation."

And says McKinstry, J., in *Lux v. Haggin*, 69 Cal. 255, 311, 10 Pac. 674: "Aridity of the soil and air being made the test, the greater the aridity the greater the injury done to the riparian proprietors below by the entire diversion of the stream, and the greater the need of the riparian proprietor the stronger the reason for depriving him of the water. It would hardly be a satisfactory reason for depriving riparian lands of all benefit from the flow, that they would thereby become utterly unfit for cultivation or pasturage, while much of the water diverted must necessarily be dissipated."

We cannot, for the reasons given, lead ourselves to believe that there is any justifiable ground upon which we can deny the common-law rule of riparian proprietors to be in force in all portions of the state, except as it may be modified or supplemented by legislation of the state or of the Congress of the United States, of which we will speak hereafter.

³⁴⁰ It is quite apparent to those who have investigated that the law-making branch of the government of the state, for the purpose of advancing the material interests and welfare of the people, has sought to provide for the building up of a great system of irrigation in those portions of the state where the rainfall is regarded as insufficient to successfully engage in agricultural pursuits, and has authorized, so far as it is empowered so to do, the appropriation of the waters of the state and their diversion from natural channels, to be used by applying them artificially to the soil for beneficial purposes. To uphold and assist in carrying forward this avowed legislative policy is our duty in so far as the same may be done by having due regard for the property rights and interests of all, which is to be determined by those well-settled and recognized rules of general application found essential to the maintenance and protection of property rights and the adjustment of conflicting interests between all who are affected by the operation and enforcement of the

law. The riparian proprietor, say all the books and the authorities, has a right to the flow of the water of the natural stream passing through or by his land, such right being inseparably annexed to the soil, and passing with it, not as an easement or appurtenance, but as a part and parcel of the land. This property right can be regarded only as a corporeal hereditament belonging to and incident to the soil, the same as though it were stones thereon, or grass or trees springing from the earth: Gould on Waters, sec. 204, and authorities there cited. The riparian right to the use of the water flowing in a natural watercourse is a property right, which should be regarded as such, and to protect which the owner may resort to any or all instrumentalities which may be employed for the protection of private property rights generally: Gould v. Boston Duck Co., 13 Gray (Mass.), 442; Ashley v. Pease, 18 Pick. (Mass.) 268; Blanchard v. Baker, 8 Me. 253, 23 Am. Dec. 504; Keeney & Wood Mfg. Co. v. Union Mfg. Co., 39 Conn. 576, 582; Beissell v. Sholl, 4 Dall. (U. S.) ³⁴¹ 211, 1 L. ed. 804. The court could as properly say that in the prosecution of some important enterprise classed as works of internal improvement, such as the construction of irrigation canals, railroads, establishing public highways, or other similar undertakings, the property rights of the individual which are invaded or impaired must be ignored because of the necessity and advantage of the public enterprise as to say that the property right of a riparian proprietor may be sacrificed in order that the public welfare generally shall be advanced by promoting a system of irrigation where that method of moistening the soil is found necessary for successful agriculture. The question we are now dealing with has arisen in many of the states where resort to irrigation has been found beneficial and essential in some portions thereof to those engaging in agricultural pursuits, and in all such states, except those in the extreme arid portions of the country, it is held, as we have here held, that the common-law rule of the rights of riparian proprietors is not inapplicable because of the local conditions there prevailing, but is, and has been, in full force throughout all parts of such states: Shamleffer v. Council Grove Peerless Mill Co., 18 Kan. 24; Lone Tree Ditch Co. v. Cyclone Ditch Co., 15 S. Dak. 519, 91 N. W. 352; Low v. Schaffer, 24 Or. 239, 33 Pac. 678; Benton v. Johncox, 17 Wash. 277, 61 Am.

St. Rep. 912, 40 Pac. 495, 39 L. R. A. 107; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674. We can, therefore, for the reasons given, perceive of no tenable ground for adopting the view contended for, and hold the law of riparian rights, as determined by the principles of the common law, to be inapplicable to the conditions prevailing in the whole or in any part of this state.

It is also urged that by virtue of the legislation enacted the common-law rights belonging to riparian proprietors have been abolished. This position cannot be, we think, successfully maintained. The legislature has not, as we construe the several acts of that body relating to the subject, attempted to abolish the common-law rule defining existing rights of riparian proprietors, or to deprive them ³⁴² of such rights when once vested. On the contrary, such rights have been distinctly recognized. Nor is it believed that an attempt to abrogate such rights could be construed as other than an unconstitutional exercise of legislative power, and therefore invalid. In the irrigation act of 1889, the legislature sought to classify the streams in this state and restrict riparian rights to those owning lands bordering on streams not exceeding a certain width, but this attempted restriction proved abortive as an unwarranted act calculated to deprive riparian proprietors of vested property rights without due compensation, contrary to constitutional provisions in that regard: *Clark v. Cambridge etc. Imp. Co.*, 45 Neb. 798, 64 N. W. 239. Otherwise, rights of riparian proprietors have in the different irrigation acts passed by the legislature been respected and recognized. What the legislature has done with a view of promoting irrigation, as we understand and construe the different laws enacted on the subject, is to provide for the appropriation of the unappropriated waters in the streams of the state and to authorize the condemnation of the property in and to the use of the waters belonging to riparian proprietors wherever required in order that the whole of the waters of a natural stream, when found necessary, may be used for irrigation purposes. The law when so construed violates no fundamental principle of property rights, nor interferes unlawfully with the property of another. Legislation of this character provides for the appropriation of the waters of the state by an orderly and legal method, and their diversion from the streams where flowing

for the purpose of irrigation and for other purposes contemplated by law, and makes provisions for compensation to be made where private property rights are taken or damaged for a public use. This the legislature may lawfully do, and on account of which none may rightfully complain. That the common-law rule pertaining to the rights of riparian proprietors has been modified in many material respects under legislation by the United States Congress and by ³⁴³ this state, will appear further on in this opinion. We are now speaking of the general rule pertaining to rights of riparian proprietors, and not of its exceptions and modifications, which we shall hereafter speak of. We conclude, therefore, that in this state, under any view we may take of the subject, the right of riparian proprietors to the use of the waters flowing in the streams to which their lands are adjacent, when once attached, is in its nature a vested right of property, a corporeal hereditament, being a part and parcel of the riparian land which is annexed to the soil, and the use of it is an incident thereto, of which the owners cannot rightfully be deprived or divested except by grant, prescription or condemnation, with compensation by some of the means and methods recognized by law for the taking or damaging of private property for public use.

The development of a system of irrigation and the appropriation and application of the waters of the streams of the state for that purpose is obviously a work of internal improvement. It is so regarded and has been expressly declared by the legislature since its first enactment on the subject, and has been affirmed by this court in more than one of its decisions. By the act of the legislature approved February 19, 1877, the organization of corporations for the purpose of constructing and operating canals for irrigation was authorized, and such corporations were given power to acquire right of way, and to condemn property necessary to the construction of such canals, in the same manner as railroad corporations might acquire property and right of way for railroad purposes, and the law applicable to an exercise of the right of eminent domain by railroad companies was made to apply to such irrigation companies. It was also expressly declared that canals constructed for irrigation purposes were works of internal improvement, and all laws applicable to such enterprises should apply to such irrigating canals: Sess.

Laws 1877, p. 168. The irrigating act of 1877, with powers more amplified, was merged ³⁴⁴ in and became a part of the irrigation law passed by the legislature of 1889: Sess. Laws 1889, c. 68, p. 503. The law of 1889 was superseded by the more comprehensive act of 1895, the substance of the provisions of the two sections of the act of 1877 being embraced in sections 39 to 48, as found in article 2, chapter 93a, of the Compiled Statutes of 1901 (Annotated Statutes, sections 6793-6802). Indeed, section 2 of the act of 1877 has been re-enacted in each succeeding law on the subject almost verbatim, while the substance of the other section of that act has been incorporated in several different sections of the act of 1895. It is manifest by a casual inspection of the different laws passed by the legislature that since the passage of the original act of 1877, above referred to, the construction of irrigation canals has been recognized and treated by the legislature as a work of internal improvement; to construct and operate these the right to take private property for a public use has been found necessary, and provisions, although at first somewhat obscure in their application, have been made by the legislature to accomplish that end. While sections 39 and 41 of the act of 1895 (Compiled Statutes of 1901, article 2, chapter 93a [Annotated Statutes, sections 6793, 6795]), are framed chiefly with a view to authorize the condemnation of rights of way for such enterprises, there appears to exist no substantial reason why they should not be construed as embracing within their scope and effect the same powers and privileges that are given to corporations organized under the district irrigation law which are expressly authorized to condemn the riparian proprietors' right to the use of the water, and divert it for irrigation purposes: Comp. Stats. 1901, c. 93a, art. 3, sec. 10, (Annotated Stats., sec. 6831). We are of the opinion the broad provisions of section 41 of article 2, when fairly construed, suffice for the purpose of authorizing condemnation for irrigation purposes, as contemplated by article 2, to the same extent as is authorized by section 10 when the irrigation business is conducted under the provisions of article 3. The concluding ³⁴⁵ words of section 41, article 2, which is a substantial re-enactment of the provisions contained in the latter part of the first section of the act of 1877, are as follows: "Upon the filing of said petition [for condemnation] the

same proceedings for condemnation of such right of way shall be had as is provided by law for the condemnation of rights of way for railroad corporations, and the same provisions of law providing for the condemnation of rights of way for railroad corporations, the payment of damages and the rights of appeal shall be applicable to irrigating ditches, canals, and to other works provided for in this act." If the construction and operation of a ditch or irrigating canal results in injury to the rights of riparian proprietors, or takes from them private property for a public use, the provisions of the law with respect to the recovery of damages where property is taken or injured by railroad companies in the exercise of the right of eminent domain become applicable, and may be resorted to by the riparian owners for the recovery of the compensation secured to them by the constitution. If the authority of section 41 seems insufficient, further authority is found in section 48 of the same chapter, wherein it is provided that canals and other works constructed for irrigation or water-power purposes are works of internal improvement, and all laws applicable to works of internal improvement are applicable to such canals and irrigation works. Under these comprehensive provisions the legislature could have intended nothing less than that in the construction and operation of irrigation enterprises private property reasonably necessary for the conduct of the business could be taken and appropriated on due compensation by the exercise of the power and right of eminent domain. Water for the irrigation canals contemplated by the act is absolutely indispensable for the successful prosecution of the enterprise. In fact, water to flow in the ditches to be constructed for the purpose of irrigating the soil for the production of crops was the overshadowing and all-controlling factor, without which the ³⁴⁶ law, so far as promoting the public welfare, would be but a hollow mockery, suggestive of a highly absurd situation—an anomalous condition of affairs. Water, and the necessity of diverting it from its natural channels and appropriating it for irrigation purposes as a public use, being of the very essence of the act authorizing the construction and operation of irrigation enterprises, can there exist any rational doubt that, under the provisions we have referred to, the right and authority to condemn property belonging to a riparian proprietor was

given to those constructing such works of internal improvement for the purpose of putting the water to the public and beneficial uses contemplated and intended by the passage of the act? By section 81 of chapter 16 of the Compiled Statutes (Annotated Statutes, section 9967), entitled "Railroads," these corporations are authorized to take, hold and appropriate so much real property as may be necessary for the construction and convenient use of their roads. The power of eminent domain which may be exercised under the provisions of this section of the statute has by the legislature been referred to and become a part of the irrigation statute, as much so as though actually incorporated therein. There are other sections of the law with reference to internal improvements of other kinds than that of railroads which might also be resorted to, and which are fairly susceptible of a like construction, when considered in connection with the irrigation acts, which in terms refer to such laws as giving to irrigation canal companies power to condemn property necessary and essential to their use in the conduct of the business engaged in as contemplated by statute. The property in water belonging to a riparian proprietor and his right to the reasonable use thereof, as we have seen, is a part and parcel of the land, inseparably annexed to the soil, and is property within the meaning of that word, of which the owner cannot be divested save and except by some lawful method, which would apply alike to all species³⁴⁷ of real property and appurtenances belonging thereto. This property right, like any other part of his realty, is subject to condemnation and appropriation for public uses in the manner provided by law. It may also be lost by grant or prescription.

In *McGee Irr. Ditch Co. v. Hudson* (Tex.), 22 S. W. 967, it is held that while in that state the irrigation act provides for the condemnation of a right of way only for an irrigation canal, still, under the Revised Statutes, article 628, section 6, authorizing canal companies to condemn any land necessary for their use, an irrigation company formed under the act of 1889 of the laws of Texas may divert water which a riparian proprietor had the right to have flow in a certain channel, and to the use thereof as such owner, since such diversion is, in effect, taking land, which may be done under the right to take private property for public uses. Says the

court in the opinion by Stayton, C. J.: "The general law providing for the incorporation of canal companies contains the following, among the powers conferred on such corporations: 'To enter upon, and condemn and appropriate, any land of any person or corporation that may be necessary for the uses and purposes of said company; the damages for any property thus appropriated to be assessed and paid for in the same manner as provided by law in the case of railroads': Rev. Stats., art. 628, sec. 6. The law first quoted evidently only provides for condemnation of ground over which an irrigation ditch might run, and, in the absence of a law providing for the condemnation of every property necessarily taken in such an enterprise, no right to condemn would exist. The act of March 19, 1889, in so far as it provides for condemnation, however, is not in conflict with article 628 of the ³⁴⁸ Revised Statutes. The provisions of the latter are broader than the former, and under the power therein given to enter upon, condemn and appropriate lands, we are of opinion that any property belonging to plaintiffs, and necessary for the uses and purposes of defendant, in the business for which it was created, may be condemned, if it will pass, or may be included, under the term 'lands.' The word 'land' includes, not only the soil, but everything attached to it, whether attached by the course of nature, as trees, herbage, and water, or by the hand of man, as buildings and fences."

In this state the court has repeatedly held that section 21, article 1, of the state constitution, is of itself a sufficient basis to justify an action for the recovery of all damages arising from an exercise of the right of eminent domain which causes a diminution in the value of the private property of another: *Chicago etc. R. Co. v. Hazels*, 26 Neb. 364, 42 N. W. 93; *Burlington etc. R. R. Co. v. Reinhackle*, 15 Neb. 279, 48 Am. Rep. 342, 18 N. W. 69. In the cases cited the question of damages arose, not for the taking of property, but for damage to abutting property by railroad companies, resulting from obstruction of streets and highways and other incidents of their construction and operation of railways, causing a depreciation in the value of abutting property. The right of the property owner to the benefit and advantage of a street and highway adjacent to his land and the right of the riparian owner to the reasonable use and en-

joyment of the water in a stream flowing over or adjoining his land, are not without features rendering them in a measure analogous. Speaking of the right to the use and enjoyment of the privilege and advantage attaching to abutting property on the public streets, it is said by the Michigan supreme court that such owner has "a peculiar interest in the adjacent street which neither the local nor the general public can pretend to claim; a private right in the nature of an incorporeal hereditament legally attached to his contiguous ground; an incidental title to certain facilities and franchises, ³⁴⁹ which is in the nature of property, and which can no more be appropriated against his will than any tangible property of which he may be owner": *Grand Rapids etc. R. Co. v. Heisel*, 38 Mich. 62, 71, 31 Am. Rep. 306. It is thus apparent that as to the property right of a riparian proprietor to the reasonable use of the water naturally flowing in the stream, provisions effective in character by virtue of the constitution and the statutes exist for the appropriation of such property and the diversion and use of the water for irrigation purposes, and that upon payment of adequate compensation for the property taken or damaged no substantial reason can be urged why the same may not be done without violating any principle governing property rights known to our system of jurisprudence. The right of a riparian proprietor to the reasonable use of water flowing in a natural channel is property, which is protected by the ægis of the constitution, and of which he cannot be deprived against his will, except for public use, and upon due compensation for the injury sustained. If the legislature had undertaken to sweep away and abolish this right, we would not be warranted in giving the act judicial sanction. Where by any possible construction of a reasonable nature legislation can be upheld, it is our duty to give it such a construction as will uphold, rather than destroy, it. The irrigation act of 1895 is valid when construed as not interfering with vested property rights which have been acquired by riparian proprietors. Such a construction, we are satisfied, is justified by a fair interpretation of the act in its entirety, considering its tenor, purport, and the object intended to be accomplished by its enactment.

The statute authorizes and regulates the appropriation of the waters of the state for irrigation and other purposes,

and, in making such appropriations as contemplated by the act, the riparian owner whose property rights are appropriated or impaired, is entitled to compensation for the injuries actually sustained, to be recovered in a suitable action or proceeding instituted for that purpose. The ³⁵⁰ construction given renders the act effective as providing a method for the development of the semi-arid portions of the state by means of a system of irrigation, including the appropriation and application of the waters flowing in the streams, to the more useful and beneficial purposes of fructifying the soil for the comfort and blessing of mankind.

Our discussion on the rights of riparian owners has extended only to those streams of water where the bed over which a stream flows is included within the survey of the public lands as made by the United States government, from whom the riparian owners obtain title. Such is the character of the stream the water of which is the subject of the present controversy. In the case at bar, the stream is a narrow one, ordinarily flowing but a small volume of water, the bed thereof belonging to the contiguous land owner. Whether the common-law rule fixing the rights of riparian proprietors applies to the larger streams of the state, such as may be classed as interstate rivers, and along the banks of which meander lines have been run by the government in its survey of the public lands, presents an entirely different question, and it would seem that riparian rights would not attach to the waters of such rivers. A final determination of the question, however, is not here made, as this should be left to be decided in a proper case, where the subject is fairly presented and considered after opportunity for thorough investigation, aided by the researches and arguments of counsel. As to those streams whose banks form the boundary lines of the estates adjoining, there are forcible reasons, well grounded on authority, for holding to the view that the rules of the common law applicable to navigable streams, as therein designated and classified, should be held applicable to all such rivers, even though in fact non-navigable: *Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 330; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674; *St. Louis etc. R. Co. v. Ramsey*, 53 Ark. 314, 22 Am. St. Rep. 195, 13 S. W. 931, 8 L. R. A. 559; *Gould on Waters*, sec. 78. While this ³⁵¹ subject received slight attention in the case of *Clark v. Cambridge*

etc. Imp. Co., 45 Neb. 798, 64 N. W. 239, it was not determined, as a decision of the case turned on another point. As to navigable streams, the doctrine seems to be that the water and the soil thereunder belong to the state, and are under its sovereignty and domain, in trust for the people, and cannot, therefore, be the subject of a claim of property therein, or the right to the use thereof by an adjoining land owner. When the government, in its survey, runs meander lines along the banks of a stream and parts with its title to the adjoining land, the boundary of which would be high-water mark, then it would seem permissible to classify the stream as navigable, in which case the waters thereof and the bed thereunder would belong to the state, and be held by it in trust for the people. The waters in such streams would be held to be *publici juris*, and not subject to riparian claims by the adjoining land owner: *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. Rep. 548, 38 L. ed. 331; *Illinois C. R. Co. v. State*, 146 U. S. 387, 13 Sup. Ct. Rep. 110, 36 L. ed. 1018; *Packer v. Bird*, 137 U. S. 661, 11 Sup. Ct. Rep. 210, 34 L. ed. 819; *Martin v. Waddell*, 16 Pet. (U. S.) 367, 10 L. ed. 997; *Pollard v. Hagan*, 3 How. (U. S.) 212, 11 L. ed. 565; *Richardson v. United States (C. C.)*, 100 Fed. 714.

The extent of the riparian proprietor's rights in and to the use of the waters of a natural channel is material to a satisfactory disposition of the subject we now have in hand. This right, stated in its broadest terms, is that "every proprietor of lands on the banks of a river, has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*), without diminution or alteration. No proprietor has the right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit ³⁵² et debet currere*, is the language of the law. Though he may use water while it runs through his land, he cannot unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate": 3 Kent's Commentaries, 439; *Smith v. City of Rochester*, 92 N. Y. 463, 473, 44 Am. Rep. 393. While, as an abstract rule of law, a riparian proprietor is entitled to the full flow of the

stream as it is wont to flow by nature, yet the rule has so many exceptions and has been so modified as the law has progressed, that the nature and extent of a riparian proprietor's pecuniary interests or property in a stream cannot be measured by such a rule, nor can the rule now be said to be a full and accurate statement of the law. The law does not recognize a riparian property right in the corpus of the water: *Vernon Irr. Co. v. City of Los Angeles*, 106 Cal. 237, 39 Pac. 762. The riparian proprietor does not own the water. He has the right only to enjoy the advantage of a reasonable use of the stream as it flows by his land, subject to a like right belonging to all other riparian proprietors: *Kinney on Irrigation*, sec. 59; *Gould on Waters*, sec. 204; *Embrey v. Owen*, 6 Ex. (Eng.) 353. The property interest in the water is usufructuary and his right thereto is subject to many limitations and restrictions, and always depends upon its reasonableness when considered in connection with a like right as belonging to all other riparian proprietors. His use must be reasonable, whatever may be its purpose; and he may not, under any circumstances, by his use materially damage other proprietors, either above or below him: *Union Mill etc. Co. v. Dangberg*, 81 Fed. 73; *Williamson v. Lock's Creek Canal Co.*, 78 N. C. 156. The mere fact that the riparian proprietor is deprived of the full flow of the stream adjacent to his land would furnish no basis for compensatory damages; merely diminishing the volume of water in the stream would not deprive the owner of property for which he could lay claim to a pecuniary compensation. At most, the naked ³⁵³ right to the full flow of the stream, and its loss by diminishing the volume of water when appropriated for irrigation purposes, could result only in *damnum absque injuria*. In order to entitle the riparian owner to compensation, he must suffer an actual loss or injury to the use of the water which the law recognizes as belonging to him, and to deprive him of which is to take from him a substantial property right. It is for an interference with or injury to his usufructuary estate in the water for which compensation may rightfully be claimed where the water of the stream is diverted and appropriated for the use of irrigation; it is such a taking of or damage to property as materially and substantially depreciates the value of the real estate of which it forms a part. Ordinarily, the riparian property right would be limited to the use of

the water of the stream for domestic purposes, and, if applied to the irrigation of riparian lands, a reasonable use for such purposes in view of an equal right of use belonging to all other riparian proprietors, which would fix the basis for compensation where there has been a deprivation of such right by the appropriation of the water for a public use: *Low v. Schaffer*, 24 Or. 239, 33 Pac. 678.

A riparian proprietor's right to the use of water for irrigation purposes must be understood as applying to riparian lands only. He would have no rights as a riparian owner which could extend to nonriparian lands. This raises the question as to the extent or area of lands bordering on a stream, or over which it flows, which may properly be classed as riparian lands. A riparian owner's right to the reasonable use of water exists solely by virtue of his ownership of the lands over or by which the stream flows. It is obvious that this right cannot be enlarged or extended by acquisition of title to lands contiguous to the riparian land; nor can a riparian owner, as such, rightfully divert to nonriparian lands water which he has a right to use on riparian land, but which he does not so use: *Chauvet v. Hill*, 93 Cal. 407, 28 Pac. 1066; *Gould v. Eaton*, 117 Cal. 539, 49 Pac. 577, 38 L. 354 R. A. 181; *Bathgate v. Irvine*, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442. Land, to be riparian, must have the stream flowing over it or along its borders, and the vital question is how far away from the stream it may be considered to extend.

The subject is considered in the case of *Lux v. Haggin*, 69 Cal. 424, 425, 10 Pac. 674. It is there held that a riparian tract of land (in that case the title to which had been obtained from the state) would include all the sections or fractional sections mentioned in any one certificate of purchase bordering on a natural water channel, or through which it had its course; but says the court: "If, however, lands have been granted by patent, and the patent was issued on the cancellation of more than one certificate, the patent can operate, by relation (for the purpose of this suit), to the date of those certificates only, the lands described in which border on the stream."

In *Boehmer v. Big Rock Creek Irr. Dist.*, 117 Cal. 19, 43 Pac. 908, it is held that where quarter sections of land are granted by separate patents based on separate entries, and therefore constituting distinct tracts of land, mere contiguity

cannot extend a riparian right incident to only one quarter section, although both are owned by the same person.

The rule in California seems to be that where riparian lands are acquired by an entryman or purchaser by any one entry or purchase, the boundary of the riparian land would be restricted to the land the title of which was acquired by the one transaction; that each tract thus acquired would be treated as an independent tract, beyond which riparian rights could not extend. It is the policy of the government in the disposition of the public lands in this state, as it has been the policy of the state regarding her school lands, to have the land surveyed into townships, sections and subdivisions of sections, in order that it may be disposed of in limited quantities in legal subdivisions not less than one-sixteenth of a section, comprising a forty-acre tract, and usually not exceeding ³⁵⁵ a quarter section of one hundred and sixty acres. The forty acre tract, or one-fourth of a quarter section—or, if an irregular tract, it is designated as a certain numbered lot—may be, and usually is, taken as the unit of measurement in the acquisition of title to the public lands within the state. As an illustration, the government authorizes the disposition of the public lands under the pre-emption, homestead or timber culture laws in tracts of not less than forty acres nor more than one hundred and sixty acres. Where more than forty acres are taken, it is not required that it be in any particular form or located within one particular section or quarter section, but if the forty acre tracts adjoin each other and do not exceed the maximum acreage allowed in one entry, a party may thus acquire a good title to the land. Within the limits of railroad grants homestead entries were limited to tracts not exceeding eighty acres, while the railroad grants of land by the government are usually by sections of six hundred and forty acres each. Where a homestead of eighty acres has a water-course through it, which also runs through a section of railroad land adjoining, there appears no sound reason for saying that the riparian land in one instance would include but eighty acres and in the other six hundred and forty. If the riparian proprietor's right is incident to the soil, is a part and parcel of the real estate, like the trees and the grass, then it would seem that in this state, at least, in view of the policy of the government in the disposition of its public lands, riparian rights would attach only to those

legal subdivisions of a section ordinarily described as forty acre tracts, or, in lieu thereof, where the tracts are irregular, to a certain designated lot, which borders on a stream or through which it flows. There is neither reason nor logic for saying that when one acquires a forty acre tract with the riparian rights belonging thereto, such is the limit of the riparian lands in that case, but where, on the same stream, an entire section is acquired by grant from the government, that the whole of the six hundred and forty acres, for that reason, becomes riparian land. It being ³⁵⁶ the policy of the government to dispose of its public domain in tracts of not less than forty acres each, why, then, may it not be said that riparian rights are limited to such tracts, even though several of them may be joined together in one certificate of purchase or instrument of conveyance? It is not decided that such should be the rule in this state, as it is deemed preferable to leave the question open for maturer investigation and consideration.

From what has been said, it must not be inferred that the rights of an appropriator for beneficial purposes contemplated by statute are not as sacred and as much entitled to the equal protection of the law as is the property right of riparian proprietors. Indeed, the property right of an appropriator in water diverted from natural channels and applied to irrigation uses is distinctly recognized in the case of *Clark v. Cambridge etc. Improvement Co.*, 45 Neb. 798, 64 N. W. 239, where the doctrine of estoppel was applied to the acts of the riparian owner, and it was held that, because of his laches, he could not maintain an injunction suit to restrain the diversion of the water by an appropriator and its application to the soil by means of irrigation, and that he would be left to his ordinary remedy at law for compensation for the injury sustained. The two doctrines of water rights—one the rule of priority of appropriation and the other the common-law doctrine of riparian ownership, whose basis is equality between all those who own lands upon the stream—may, in our judgment, both exist at the same time, as both have existed in this state, as we shall endeavor hereafter to demonstrate. We have spoken of the common-law rule, made so by the legislative adoption of the principles of the common law when applicable and not inconsistent with the laws of the state. Valid vested rights have also been acquired by reason of the prior appropria-

tion of the public waters of the state which have received sanction and recognition by the legislature and by the Congress of the United States, which place the ³⁵⁷ title of the appropriator on an equality with riparian owners. The fundamental hypothesis of prior appropriation of water for the development of the arid or semi-arid portions of the country is the recognition of the right of the people, or those desiring, to appropriate and apply to beneficial uses any unemployed water of the natural streams, and that such rights, when so acquired, are to be determined according to the date of appropriation, priority of acquisition giving the better right. The two doctrines are not necessarily so in conflict with each other as that one must give way when the other comes into existence. The common-law rule of riparian rights is underlying and fundamental and takes precedence of appropriations of water if prior in time. The two doctrines stand side by side. They do not necessarily overthrow each other, but one supplements the other. The riparian owner acquires title to his usufructuary interest in the water when he appropriates the land to which it is an incident, and when the right is once vested it cannot be divested except by some established rule of law. The appropriator acquires title by appropriation and application to some beneficial use, of which he cannot be deprived except in some of the modes prescribed by law. The time when either right accrues must determine the superiority of title as between conflicting claimants.

The irrigation act of 1889 abrogated in this state the common-law rule of riparian ownership in water, and substituted in lieu thereof the doctrine of prior appropriation. This legislation could not and did not have the effect of abolishing riparian rights which had already accrued, but only of preventing the acquisition of such rights in the future. The law of 1895 but continued in force the act of 1889 in so far as that act abrogated the common-law rule as to the rights of riparian proprietors, and since the taking effect of the act of 1889 those acquired rights to the waters flowing in the natural channels of the state are to be tested and determined by the doctrine of prior appropriation. That it was competent ³⁵⁸ for the legislature to abrogate the rule of the common-law as to riparian ownership in waters as to all rights which might be acquired in the future, and substitute a system of laws providing for the appropriation and applica-

tion of all the unappropriated waters of the state to the beneficial uses as therein contemplated, there exists, it would seem, no reasonable doubt. In *United States v. Rio Grande Dam etc. Co.*, 174 U. S. 690, 19 Sup. Ct. Rep. 770, 43 L. ed. 1136, it is held that it is within the power of a state legislature to change the common-law rule of riparian proprietors and authorize the appropriation of the flowing waters within its dominion for such purposes as it deems wise and proper. The substitution of the law of prior appropriation, instead of the common-law rule of riparian ownership, is applicable only to those waters in the state which are unappropriated, or, in other words, which have not become the property of riparian proprietors. In our view of the subject, the right of the appropriators of water who have applied the same to the soil for agricultural purposes by means of irrigating canals antedates the passage of either of the irrigation acts of the legislature of which we have just made mention. This right has grown out of the necessities of the case, and has been sanctioned by the acts of Congress and recognized by the laws of the state. It is a matter of common knowledge, historical in character, that in the development of the state in the higher altitudes in the western portions, because of the arid or semi-arid climatic conditions which prevail, it has been found impossible to successfully engage in agricultural pursuits save by applying to the soil, by the process known as irrigation, waters diverted and drawn from natural streams, thereby rendering highly productive a land otherwise valuable only for grazing. It is a fact so common and notorious that we may properly take judicial notice of it that since the early settlement of the western portion of the state it has been the custom of the settlers to appropriate the waters of the ³⁵⁹ streams flowing therein by means of irrigating canals and apply them to the soil in prosecuting the business of agriculture in all its varied branches. We do not mean to say that there has grown up in the section of the state referred to a custom adopted by the people which has been perfected into a system or code of laws respecting the appropriation of water for agricultural purposes, nor do we find this necessary in the present case. What is said is that from the earliest settlement of the semi-arid portions of the state, and before the enactment of any irrigation statute providing for the appropriation of water, there has existed a practice or usage of diverting water from

the natural channels of the streams into irrigation canals constructed for that purpose, and the appropriation and application of such water for agricultural purposes. Whether or not under this practice or custom appropriators have acquired rights which are in their nature property, and which when once acquired become a superior title, and give the better right to the use of such water than that of a riparian owner whose title is acquired subsequently, must depend on facts and circumstances as disclosed in any particular case. When such a custom has been so generally recognized as to have the force of law, it can only be regarded as a substantial adoption of the doctrine of prior appropriation of water which obtains in the arid states immediately west of us.

Says Mr. Justice Miller, in speaking of the United States statute recognizing the right of those who have appropriated water for agricultural purposes: "The section of the act which we have quoted was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one": *Broder v. Natoma Water etc. Co.*, 101 U. S. 274, 276, 25 L. ed. 790. The section just referred to is contained in an act of Congress of July 26, 1866, and provides "that whenever, by priority of possession, rights to the use of water for mining, agricultural, ³⁶⁰ manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: Provided, however, That whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage": 14 U. S. Stats. at Large, p. 253, sec. 9.

In a decision by the United States supreme court (*Basey v. Gallagher*, 87 U. S. 670, 22 L. ed. 452), in which the opinion was prepared by Mr. Justice Field, the section we have just quoted was under consideration. It is there said by the author, after speaking of another case decided prior thereto (*Atchison v. Peterson*, 87 U. S. 507, 22 L. ed. 414): "Ever since that decision it has been held generally throughout the

Pacific states and territories that the right to water by prior appropriation for any beneficial purpose is entitled to protection. Water is diverted to propel machinery in flour-mills and sawmills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits, for this right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual. The act of Congress of 1866 recognizes the right to water by prior appropriation for agricultural and manufacturing purposes,³⁶¹ as well as for mining. . . . It is very evident that Congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition; and that law may be shown by evidence of the local customs, or by the legislation of the state or territory, or the decisions of the courts. The union of the three conditions in any particular case is not essential to the perfection of the right by priority; and in case of a conflict between a local custom and a statutory regulation the latter, as of superior authority, must necessarily control."

In *Lux v. Haggin*, 69 Cal. 255, 446, 10 Pac. 674, it is observed by the California supreme court: "From the foundation of the state, waters pertaining to the public lands of both the federal and state governments have been appropriated and used for mining, agriculture, and other useful purposes. Such appropriation and use was first sanctioned by custom, next by the decisions of the courts, and finally by legislative action on the part of the United States as well as the state. It thus became a part of the law of the land, of which every citizen was entitled to avail himself, and of which every purchaser from the United States, as well as the state, was bound to take notice. In protecting, therefore, the right of the appropriators of water upon the public lands of the state and of the United States, no wrong is done to the purchasers from either government. That from the very beginning it has been the custom of the people of the

state to divert from their natural channels the waters of the streams upon the public lands, and appropriate the same to the purposes of mining, agriculture, and other useful and beneficial uses, is a part of the history of the state."

See, also, *Isaacs v. Barber*, 10 Wash. 124, 45 Am. St. Rep. 772, 38 Pac. 871, 30 L. R. A. 665, where it is held that judicial notice will be taken of the fact that at least that portion of the state east of the Cascade Mountains was included within ³⁶² the territory where the customary law of miners was in force and the right of appropriating water for agricultural and manufacturing purposes existed, although the common-law rule of riparian ownership was a part of the law of the state.

Recognizing the necessity for the appropriation of water and its application to the soil for agricultural purposes, the legislature of this state, in 1877, passed an act having for its object the formation of corporations for the construction and operation of canals for irrigation, and for that purpose gave them the right to acquire right of way for such canals, and declared the canals to be works of internal improvement: Sess. Laws 1877, p. 168. It is manifest from a reading of the act, brief though it is, that the legislature, recognizing the conditions existing in the semi-arid portions of the state where the tide of immigration was then beginning to flow, and the necessity of appropriating the public waters for agricultural purposes by means of irrigating canals, passed the act with the view of providing effective means for the appropriation of such waters and their application to the soil in order that agriculture might be successfully engaged in, and the resources of the state developed. Without irrigation the country was principally of use for grazing; with it, and a soil for fertility unsurpassed which it possessed, and a favorable climate, the country could be made to blossom as the rose, and to sustain a population of thousands, where but hundreds had previously found a means of livelihood. Who can doubt that by the passage of this act the legislature, composed as it was of intelligent men, intended to and did recognize the right of the inhabitants of the public domain—those settling there for the purpose of building permanent homes—to construct irrigation canals and appropriate the waters of the natural streams for the purpose of promoting agriculture and developing the country? It would be the height of absurdity to say that the construction of irrigation canals was authorized for any other purpose or

with any other view ³⁶³ than the appropriation of the public waters flowing in the streams. Congress had authorized and sanctioned the appropriation of water for the purposes contemplated by the legislative act. It had declared by the act of 1866 that in the disposition of the public domain riparian proprietors took title to their lands subject to the rights of appropriators who had acquired title to the use of water by appropriation for agricultural purposes, where such rights were recognized by local customs, by the legislature or by the courts. Practically all the lands in the semi-arid portions of the state at the time belonged to the government. It was the riparian proprietor, and it authorized the appropriation and diversion of the water for agriculture, mining and manufacturing purposes. The state recognized and encouraged the appropriation of water for agricultural purposes by the passage of the act of 1877. There were no riparian proprietors except the general government, or at most but a few, who were or could be affected by the act. It contemplated the appropriation of the waters of the streams and their use for irrigation to meet the necessities of the case in conformity with the customs and usages prevailing in arid portions of the western country, where irrigation was essential to agriculture. The congressional act of 1866 authorized this to be done, and land thereafter disposed of by the United States was subject to prior rights acquired by appropriation. The act of 1889 (Sess. Laws 1889, c. 68, p. 503), in which was merged the act of 1877, especially recognized the rights acquired by prior appropriators and treated them as it would any other vested property rights. Section 13, article 1, thereof declares: "All ditches, canals and other works heretofore made, constructed or provided by means of which the waters of any stream have been diverted and applied to any beneficial use must be taken to have secured the right to the waters claimed to the extent of the quantity which said works are capable of conducting and not exceeding the quantity claimed without regard to, or compliance with, the requirements ³⁶⁴ of this chapter." And the act of 1895 preserved all right acquired by appropriation prior to its passage: Sess. Laws 1895, c. 9, p. 244. By section 49 it is provided: "Nothing in this act contained shall be so construed as to interfere with or impair the rights to water appropriated and acquired prior to the passage of this act."

In the light of the provisions of the act of Congress as construed by the supreme court of the United States, the different acts of the legislature of this state relating to the appropriation of the waters flowing in the streams thereof, and taking notice of those historical facts connected with the development of which we have made mention, the conclusion appears to us irresistible that every appropriator of water who has applied it to the beneficial uses contemplated by these several acts has acquired a vested interest therein, which gives him a superior title to the use of the water over the riparian proprietor whose right has been acquired subsequent thereto, or who has lost his right, once acquired by either grant or prescription. Assuming, then, as we think should be done, that the right of acquiring an interest in the use of water by appropriation when applied to the beneficial purposes of agriculture has existed in this state since its early settlement in those portions where irrigation is found to be necessary, the decisive question in all cases as between riparian proprietors and those claiming as appropriators is who first secured the right to the use of the water in controversy. Has the riparian proprietor, who appropriates his riparian water right as an incident to and a part of the land obtained from the government, and whose right then attaches, a superior claim, or has the appropriator a better right because prior in time? The answer in each case must depend upon the facts and circumstances as developed therein. As to the law applicable to controversies between those claiming as riparian proprietors and those claiming by right of prior appropriation, see *Low v. Schaffer*, 24 Or. 239, 33 Pac. 678; *Speake v. Hamilton*, 21 Or. 365, 3, 26 Pac. 855; *Kaler v. Campbell*, 13 Or. 596, 11 Pac. 301; *Ramelli v. Irish*, 96 Cal. 214, 31 Pac. 41; *Judkins v. Elliott (Cal.)*, 12 Pac. 116.

In support of its right to maintain an action of the character of the one at bar, it is argued by the plaintiff that those sections of the irrigation statute constituting the state board of irrigation with authority to ascertain and determine the priority and amount of past appropriations and allow further appropriations when it is determined there is unappropriated water in any natural stream from which it is sought to divert it, and with other powers as therein defined, are unconstitutional, because conferring judicial powers upon a tribunal not authorized by the constitution, and

in contravention of its provisions. As we have heretofore made mention, the lower court in the trial of the case refused to entertain jurisdiction and try the merits of the controversy, holding that the state board of irrigation had exclusive original jurisdiction of the matters set out in the petition, and that as to all issues raised by the pleadings, save those pertaining to an injunction to hold matters in statu quo pending a determination of such rights, the respective parties should be remanded to the board for such remedies as they might be found entitled to. It is no doubt true, as pointed out by counsel, that the sections in question are borrowed from the statutes of Wyoming, in which state constitutional provisions authorize the creation of such a board, while our constitution is silent on the subject. But it is to be noted that the Wyoming constitution has not provided for a board of irrigation with judicial functions in the sense that it is a judicial tribunal. The duties of the board there, as here, are supervisory and administrative in character, and not judicial. While it may be true that they are given powers of a quasi judicial character, this of itself does not constitute them a judicial body, nor does it have the effect of conferring upon administrative bodies the exercise of judicial functions in contravention of constitutional provisions. The Wyoming statute, from which ours is borrowed, has been subjected ³⁶⁶ to judicial construction, and is upheld by the supreme court of that state on the express ground that the powers authorized therein are not judicial, but administrative: *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 87 Am. St. Rep. 918, 50 L. R. A. 747, 61 Pac. 258. With this authoritative construction of the statute, and a decision of the very question raised in the case at bar upon reasoning quite convincing and satisfactory, it would seem that the question should be regarded as at rest. The primary object of the board is for the purpose of supervising the appropriation, distribution and diversion of water. This is obviously an administrative rather than a judicial function.

Says the Wyoming supreme court, in the case just cited (page 757): "It is a matter of public concern that the various diversions shall occur with as little friction as possible, and that there shall be such a reasonable and just use and conservation of the waters as shall redound more greatly to the general welfare and advance material wealth and pros-

perity": and, quoting from *White v. Farmers' Highline Canal etc. Co.*, 22 Colo. 191, 43 Pac. 1028, 31 L. R. A. 828: "From the very nature of the business, controversies with reference to the use of water naturally led to unseemly breaches of the peace; and, to avoid these, it was found expedient and necessary to provide complete rules of procedure governing the taking of water from the public streams of the state, and regulating its distribution to those entitled thereto"—as it were, a sort of policing of the waters capable of use for irrigation, as necessary and required, as well to preserve and procure proper use of the waters as to prevent breaches of the peace. In order to accomplish this object it is necessary and expedient to provide for certain preliminary investigations. Again, quoting from *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 87 Am. St. Rep. 918, 61 Pac. 258, 50 L. R. A. 747: "Any effort to supervise and control the waters of the state, their appropriation and distribution, in the absence of an effective ascertainment of the several priorities of rights, must result in practical failure in times when official intervention is ³⁶⁷ most required. . . . In the development of the irrigation problem under the rule of prior appropriation, perplexing questions are continually arising, of a technical and practical character. . . . The board is not required to await the occurrence of controversies, but is to proceed, on its own motion, to ascertain the various rights, conflicting or not, and thereupon see that the water is properly divided."

Such functions, it would seem, are clearly administrative in character, and not judicial. It is a judicial function to administer justice between litigants in cases where disputes arise and to settle these disputes according to law as administered in courts of justice. The board of irrigation, however, in many cases acts in advance of any dispute, and whether there is or will be a controversy in no way affects its powers. The courts can act only as controversies arise between litigants, and then only by determining the questions presented by the litigation. While there are some questions affecting property rights which grow out of the administration of the law by the state board of irrigation, and in which are involved matters in dispute calling for action of a quasi judicial character, yet as to all these ample provisions are made for recourse to the courts. Powers of the

same general nature and character are conferred upon almost every administrative body known to the statute, and regarding which it has frequently been decided are of a quasi judicial nature, and yet such bodies are invariably held to be administrative, and to in no way conflict with the constitutional provisions regarding officers and bodies upon whom judicial power may be conferred. The state board of transportation, as heretofore organized in this state, the constitutionality of which has been invariably upheld when attacked, in all respects, save as to the manner of passing the law providing for its creation, is a fair illustration of the validity of legislation of this character. Numerous other boards and offices created by statutes, of an administrative character, and yet possessing powers of a quasi ³⁶⁶ judicial nature, might also be referred to if thought to serve any useful purpose. For the reasons given, we are of the opinion that the sections of the act in question are not obnoxious to the constitution on the objections raised by counsel, and that the authority of the board of irrigation to make the determinations contemplated by the act, and the requirement of its approval as a condition to the right of appropriation under the provisions of the act, is a valid exercise of legislative power.

It does not, however, necessarily follow from the conclusion just reached as to the powers and duties of the board that the courts are in any way ousted of their jurisdiction over actual controversies. The board is possessed of powers of an administrative character. The courts have judicial powers, and while the board may make all needful preliminary determinations to enable it to regulate the distribution of water, and may determine whether or not proposed appropriations shall be allowed, and in what order, in pursuance of the provision of the statute, subject to the right of appeal, whenever a controversy arises over the substance of the rights of various parties making use of a stream, such controversies are proper for the courts to take judicial cognizance of. The courts cannot administer the statute nor regulate the use of the streams, but they can and should adjudicate disputes based on the rights of parties acquired under the statute. The statute does not create a mere license to the use of water appropriated; it creates a right in and to the use of the water, and expressly provides for its

sale and disposal in the same manner as real property: Comp. Stats., art. 2, c. 93a, sec. 63; Annotated Statutes, sec. 6817. See, also, *Strickler v City of Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313; *Frank v. Hicks*, 40 Wyo. 502, 35 Pac. 475, 1025. Whenever it becomes necessary to vindicate or support such a right by judicial proceedings, the courts should be open and available therefor as in the case of a controversy regarding any other property right; hence it is that all controversies over water rights ³⁶⁹ arising under the statute are not necessarily for the board of irrigation alone. If a controversy has been submitted to that board and by it adjudicated, and no appeal taken, an entirely different question is presented. But where the board has made no determination and a large number of persons are claiming the right to divert and use the water of a stream, some by appropriation under the statute, some under prior acts, some by prescription, and others as riparian owners whose rights have accrued prior to the statute and have not been divested, we know of no sound reason why a suit in equity to determine and adjust such rights and enjoin interference with those rights by others under a claim of right may not be maintained. Such suits are permitted everywhere where the system of appropriation adopted by our statute obtains. In some states they have been provided for by statute, but in the absence of statutes they have been upheld under general principles of equity jurisdiction: *Frey v. Lowden*, 70 Cal. 550, 11 Pac. 838. In our opinion, it is altogether proper to permit such suits in this state where riparian rights exist and have long existed, but are subject to be divested or impaired by appropriations of water under the statute upon due compensation therefor. The litigation involved in the appropriation of water from a stream, the banks of which are thickly settled, would be endless if the jurisdiction of a court of equity to prevent multiplicity of suits could not be invoked. This principle has been appealed to frequently over litigation of water rights, and has been held to permit of a single suit by a plaintiff against all of a large number of persons having or claiming rights in the water of the stream which infringed on the rights of such plaintiff: *Gould on Waters*, sec. 564. The chief difficulty in such cases arises from the fact that the several defendants have several rights and interests, and are not so

connected in interest that a determination as to one would include them all. There is to be found in the reported cases and in the text-books authority for a limitation of the jurisdiction to prevent a multiplicity of suits ³⁷⁰ in such cases, but the weight of authority, following the leading case of *Mayor v. Pilkington*, 1 Atk. (Eng.) 282, holds to a contrary doctrine: *Miller v. Highland Ditch Co.*, 87 Cal. 430, 22 Am. St. Rep. 254, 25 Pac. 550; *Hillman v. Newington*, 57 Cal. 56; *Woodruff v. North Bloomfield Gravel Min. Co.*, 8 Saw. 628; *Meyer v. Phillips*, 97 N. Y. 485, 49 Am. Rep. 538. See, also, *New York etc. R. Co. v. Schuyler*, 17 N. Y. 592; *Thorpe v. Brumfitt*, 8 App. Cas. 650, 656; *Western Land etc. Co. v. Guinault*, 37 Fed. 523; *United States v. Flournoy Livestock etc. Co.*, 69 Fed. 886; *Hammontree v. Lott*, 40 Mich. 190; 1 *Pomeroy's Equity Jurisprudence*, secs. 252-260. For such reasons we are of the opinion the plaintiff might properly bring such an action as the one before us, so far as it comes within the scope of a bill of peace, to avoid a multiplicity of actions.

There is much in the petition to indicate that the action was intended as a general condemnation proceeding as well, and that some sort of administrative proceeding in parceling out and distributing the waters of the stream in controversy was contemplated, as well as the determination of the rights of the several parties. All this administrative work is for the board of irrigation, and, so far as relief of that nature is sought, the lower court acted correctly in remanding the parties to their remedies by a proper application to the board. It is also true that proceedings for condemnation in furtherance of an irrigation project cannot be joined with a suit in equity of the kind just considered. A petition, however, must be judged and the nature and character of the action thereby begun determined, chiefly by the facts alleged and the legal results thereof, and remedies appropriate thereto: *Alter v. Bank of Stockham*, 53 Neb. 223, 230, 73 N. W. 667. Disregarding much surplusage and irrelevance, the prayer for an injunction against the several defendants, and the allegations upon which it is based, are sufficient to bring the petition within the jurisdiction of a court of equity. Nor do we ³⁷¹ see any reason for not holding that the plaintiff in a suit in equity in the nature of a bill of peace to protect his water right and determine and define conflicting rights to or claims

upon the waters of the same stream may offer to do equity by compensating riparian owners whose rights are affected by the construction and operation of a canal under his appropriation, and that in this way the amounts due the several parties claiming rights by way of damages may become a proper subject of inquiry and adjudication therein.

One other feature of the plaintiff's case it seems proper to here give consideration. The plaintiff, it appears, was under contract to furnish water to the village of Crawford for general municipal purposes, including water for sprinkling streets and for power for a lighting plant, and was also under some obligation to the general government to furnish water for flushing the sewers at Fort Robinson, an occupied military post located near the village of Crawford. Furnishing water for the uses referred to it is claimed is a domestic use of the water, within the purview of section 43, article 2, chapter 93a of the Compiled Statutes (Annotated Statutes, section 6797), and because thereof the plaintiff claims priority over several defendants as an appropriator of water for domestic and agricultural purposes under the statute. As far as the canal is intended for irrigation, the appropriation of water to flow therein is obviously an appropriation for an agricultural purpose. We do not, however, agree with counsel that the other purposes named are domestic, within the meaning of the statute. In our opinion, the term "domestic purposes," as used in the statute, has reference to the use of water for domestic purposes as known and recognized at common law by riparian proprietors: Gould on Water Rights, sec. 205. The common law distinguishes between those modes of use which ordinarily involve a taking of small quantities of water, and but little interference with the stream, and those which necessarily involve a taking or diversion of large quantities, and ³⁷² a considerable interference with its ordinary flow. The use of a stream in the ordinary way by a riparian owner for drinking and cooking purposes and for watering his stock, is a domestic use. It involves no considerable diversion of water and no appreciable interference with the stream. This right of the riparian owner the statute intended to preserve to him, and to protect against appropriations of water for other uses by canals, ditches and pipe-lines, whereby large quantities would be abstracted. This is the only construction which will give any force to the statute. If all of the water of a

stream may be diverted by a canal for so-called domestic purposes involving incidental use for power, the priority given agricultural uses is rendered nugatory. This is the construction given similar provisions elsewhere: *Montrose Canal Co. v. Loutsenhizer Ditch Co.*, 23 Colo. 233, 48 Pac. 532; *Broadmoor Dairy etc. Co. v. Brookside Water etc. Co.*, 24 Colo. 541, 52 Pac. 792.

In the first case cited the court says (page 534): "While it is true that section 6 of article 16 of the constitution recognizes a preference in those using water for domestic purposes over those using it for any other purpose, it is not intended thereby to authorize a diversion of water for domestic use from the public streams of the state by means of large canals. . . . The use protected by the constitution is such as the riparian owner has at common law to take water for himself, his family, or his stock, and the like."

The principle upon which the decree on the cross-petition of the defendant Hall proceeds is in the main correct. Having been brought into court by the plaintiff, he sets up his previously acquired riparian rights, the infringement thereof by plaintiff, and consequent damage, and prays an injunction. It is probably true he would not necessarily have been entitled to an injunction in an independent suit brought by him for that purpose, since there would be no question of repeated trespasses in case plaintiff had acquired a superior right by appropriation for irrigation³⁷³ purposes, and an action at law for damages would be an adequate remedy. But when the plaintiff sued him and prayed for an injunction against him, he could demand that plaintiff do equity and pay his damages before any relief be awarded. The court, we think, was justified in enjoining any interference with the riparian rights of the defendant Hall until this was done. It also appears that as to those uses to which the plaintiff was putting or seeking to put the water sought to be appropriated by it, not agricultural, defendant had a right to insist that he had priority by reason of his long-continued use for power and manufacturing purposes, and an injunction against any diversion beyond what was used by plaintiff for irrigation, so far as such diversion injured defendant Hall, was proper, in so far at least as he was able to make a beneficial use of the water for power purposes for which it was used: *Comp. Stats.*, art. 2, c. 93a, sec. 20 (*Annotated Stats.*, sec. 6774). But the injunction granted

goes much beyond either of these grounds. As has been seen, the common law does not give to a riparian owner an absolute and exclusive right to all the flow of the water from a stream in its natural state, but only the right to the benefit, advantage and use of the water flowing past his land in so far as it is consistent with a like right in all other riparian owners. Hall was entitled to an injunction restraining any unreasonable diversion of the water which produced a substantial injury to him. But he could not insist that the slightest sensible diminution in the volume of the water be stopped merely as such. He was entitled only to protection to the right which he had acquired as a riparian owner against any unlawful invasion thereof.

Connected with this same question is involved the right of the plaintiff, even as against a riparian owner, to divert the storm or flood waters passing down the stream in times of freshets. Hall at most, as a riparian owner, was entitled to only the ordinary and natural flow of the stream, or so much as was found necessary to propel his ³⁷⁴ mill machinery, and could not lawfully claim as against an appropriator the flow of the flood waters of the stream.

In *Modoc Land etc. Co. v. Booth*, 102 Cal. 151, 156, 36 Pac. 431, it is said on this subject: "It seems clear, however, that in no case should a riparian owner be permitted to demand, as of right, the intervention of a court of equity to restrain all persons who are not riparian owners from diverting any water from the stream at points above him, simply because he wishes to see the stream flow by or through his land undiminished and unobstructed. In other words, a riparian owner ought not to be permitted to invoke the power of a court of equity to restrain the diversion of water above him by a nonriparian owner, when the amount diverted would not be used by him, and would cause no loss or injury to him or his land, present or prospective, but would greatly benefit the party diverting it."

And in *Fifield v. Spring Valley Water Works*, 130 Cal. 552, 62 Pac. 1054, it is held that a riparian proprietor is not entitled to an injunction to restrain a water company engaged in supplying water for public use from diverting the storm or flood waters of a creek which will not prevent the flowing over his land of the ordinary waters of the stream, nor in any way damage his land or interfere with the rights appurtenant thereto: See, also, *Edgar v. Stevenson*, 70

Cal. 286, 11 Pac. 704; *Heilbron v. '76 Land & Water Co.*, 80 Cal. 189, 22 Pac. 62; *Black's Pomeroy on Water Rights*, sec. 75.

On the arguments of the case at bar, it was suggested that defendant Hall had acquired a prescriptive right to the full flow of the stream by ten years' user. There cannot be, in the very nature of things, any such thing as a prescriptive right of a lower riparian owner to receive water of a stream as against upper owners. The riparian owner is entitled to the reasonable use and enjoyment of the water of the stream and to insist that the water come to his land to be so used and enjoyed. He may, by prescription, acquire a right to use and divert the water beyond that which the common law would give him, but he gets ³⁷⁵ this right only by adverse user. If he diverts water which otherwise would flow down to a lower owner, that use is adverse. On the other hand, the water which comes to him would come in any case, and there is nothing adverse to anyone, in merely receiving it, that could be said to give a prescriptive right enabling him to prevent reasonable use of it by the upper owner: *Hargrave v. Cook*, 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390; *Bathgate v. Irvine*, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442; *Mud Creek Irr. etc. Co. v. Vivian*, 74 Tex. 170, 11 S. W. 1078.

We have herein discussed some matters having an indirect bearing on the main issues involved in the case. The court, however, must not be understood as being committed to any proposition not expressly decided.

It follows from what has been said that the order of the trial court dismissing the plaintiff's action must be reversed, and the cause remanded, with directions to proceed in the further trial of the cause in accordance with the views herein expressed.

SEDGWICK, J. I concur in the conclusions reached upon the following questions, which are necessarily involved in the determination of this case.

1. The common-law doctrine of riparian rights is the basis of our law upon that subject, and governs, so far as applicable to our conditions, matters not regulated by our irrigation statutes.

2. Those parts of the irrigation act of 1895 which provide for a board of irrigation, and the adoption of the rule of ownership of water by appropriation, are constitutional.

3. A suit in equity may be maintained against persons claiming rights to use or divert water of a stream to prevent infringement, under the color of such right, of the rights of plaintiff acquired under our irrigation act.

³⁷⁶ 4. Damages accruing to such parties by reason of appropriations under the irrigation act become a subject of inquiry and adjudication in such an equity suit.

5. Lower riparian owners do not acquire a prescriptive right to receive water as against upper owners.

6. I think the scope and character of the riparian rights of the defendant Hall, under the facts disclosed in the cross-petition, are rightly determined.

I express no opinion on the discussion of the doctrine of appropriation as existing independently of and prior to our statutes. If irrigation enterprises are to be met with demands for damages claimed to accrue from interfering with the ownership of the body of the water in our streams, which ownership, it is claimed, is derived from some other source than the irrigation statutes, it seems to me that it will be a serious obstacle in the way of the growth and development of such enterprises, and such rules ought not to be announced until the occasion has arisen in actual litigation, and after full discussion. The doctrine of the private ownership of the body of the water of running streams is not to be found in the common law, nor in the civil law, but was originated in our mining states, and developed there under the influence of the necessities of our miners, and later of farmers in the arid and semi-arid districts. It is in the light of these facts that we must determine how far the common law has been modified by our constitution, and the legislation thereunder, and how far it is applicable to existing conditions. The question whether the law of riparian ownership applies to "the larger streams of the state" appears to depend upon whether the owner of the land is held to own to the thread of the stream or only to the banks, and the former was determined to be the law of this state in *McBride v. Whitaker*, 65 Neb. 137, 90 N. W. 966. I am not satisfied with the discussion of the extent of lands that may be called riparian, and do not see how it is involved in this case.

The Doctrine of Riparian Rights does not prevail in many of the western states: See *Walsh v. Wallace*, 26 Nev. 299, 99 Am. St. Rep. 692; *Willey v. Decker*, 11 Wyo. 496, 100 Am. St. Rep. 939. See, however, *Benton v. Johncox*, 17 Wash. 277, 61 Am. St. Rep. 912.

A Riparian Proprietor may make a reasonable use of the waters of a stream for irrigation, at least after the natural wants of other proprietors have been satisfied: See *Pierson v. Speyer*, 178 N. Y. 270, 102 Am. St. Rep. 499; *Charnock v. Higuerra*, 111 Cal. 473, 52 Am. St. Rep. 195; *Alta etc. Co. v. Hancock*, 85 Cal. 219, 20 Am. St. Rep. 217; *Boynton v. Longley*, 19 Nev. 69, 3 Am. St. Rep. 781. As to the quantity which may lawfully be diverted for this purpose, see *Hammond v. Rose*, 11 Colo. 524, 7 Am. St. Rep. 258; *Anderson v. Cincinnati etc. Ry. Co.*, 86 Ky. 44, 9 Am. St. Rep. 263; *Jones v. Conn*, 39 Or. 30, 87 Am. St. Rep. 634; *Meng v. Coffee*, 67 Neb. 500, post, p. 697; and as to what land the water may be lawfully applied after diversion, see *Hammond v. Rose*, 11 Colo. 524, 7 Am. St. Rep. 258; *Jones v. Conn*, 39 Or. 30, 87 Am. St. Rep. 634; *Willey v. Decker*, 11 Wyo. 496, 100 Am. St. Rep. 939; *Watkins Land Co. v. Clement*, 98 Tex. 578, 107 Am. St. Rep. 653; *Bathgate v. Irvine*, 126 Cal. 135, 77 Am. St. Rep. 158.

CITY OF LINCOLN v. FIRST NATIONAL BANK.

[67 Neb. 401, 93 N. W. 698.]

JUDGMENTS—Notice—Conclusiveness.—A judgment against a city in an action against it for personal injury of which a city lot owner has notice is conclusive upon him as to the fact, cause and extent of such injury, but not as to his responsibility for such cause of injury. (p. 693.)

LIMITATION OF ACTIONS—Judgments.—The statute of limitations does not begin to run against an action on a city lot owner's liability over to the city for injuries growing out of defects in premises, until the city's liability is fixed by judgment against, or payment by, it. (p. 693.)

NUISANCE—Liability for Notice of.—A person who comes into possession of city land as grantee or lessee, with a nuisance already existing on it, is not liable for the continuance of the nuisance and personal injury arising therefrom until his attention has been called to it and he has been requested to abate it, and to render him liable, even if he has notice of the nuisance, it must be shown that his possession and control of the premises were such as to cast upon him the duty of actively providing for the public safety. (p. 695.)

E. C. Strode and D. J. Flaherty, for the plaintiff in error.

J. W. Deweese, F. E. Bishop and W. E. Blake, for the defendant in error.

402 HASTINGS, C. In this case plaintiff filed in the district court for Lancaster county, January 24, 1901, a petition setting out its incorporation and that of the defendant bank; that the latter, November 1, 1894, and long prior thereto and thereafter, owned lot 13 in block 34 in plaintiff city, and maintained for its own use and benefit a vault un-

der the sidewalk, which was a public sidewalk of the city on one of its principal thoroughfares, with a large opening or coal-hole through the sidewalk, constructed by defendant's grantors, and maintained by it for its own benefit; that the lid covering this hole was defective, unfastened and insecure, and subject to displacement by any person stepping upon the edge of it, and was not of sufficient size and weight to securely cover the hole; that these facts were well known to the defendant; that about November 1, 1894, Mrs. Pirner stepped upon the coal-hole cover, and ⁴⁰⁸ by reason of its defective construction, fell through and sustained serious injuries thereby, and because of such injuries instituted an action against the plaintiff, in which she recovered the sum of \$4,000 damages and \$227.26 costs; that the city prosecuted error to this court, where the judgment was affirmed on February 9, 1900 (*City of Lincoln v. Pirner*, 59 Neb. 634), and additional costs in the sum of \$40.80 court costs, and \$20 for printing, were incurred; that on September 10, 1900, the city paid the judgment, interest and costs in full, amounting to \$5,256.12, and incurred expenses, including costs of the supreme court, and procuring bill of exceptions prepared in the defense of said action, in the sum of \$349.86; that the injuries to Mrs. Pirner were caused by the defendant's unlawfully maintaining its excavation under and its coal-hole through the sidewalk in an unsafe, dangerous and defective condition, to the plaintiff's damage in the sum of \$5,605.98. The defendant answered, admitting the corporate character of the parties and the recovery of judgment by Mrs. Pirner against the plaintiff and the error proceedings to this court, and denied the other allegations. A general denial was filed to this answer, and on the issues so made, trial was had to the court, a jury being waived, and the district court found for the defendant and dismissed the action. Motion for new trial was overruled. From this judgment the plaintiff brings error.

The plaintiff claims that under the facts in this case the defendant is liable over to the city (1) at common law; (2) under the city charter, which at the time of the accident provided as follows: "It is hereby made the duty of all real estate owners and occupants to keep the sidewalk alongside or in front of the same in good repair and free from snow and ice and other obstructions, and they shall be liable for all damages or injuries occasioned by reason of the defective

condition of any such sidewalk" (Comp. Stats. 1893, c. 13a, sec. 67, subd. 6); and (3) under the ordinance of the city providing for excavations ⁴⁰⁴ beneath sidewalks, as follows: "No person shall be allowed to keep or use for vaults, areas, or other purposes, the space beneath the sidewalks included within the sidewalk lines of any street within the city, unless a permit therefor shall have been obtained from the city council; such permit to continue and be issued only upon such condition that the party receiving the same shall, as compensation for the privilege granted by such permit, maintain and keep in repair a sidewalk over such space intended to be used for vaults, areas, or other purposes, and pay all damages that may be sustained by any person by reason of said sidewalk being in a defective or dangerous condition."

The bank asserts that there is no common-law liability on its part for lack of any knowledge or notice on its part of the defective condition of this coal-hole; that no liability attaches to it as mere owner, for a mere passive neglect; that defendant's possession of the property was only constructive, by reason of a sheriff's deed bearing date about three weeks before Mrs. Pirner's accident, and no actual knowledge on the part of the bank, or demand upon it for repairs, appears in the evidence; that there was no statutory liability, because in the year 1899, a year and more before the institution of this action, the statute above quoted was repealed; that any attempt to create such a liability by ordinance was unconstitutional and void; and that the right of action is barred by the statute of limitations, because the injury was sustained by Mrs. Pirner in 1894—more than six years before the commencement of the action.

The bank appears clearly to have had notice of the pendency of Mrs. Pirner's action against the city and to have refused to take any part in it. Under the admissions of the answer, therefore, the bank is concluded as to the existence of the trouble of which she complained—a defective lid on this coal-hole—as to her injury from that cause, and as to the amount of damages sustained by her. The bank, of course, is not concluded by that adjudication ⁴⁰⁵ as to the question of its own responsibility for the condition of the coal-hole: 2 Dillon on Municipal Corporations, sec. 1035.

The sole questions in this case, then, are as to the responsibility of defendant merely because it was the owner of this coal-hole, and as to the statute of limitations. If

either is found in favor of the defendant, the judgment must be affirmed. So far as the latter question is concerned, no authority whatever is cited by defendant, and only some cases on sureties' rights to contribution and officers' claims for indemnity, by plaintiff. It seems clear, however, that if there exists any right on the part of the city to recover over against the bank because of the injury to Mrs. Pirner, it could only be when the city's liability toward Mrs. Pirner became fixed. The wrong, so far as the city is concerned, only became actionable when damage to the city accrued, and that was only when a final judgment in Mrs. Pirner's favor was rendered. Any attempt to recover of the bank on plaintiff's part before that time would have been futile, and the statute would not commence to run, as against a right of action, until such right of action was in existence. Evidently the city could not assert its liability to Mrs. Pirner in a case against the bank so long as it was denying such liability in Mrs. Pirner's own action in the same court, or in this one on review. It will not be necessary to discuss further the question of the statute of limitations. The city's claim here is for indemnity against liability on Mrs. Pirner's judgment, not for the injury to Mrs. Pirner.

It remains to see whether there is any right to charge defendant with responsibility for the condition of the coal-hole lid, either at common law, by statute or by ordinance of the city.

The common-law liability of the defendant is the claim most strongly urged by plaintiff. It rests, as above stated, solely on the ownership of the property on the defendant's part by virtue of a sheriff's deed bearing date about three weeks before Mrs. Pirner's fall. One Carr, ⁴⁰⁶ as owner, had built the walk and coal-hole some years before and was still in possession. In what capacity he was still holding does not appear. There is nothing to show possession by defendant except the sheriff's deed and its recording on October 11, 1894. In that deed, Carr is named as one of the defendants whose rights were conveyed by it. The injury occurred November 1, 1894. The sole cause alleged is the loose lid of the coal-hole, so that it slipped aside and let the woman's foot through, and caused a fall, with bruising of the foot and leg and some injury of the back. The excavation and hole in the walk had been there since 1883, in substantially the same condition. The walk and coal-hole had been

made under the inspection of the city's street commissioner. Not so much as knowledge of the coal-hole's existence on the part of this defendant, whose sheriff's deed is dated twenty-three days, and recorded twenty days, before this accident, appears. It is clear that if the defendant is liable at common law, it must be for maintaining a nuisance in a public street. It may be taken as settled that an unauthorized coal-hole in a sidewalk would be a nuisance per se: *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603; *Robinson v. Mills*, 25 Mont. 391, 65 Pac. 114. Both of the above cases hold, with seeming good reason, that an unsafe and improperly secured authorized excavation is as much a nuisance as is an unauthorized one. No authority for maintaining a coal-hole is pleaded here, and the finding in *Mrs. Pirner's* case would be conclusive as to its bad condition if there was. But can defendant, under the evidence here, be claimed to have been conclusively shown to be guilty of maintaining it, so that the trial court's finding otherwise must be reversed? The bank had only a sheriff's deed, and the defendant in the foreclosure action was still in possession.

"A party who comes into possession of lands as grantee or lessee, with a nuisance already existing on them, is not, in general, liable for the continuance of the nuisance until his attention has been called to it, and he ⁴⁰⁷ has been requested to abate it": *Cooley on Torts*, 1st ed., p. 611, 2d ed., p. 728. This rule is put upon the ground, in the first place, that the purchaser has a right to assume, as to other persons, that a right to maintain it has been acquired. It is also put on the ground that the purchaser ought not to be held liable for consequences of which he was ignorant, and which he did not intend: *Johnson v. Lewis*, 13 Conn. 303, 307, 33 Am. Dec. 405.

It is conceded by plaintiff that such is the general rule, but it is urged that it has no application to a public nuisance that results in an obstruction to the streets. The rule requiring at least notice to the purchaser of the existence of a nuisance, before his liability commences, is stated in *Pollock on Torts*, sixth edition, page 416, without the indication of any exception, and based on *Penruddock's Case*, 5 Coke (Eng.), 100½. In *Cooley on Torts*, at the place cited, it is said to have no application to cases where a personal duty or obligation is cast upon the owner by law, or where the nuisance is immediately dangerous to life or health. It would

seem reasonable to hold that it would not apply where the owner's suffering the nuisance to continue would amount to a failure to perform some duty owed to the public, or apply to the actual infliction of a wrong. The three cases cited and relied upon by plaintiff are of this kind.

Leahan v. Cochran, 178 Mass. 566, 86 Am. St. Rep. 506, 60 N. E. 382, 53 L. R. A. 891, is distinctly of this kind. Defendant purchased and thereafter occupied a house whose gutter discharged water on the sidewalk. The water froze, and plaintiff was injured by the ice. The defendant was held liable because of a duty to keep obstructions off the walk, and no prescriptive right to maintain a dangerous situation there was acquirable by use or purchase.

Matthews v. Missouri P. R. Co., 26 Mo. App. 75, 81, is another case of obstruction in a highway, and liability is ⁴⁰⁸said to result for the same reason to one who was openly maintaining the obstruction which caused the injury. Defendant is held, not as owner of the premises, but as "the continuer of the nuisance."

The case of *Morgan v. Illinois etc. Bridge Co.*, 17 Fed. Cas. 749, No. 9802, is cited by plaintiff. The liability in the Missouri case is held to result because the receiver and the road which he represented had maintained for three years, as lessees of another corporation, a fourteen-foot cut in a crowded thoroughfare, without railing or protection. It was held that the fact of the premises being in such condition when leased was no protection. A duty to protect passers against their excavation arose when they commenced to use it.

These cases are very far from showing a duty on defendant's part to protect passers or the city from injury because of this coal-hole.

It seems clear that to bring the defendant within the exception to the rule requiring that purchasers have notice of the existence of a nuisance to render them liable, such possession and control of these premises as to cast upon it the duty of actively providing for the public safety must be shown. Such a duty is found and indicated in *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603, where it is held to devolve upon both landlord and tenants to see that an excavation under the street was made safe for passers. The numerous decisions as to the respective liabilities of lessor and lessee in such cases show that the owner's liability, where it

exists, is not as owner, but as creator or continuer of a nuisance. They may be found collected and discussed in *Plumer v. Harper*, 3 N. H. 88, 14 Am. Dec. 333, or more recently and fully in *Wasson v. Pettit*, 117 N. Y. 118, 22 N. E. 566, 5 L. R. A. 794, and in the extended notes to those cases. Such presumption of use and control as the three weeks' possession of a sheriff's deed might ⁴⁰⁹ raise is rebutted by the fact that the foreclosure defendant was still in possession.

The liability as owner, which is sought to be established by means of the statute before quoted, cannot attach. As before stated, a right of action accrued in favor of the city only when its liability to Mrs. Pirner became fixed. This was after the repeal of the statute in question, which took place in 1899. The affirmance of Mrs. Pirner's judgment was in 1900. The general saving clause in chapter 88, section 2 of the Compiled Statutes (Annotated Statutes, section 6966), relates only to causes of action accruing before such repeal.

The liability under the city ordinance is against the person who is "allowed to keep or use" a vault or excavation beneath the street. As the evidence in this case entirely fails to show that defendant kept or used this excavation or coal-hole, there can be no liability under this ordinance. Indeed, the fact that the excavation and coal-hole were outside of the defendant's lot, and entirely on the city's land, and could not be maintained save with the consent of the city, is of itself a sufficient answer to any claim against defendant merely as owner of lot 13. Doubtless possession, control and use of these premises would make defendant responsible for the safety of any excavation under the city's streets, at least to the extent of taking all reasonable precaution to make it safe: *Wasson v. Pettit*, 117 N. Y. 118, 22 N. E. 566, 5 L. R. A. 794. No such control appears here.

It is recommended that the judgment of the district court be affirmed.

Kirkpatrick and Lobingier, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

The Right of a Municipality to compel an abutting property owner to reimburse it for damages paid by it to a person injured in consequence of a defective pavement or sidewalk is considered in the

recent case of *New Castle v. Kurtz*, 210 Pa. St. 183, 105 Am. St. Rep. 798, and cases cited in the cross-reference note thereto.

The Relative Liability of a Grantor and his grantee or of a lessor and his lessee where an injury results from the dangerous condition of the sidewalk in front of the premises, is considered in the recent case of New Castle v. Kurtz, 210 Pa. St. 183, 105 Am. St. Rep. 798; and in the monographic notes to Griffin v. Jackson Light etc. Co., 92 Am. St. Rep. 541; Leahan v. Cochran, 86 Am. St. Rep. 521-523.

MENG v. COFFEE.

[67 Neb. 500, 93 N. W. 713.]

WATERS—Riparian Rights.—Running water is publici juris, and one riparian owner is not permitted to monopolize all the water of a running stream when there are other riparian proprietors who need and may use it also, nor has any riparian owner an absolute right to insist that every drop of the water shall flow past his land exactly as it would in a state of nature. (p. 700.)

WATERS—Riparian Rights.—A riparian owner has no absolute and exclusive right to the flow of all the water of the stream in its natural state, but only a right to the benefit and advantage of the water flowing past his land so far as consistent with a like right in all other riparian owners. (p. 701.)

WATERS—Riparian Rights—Irrigation.—A riparian owner may take water from the stream for the purposes of irrigation, and the only limitation upon such right is that it must be exercised reasonably with due regard to the rights of others under the circumstances of each particular case. (p. 708.)

WATERS—Riparian Rights—Regulation of Use.—In regulating the use of water by riparian owners, the law distinguishes between those modes of use which ordinarily involve the taking of small quantities and but little interference with the stream, and those which necessarily involve the taking or diversion of large quantities and a considerable interference with its ordinary course and flow. (p. 708.)

WATERS—Riparian Rights—Equality in Use.—The purpose of the law is to secure equality in the use of the water by riparian owners, as near as may be, by requiring each to exercise his rights reasonably and with due regard to the rights of other riparian owners to apply the water to the same or other purposes. (p. 708.)

WATERS—Riparian Rights—Irrigation—Reasonable Use.—What is a reasonable use of the water of a stream for irrigation purposes is largely a question of fact, and one which may be viewed with some liberality in semi-arid regions, where use for such purposes necessarily involves much loss. (p. 709.)

WATERS—Riparian Rights—Irrigation.—The uses which an upper riparian owner may make of a stream for the purposes of irrigation must be judged in determining whether they are reasonable, with reference to the size, situation, and character of the stream, the uses to which its waters may be put by other riparian owners, the season of the year and the nature of the region as to aridity.

The circumstances differ in different cases, and what use is reasonable must be largely a question of fact in each case. (p. 710.)

WATERS—Riparian Rights—Use for Irrigation.—An upper riparian owner, in using the water of a stream for irrigation, must not waste, needlessly diminish, nor wholly consume it, to the injury of other like owners, nor so as to prevent a reasonable use of it by them also. (p. 710.)

WATERS—Riparian Rights—Irrigation.—Appropriation of Water by "Squatter's Right," not recognized by law or custom, does not give to the settler on public land who has appropriated water in that way for a less period than that fixed by statute an exclusive right to the water as against other settlers upon the stream. (p. 713.)

WATERS—Riparian Rights—Settler's Appropriation of Water—Tacking to Establish Prescriptive Right.—The period during which a settler upon government land maintains an irrigation ditch under "squatter's right," and afterward under a homestead entry, prior to obtaining patent to his land, may be counted by him in making out the statutory period of prescription as against a subsequent settler and patentee from the government on the same stream. (p. 713.)

WATERS—Riparian Rights—Adverse User.—An upper riparian owner acquires no right to divert or dissipate the whole stream by making such use thereof as will still leave water for the lower riparian owner. So long as there is sufficient water for all, there is no adverse user. (p. 714.)

WATERS—Riparian Rights—Adverse User—Dry Seasons.—Only a continuous and adverse user of the whole stream for the statutory period of prescription will give an upper riparian owner a right to take out a greater proportion of the water of such stream in time of a dry season than he has habitually taken out in other and former seasons. (p. 715.)

C. Kellar and N. K. Griggs, for the appellant.

A. G. Fisher, for the appellee.

502 POUND, C. This suit was brought in 1893 to enjoin the defendants, upper riparian owners upon Hat creek and its several tributaries, from diverting the waters of said streams for irrigation purposes to such extent as to deprive the plaintiff, a lower owner, of the use of the stream. Upon trial a decision was announced orally adverse to the plaintiff. On appeal to this court it appeared that no final decree had been entered in accordance with such announcement, and the appeal failed. Thereafter a decree dismissing the cause and following the findings originally announced was duly entered, from which the present appeal is prosecuted. The defendants justify their diversions of the waters of said streams upon these grounds: 1. Prior appropriation; 2. That irrigation of meadow land to produce forage for their stock is a "domestic" use of the water, for which, if neces-

sary, they may consume the whole; 3. That they have a right to divert the water, as against the plaintiff, by reason of section 2339 of the Revised Statutes of the United States; 4. That the character of the soil in the region in question and the nature of the beds of the streams are such that the waters diverted would be lost by evaporation and absorption in any event before reaching the plaintiff; and 5. That they have acquired rights to divert the water by prescription. The alleged appropriations were long prior to any legislation authorizing the same, and no questions under the present irrigation laws are before us in this case.

The first two positions are clearly untenable if this court is to adhere to its repeated pronouncements that the rules of the common law as to the rights and duties of riparian owners are in force in this state: *Clark v. Cambridge etc. Improvement Co.*, 45 Neb. 798, 64 N. W. 239; *Gill v. Lydick*, 40 Neb. 508, 59 N. W. 104; *Eidemiller Ice Co. v. Guthrie*, 42 Neb. 238, 60 N. W. 717, 28 L. R. A. 581; *Slattery v. Harley*, 58 Neb. 575, 71 N. W. 151; *Crawford Co. v. Hathaway*, 60 Neb. 754, 84 N. W. 271, 61 Neb. 317, 85 N. W. 303. But in view of the general misconception ⁵⁰³ of the scope and purpose of those rules and their effect upon irrigation, and the earnest and able arguments which have been presented in the endeavor to bring the court to a contrary conclusion, it has seemed proper to treat the question as *res integra*, and for that purpose the arguments in the several other cases now pending which involve the soundness of the prior decisions referred to have been considered in connection with those in the case at bar.

A great deal of what has been urged upon us as demonstrating the inapplicability of the rules of the common law upon this head to conditions in Nebraska proceeds upon an erroneous impression of the nature and purpose of such rules. Thus, in a brief in which the subject is most elaborately and exhaustively discussed, counsel say: "No riparian proprietor in Nebraska to-day is entitled to the full flow of the stream through his premises just for the pleasure it may give him to see the stream filling its banks. . . . The use of the water belongs to the people." And throughout that brief, and in all the arguments we have examined, it is assumed that at common law taking of water from a stream is an injury to the riparian proprietor, and that the latter may insist that no water whatever shall go out. The common

law does not hold to so unreasonable a rule. On the contrary, it considers running water *publici juris*, and while it will not permit any one man to monopolize all the water of a running stream when there are other riparian owners who need and may use it also, neither does it grant to any riparian owner an absolute right to insist that every drop of the water flow past his land exactly as it would in a state of nature. "No one," said Nelson, J., in *Howard v. Ingersoll*, 13 How. (U. S.) 380, 426, 14 L. ed. 189, "can set up a claim to an exclusive right to the flow of all the water in its natural state; and that what he may not wish to use himself shall flow on till lost in the ocean. Streams of water are intended for the use and comfort of man; and it would be unreasonable and contrary to the universal ⁵⁰⁴ sense of mankind, to debar a riparian proprietor from the application of the water to domestic, agricultural, and manufacturing purposes, provided the use works no substantial injury to others." In *Embrey v. Owen*, 6 Ex. (Eng.) 353, a case involving the right to use water for irrigation, Parke, B., said (page 368): "This right to the benefit and advantage of the water flowing past his land, is not an absolute and exclusive right to the flow of all the water in its natural state; . . . but it is a right only to the flow of the water, and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence." In the leading case of *Elliot v. Fitchburg R. Co.*, 10 Cush. (Mass.) 191, 57 Am. Dec. 85, Shaw, C. J., said: "The right to the use of flowing water is *publici juris*, and common to all the riparian proprietors; . . . it is a right to the flow and enjoyment of the water subject to a similar right in all the proprietors." The common law seeks to secure equality in use of the water among all those who are so situated that they may use it. It does not give any riparian owner property in the corpus of the water, either so as to be able to take all of it, or so as to insist that every drop of it flow in its natural channel: *Vernon Irr. Co. v. City of Los Angeles*, 106 Cal. 237, 39 Pac. 762.

When, therefore, counsel tell us that their clients have a natural right to irrigate, and that reasonable use of the water is necessary in the exercise of that right, they urge nothing against the rules of the common law, since the latter merely insist that others along the streams in question have the same natural right, and permit every rea-

sonable ⁵⁰⁵ use by each consistent with like use by all. The apparent modifications of the common-law rules in the semi-arid or arid states, in that courts of such states are more liberal in their construction of what is a reasonable use, are no departure from the principles on which the rules are founded. On the contrary, they carry them to their logical conclusion in view of the special conditions of such regions.

Understanding what is meant by the general common-law rule as to riparian rights, and bearing in mind that it does not give to a riparian owner an absolute and exclusive right to the flow of all the water of the stream in its natural state, but only a right to the benefit and advantage of the water flowing past his land so far as consistent with a like right in all other riparian owners, we come next to the question, Is such rule in force in this state? Much of what has been urged to show that the rule is inapplicable to our conditions, and hence not in force under chapter 15a of the Compiled Statutes (Annotated Statutes, section 6950), is deprived of its effect by proper statement and limitation of the rule itself and apprehension of the principle on which it proceeds. It is further to be noted that the rule has long been in operation without complaint or objection in the eastern portion of the state, and that the difficulties now asserted arise quite as much from the necessity of application of the principles of the common-law to the different circumstances of the semi-arid portions of the state so as to reach detailed rules applicable to those sections, as from any inherent deficiency in the principles themselves. It is obvious that whatever rule is adopted must be of general effect throughout the state, or, at the least, if there are to be two rules, the areas within which they are to prevail respectively must be capable of judicial recognition. The territory of each rule must be known to the courts as something of which they take judicial notice. But this is not an arid state. Only a portion of it may be so described with propriety, and there is no arbitrary line by which the arid portions are ⁵⁰⁶ bounded so as to be judicially recognizable. In the Pacific states, where one rule is applied with reference to the public domain and another in cases of private ownership, the limits are not subject to dispute. But, in this state, whether a particular locality is or is not arid is a question of fact in each case (*Slattery v. Harley*, 58 Neb. 575, 577, 71 N. W. 151), and it would be an anomaly to have the

rules of law by which a cause is to be governed depend upon such an issue, and be triable to a jury. Moreover, if a rule of the common law is to be rejected as inapplicable to our state, it must be because its inapplicability is general throughout the state. If it were conceded that the extreme western portion of the state presents conditions to which the common-law rule is not applicable, how are we in a state like Nebraska, in which the diversity of extreme conditions is great, and yet the transitions are gradual and imperceptible, to draw any line at which we may say one condition ceases and another begins? Where purely arbitrary, the drawing of such a line would be legislation; and nothing short of anarchy could result from leaving it undrawn with two conflicting rules in force. What is needed in such cases is a sound and practical mode of applying the principles of the common law to the peculiar conditions of arid or semi-arid localities, not a sweeping act of judicial legislation requiring not a little supplementary legislation of the same oblique character. In a case like the one at bar, where but a few of the questions inevitably to arise could be involved, complete formulation of a system of rules would be improper and impossible. But to abrogate the existing law as to riparian rights and put anything less than an equally complete system in its place, would result in a condition of chaos far worse than the partial or local difficulties sought to be obviated. "Where the precedents are unanimous in support of a proposition, there is no safety but in a strict adherence to such precedents. If the court will not follow established rules, rights are sacrificed, and lawyers and litigants are left in doubt and uncertainty, while there is ⁵⁰⁷ no certainty in regard to what, upon a given state of facts, the decisions of the court will be. If the common-law rule is inadequate, the proper course is by legislation": Maxwell, C. J., in *Wilson v. Bumstead*, 12 Neb. 1, 4, 10 N. W. 411.

Not only should the inapplicability of a common-law rule be general, extending to the whole, or the greater part, of the state, or at the least to an area capable of definite judicial ascertainment, to justify the courts in disregarding such rule, but we think, in view of the ease with which legislative alteration and amendment may be had, the power to declare established doctrines of the common law inapplicable should be used somewhat sparingly. In the whole course of decision in Nebraska, from the territorial courts

to the present, this power has been exercised but three times: 1. With reference to trespass upon wild lands by cattle (*Delaney v. Errickson*, 10 Neb. 492, 35 Am. Rep. 487, 6 N. W. 600), restricted, however, to wild lands by later adjudications (*Lorance v. Hillyer*, 57 Neb. 266, 77 N. W. 755); 2. With reference to the effect of covenants to pay rent in a lease after destruction of leased buildings, dissented from, however, by three of the six judges (*Wattles v. South Omaha Ice etc. Co.*, 50 Neb. 251, 61 Am. St. Rep. 554, 69 N. W. 785, 36 L. R. A. 424; and 3. With reference to estates by entirety (*Kerner v. McDonald*, 60 Neb. 663, 83 Am. St. Rep. 550, 84 N. W. 92). Of these three cases it may be remarked that the first was in line with legislation which clearly ran counter to the common-law rule, and that the other two dealt with strict feudal rules of property, based on conceptions long since become obsolete. The recent holdings as to the statute of uses (*Farmers' etc. Ins. Co. v. Jensen*, 58 Neb. 522, 78 N. W. 1054, 44 L. R. A. 861), and the statute of Elizabeth concerning charitable uses (*St. James Orphan Asylum v. Shelby*, 60 Neb. 796, 83 Am. St. Rep. 553, 84 N. W. 273), are of different nature. In the statute of uses the court did not have to do with a rule of the common law, but with an English statute, which was not adjustable to our own legislation as to conveyances. ⁵⁰⁸ In the statute of Elizabeth relating to charitable uses the court was again dealing with an English statute, and as that statute gave extrajudicial powers to the courts, which they could not exercise under our constitution, the question was one of legislative superseding of the rule, not of inapplicability. Thus the distinction between the case at bar and those in which common-law rules or English statutes have been set aside is readily apparent. Here we are confronted with no legislation to the contrary, nor are we dealing with an antiquated rule of feudal origin, but with an enlightened system of rules, founded on obvious principles of justice, and concededly applicable to the general conditions of the country and to the greater part of this state. Moreover, in each of the three cases in which common-law rules have been held inapplicable there was a complete rule at hand to take the place of the one rejected, and no complicated and extensive judicial legislation was required. In the case of trespasses by cattle, the herd law was on the statute books; the rule as to the effect of covenants in a lease to pay rent was an isolated rule, without collateral

consequences, and the obvious and well-settled principle of apportionment, governing all agreements, was available in its stead; and the doctrine of tenancy by the entirety stood alone, unconnected with any general body of rules, and all cases that might have been governed by it were readily referable to the rules governing tenancy in common. In like manner, with the statute of uses removed, we had a complete statutory system of conveyancing, and in the absence of the statute of charitable uses, there were still the general equitable powers of the court of chancery, existing anterior to that statute. But while in those cases a single rule, part of no general system of modern application, was rejected, here the rules assailed are results of a general doctrine and part of a complete system, and to overthrow them would leave the whole body of the law of waters unsettled and confused. The subject calls for legislative, not for judicial, action: Black's Pomeroy on Water Rights, secs. 162, 163.

509 Nor do we believe that the common-law rule of equality among riparian owners, administered liberally with respect to the circumstances of particular localities, is necessarily prohibitive of irrigation anywhere. If we bear in mind wherein the essential doctrine of the common law on this subject consists, we doubt whether a more equitable starting point for a system of irrigation law may be found; and we are not alone in this view: Black's Pomeroy on Water Rights, sec. 163. But if the existence of a rule better applicable to parts of the state were of itself sufficient ground for judicial overturning of the law, the question would arise, What principle are we to adopt? The one for which counsel contend, and the only one that could be contended for seriously, is the doctrine of appropriation, and, believing that to adopt this doctrine by judicial legislation in place of the rules of the common law would lead to difficulties in other parts of this state no less great than those charged to the rules at present sanctioned, we purpose to review briefly its history and some of its incidents. The history of this doctrine is well known and has often been set forth: Black's Pomeroy on Water Rights, secs. 11-24; 17 Am. & Eng. Ency. of Law, 2d ed., 494; *Atchison v. Peterson*, 20 Wall. (U. S.) 507, 22 L. ed. 414. It arose in California at a time when government and law were not yet established, when there was no agricultural population and were no riparian owners, and when streams could be put to no use except for mining.

From the necessities of the case, there being no law applicable, the miners held meetings in each district or locality and adopted regulations by which they agreed to be governed. As at that time streams could be put to no use except for mining, and as the use of large quantities of water was essential to mining operations, it became settled as one of the mining customs or regulations that the right to a definite quantity of water and to divert it from streams or lakes, could be acquired by prior appropriation. This custom acquired strength; rights were gained under it and investments made, and it was soon approved by the courts ⁵¹⁰ and by local legislation; and, though not originally available against the general government or its patentees, was made so available by act of Congress in 1866: 2 U. S. Comp. Stats. 1901, p. 1437. But it was only the same rule as that by which possession of mining claims was recognized. It was a custom intended to prevent disorder and forcible dispossession of those who had located mines. As stated by Field, J., in *Atchison v. Peterson*, 20 Wall. 507, 510, 22 L. ed. 414: "By the custom which has obtained among miners in the Pacific states and territories, where mining for the precious metals is had on the public lands of the United States, the first appropriator of mines, whether in placers, veins, or lodes, or of waters in the streams on such lands for mining purposes, is held to have a better right than others to work the mines or use the waters." In other words, the doctrine in question was not formulated as an enlightened attempt to adjust the conflicting relations of a large community of individuals. It was a crude attempt to preserve order and the general peace, and to settle customary rights among a body of men subject to no law, under which so many and so valuable rights arose that when the law stepped in it was obliged to recognize them. In this way the rule of appropriation became established in the Pacific states, in opposition to the common law, with reference to streams or bodies of water which wholly ran through or were situated upon the public lands of the United States: Black's *Pomeroy on Water Rights*, sec. 15. These rules, however, were confined to the public lands, and are so confined at the present time in California, Oregon and Washington. In other states and territories the new doctrine was given general application; sometimes by judicial decision, as in Nevada, but chiefly by constitutional or legislative enactment. Thus, in those

states of which the whole or a portion is arid, we now find some in which the common-law rules are in force—California, Oregon, Washington, Montana, North Dakota and, substantially, Texas—though in many of these, for reasons stated, the other rule obtains ⁵¹¹ upon the public lands of the United States; others in which the doctrine of prior appropriation is in general force—Nevada, Arizona, Colorado, Idaho, Utah, Wyoming. Of these, however, Colorado, Idaho and Wyoming have constitutional provisions declaring such to be the paramount law, and in the other jurisdictions named it is generally established by statute. Not only does the history of the rule obviously remove our state from its operation, but a mere comparison of the jurisdictions where the contending principles are in force is very suggestive. In all states which, like our own, are but partially arid, the common law is in force. The states holding to the contrary rule are wholly within the arid regions. Moreover, whereas in those states and some of the partially arid, the arid regions were first settled, and rights, customs and legislation grew up and were shaped with reference to such conditions, with us the amply watered regions of the eastern portion of the state were first settled, and our laws, legislation and lines of judicial decisions were fixed before agriculture in the arid or semi-arid portions of the state was at all established. Not only does this suggest that the appropriation doctrine unregulated by minute legislation is unsuited and inapplicable to the state as a whole, but a consideration of some of its incidents will make such conclusion manifest. Under such doctrine the first appropriator may appropriate the entire flow of a stream, if used in proper irrigation: *Hammond v. Rose*, 11 Colo. 524, 7 Am. St. Rep. 258, 19 Pac. 466; *Drake v. Earhart*, 2 Idaho, 750, 23 Pac. 541. Also a nonriparian may appropriate and get an exclusive right to the whole water of a stream for nonriparian lands: *Hammond v. Rose*, *supra*. It must be clear that such rules are not applicable to this state at large. Land along streams has been bought and sold and titles have been acquired for many years throughout the older portions of the state in reliance upon the rights and advantages incident to ownership of riparian property. The application of the rules of the common law in this state having been undoubted so long, the results of suddenly ⁵¹² overturning them and permitting the first comers to get all the water from the several

streams in the older parts of the state by mere appropriation and turn whole streams upon nonriparian tracts, would be intolerable. Not only have these rules been relied upon in the acquisition and disposition of property, but they have received legislative recognition. Section 8, chapter 57 of the Compiled Statutes (Annotated Statutes, section 7307), providing for ascertainment of damage to lower owners by retention of water in mill ponds; section 32, article 3, chapter 93a of the Compiled Statutes (Annotated Statutes, section 6854); section 6, article 1, chapter 93a of the Compiled Statutes (Annotated Statutes, section 6752), and perhaps section 43, article 2 (Annotated Statutes, section 6797), of the last-named chapter—indicate an understanding that riparian owners have rights which must be respected and may only be divested by due process of law. Counsel contend that the irrigation act of 1877 “looked on the law of riparian rights with disapproval.” But this statement, already sufficiently refuted in the opinion in *Crawford Co. v. Hathaway*, 60 Neb. 754, 84 N. W. 271, is based upon the fallacious assumption that any taking of water from a flowing stream is an infraction of riparian rights.

For the reasons indicated, we are of opinion that the former holdings of the court must be adhered to, and that, except as altered by statutes, the common-law rules are in force in every part of the state. The details of such rules with respect to irrigation, however, and their application to irrigation in the semi-arid portions of the state, have not as yet received careful consideration by this court. It is generally recognized that at common law a riparian owner may take water from a stream for purposes of irrigation: *Embrey v. Owen*, 6 Ex. (Eng.) 353; *Elliot v. Fitchburg R. Co.*, 10 Cush. (Mass.) 191, 57 Am. Dec. 85; *Gillett v. Johnson*, 30 Conn. 180; *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 11 Am. St. Rep. 72, 6 South. 78, 4 L. R. A. 572; *Gould on Waters*, 3d ed., sec. 217. At an early day there was a tendency to class irrigation ⁵¹³ among those uses of a stream which might be carried even to entire consumption of its waters. But another view has long prevailed and is now well established, not only in the eastern portion of the country, but even in the arid and semi-arid states (so far as such states recognize the common-law doctrine as to riparian rights), to the effect that irrigation is one of those uses which must be exercised reasonably, with a due regard to the rights

of others: *Low v. Schaffer*, 24 Or. 239, 33 Pac. 678; *Gillett v. Johnson*, 30 Conn. 180; *Black's Pomeroy on Water Rights*, sec. 151; *Gould on Waters*, 3d ed., secs. 205, 217. This subject has been confused needlessly by the unfortunate use of the words "natural" and "ordinary" in this connection to distinguish those uses which the common law does not attempt to limit, and "artificial" or "extraordinary" to designate those which are required to be exercised within reasonable bounds. It is no doubt true that irrigation is a very natural and a very ordinary want, and that use of a stream for such purpose is natural and ordinary in semi-arid regions. But such is not the question. The law does not regard the needs and desires of the person taking the water solely to the exclusion of all other riparian proprietors, but looks rather to the natural effect of his use of the water upon the stream and the equal rights of others therein. The true distinction appears to lie between those modes of use which ordinarily involve the taking of small quantities and but little interference with the stream, such as drinking and other household purposes, and those which necessarily involve the taking or diversion of large quantities and a considerable interference with its ordinary course and flow, such as manufacturing purposes. The purpose of the law is to secure equality in the use of the water by riparian owners, as near as may be, by requiring each to exercise his rights reasonably and with due regard to the right of other riparian owners to apply the water to the same or to other purposes. This purpose is not subserved by any arbitrary classification, and in regions where water must be carefully husbanded and is in great ⁵¹⁴ demand for agricultural purposes, it is obviously better to incline toward such a rule as will further equality and a wide participation in the benefits of a stream: *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674. Accordingly, wherever the common-law rules as to riparian rights apply, even in the arid portions of the country, the weight of authority places irrigation among those uses of a stream which must be exercised reasonably under the circumstances of each case: *Union Mill etc. Co. v. Ferris*, 2 Saw. 176, Fed. Cas. No. 14,371; *Union Mill etc. Co. v. Dangberg*, 2 Saw. 450, Fed. Cas. No. 14,370; *Smith v. Corbit*, 116 Cal. 587, 48 Pac. 725; *Baker v. Brown*, 55 Tex. 377; *Trambley v. Luterman*, 6 N. Mex. 15, 27 Pac. 312; 17 Am. & Eng. Ency. of Law, 2d ed., 487; *Black's Pomeroy on Water Rights*, sec.

151. This conclusion is not altered, so far as concerns the case at bar, by section 65, article 2, chapter 93a of the Compiled Statutes (Annotated Statutes, section 6819), which declares water for irrigation to be a "natural want." If that section was meant to enact a new rule, we have here a cause which arose two years prior to its adoption. If it was meant to be declaratory, we must consider it in connection with section 43, which says that domestic uses must come before agricultural uses, and is inconsistent with any construction that would allow complete diversion of a whole stream for irrigation as against those who desire to use its water for domestic purposes. It would doubtless be impolitic to give an arbitrary or hard-and-fast meaning to the word "reasonable" in this connection. The use of water for irrigation always involves some loss, and we do not think it would be wise to declare every perceptible diminution of the waters of a stream to be unreasonable. The necessity of a liberal view of what constitutes a reasonable use of water for irrigation has been judicially recognized (*Harris v. Harrison*, 93 Cal. 676, 29 Pac. 325; *Bathgate v. Irvine*, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442), and we think caution in that respect entirely proper. If the rights of the upper owner in the water are no more than those of the lower owner, they are at the same time ⁵¹⁵ no less. His right to reasonable use of the water for irrigation ought not to be rendered nugatory by requiring it to be exercised in an impossible manner. We do not think this conflicts with what was said in *Clark v. Cambridge etc. Improvement Co.*, 45 Neb. 798, 64 N. W. 239, and reaffirmed in *Slattery v. Harley*, 58 Neb. 575, 71 N. W. 151, since the court was there considering only whether the common-law rules were in force, not the definition of the reasonable use allowed by those rules as applied to sections of the state shown by pleadings and proofs to be arid. Nor does it conflict with the holding in *Crawford Co. v. Hathaway*, 60 Neb. 754, 84 N. W. 271, hereinbefore reiterated, to the effect that the common-law rules apply in every part of the state. For, if we regard the question of what is reasonable use as in great part one of fact, the conditions of soil, climate, and rainfall in any given locality, when proved, may be considered properly as important elements of fact, without in the least affecting the general rule. But if we concede so much, the law insists that the lower owner shall not be deprived of the

use of the water to an unreasonable extent: *Sampson v. Hoddinott*, 1 Com. B., N. S., 590. The uses which an upper riparian owner may make of a stream for purposes of irrigation must be judged, in determining whether they are reasonable, with reference to the size, situation and character of the stream, the uses to which its waters may be put by other riparian owners, the season of the year, and the nature of the region. These circumstances differ in different cases, and what use is reasonable must be largely a question of fact in each case: *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674; *Baker v. Brown*, 55 Tex. 377; *Harris v. Harrison*, 93 Cal. 676, 29 Pac. 325; *Minnesota Loan etc. Co. v. St. Anthony Falls Water-Power Co.*, 82 Minn. 505, 85 N. W. 520; *Embrey v. Owen*, 6 Ex. (Eng.) 353; *Pitts v. Lancaster Mills*, 13 Met. (Mass.) 156. Some things, however, are clearly unreasonable, and it may be laid down absolutely that the upper owner, in using the water for irrigation, must not waste, needlessly diminish, or wholly consume it, to the injury of other ⁵¹⁶ owners, nor so as to prevent reasonable use of it by them also: *Union Mill etc. Co. v. Dangberg*, 2 Saw. 450, Fed. Cas. No. 14,370; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674; *Harris v. Harrison*, 93 Cal. 676, 29 Pac. 325; *Gould v. Eaton*, 117 Cal. 539, 49 Pac. 577, 38 L. R. A. 181; *Coffman v. Robbins*, 8 Or. 278; *Gillett v. Johnson*, 30 Conn. 180.

Judged in this way, we think the use made of the streams in question by three of the defendants may not be said to be reasonable. Hat creek is a small stream, about ten feet wide where it passes the plaintiff's lands, formed by the junction of a number of similar streams a few miles above. Of these, Warbonnet creek, after gathering in several small tributaries, flows into Munroe creek, which is received by Sowbelly creek, and the latter soon joins Hat creek, into which, some distance above, a number of smaller streams have been united. All of these creeks are fed by springs in the hills and flow the year round, although at times somewhat reduced in volume in dry weather. There is some conflict in the testimony as to the disposition of the water diverted by the several defendants, and how far it or some of it may return to the creeks. The most satisfactory testimony is that of the county surveyor, and we have looked chiefly to his statements for an understanding of the facts. The defendant Brewster maintains a dam on Warbonnet

creek, and a ditch, by means of which he irrigates some three hundred acres. The capacity of this ditch is sufficient to contain the entire stream. It takes the water away from the creek to a point about a mile off, where the dip is but very slightly toward the creek, and there discharges it, so that practically all that is not used in irrigation will, in hot weather, evaporate, and not return to the creek. On one occasion, when the season was very dry in that vicinity, and a number of Mr. Brewster's neighbors below him were complaining because they could get no water, it appears that he was turning the water upon a meadow of eighty to one hundred acres so that it stood there from one to one and one-half inches deep; and, as we have seen, what was not used was substantially ⁵¹⁷ wasted. This is obviously unreasonable. The defendant Wilcox maintains a ditch on Munroe creek, with which he irrigates one hundred and fifty acres. This ditch also is sufficient to carry the whole stream, and the water is so discharged that none gets back into the creek, since the ground slopes in another direction at the point of discharge. With respect to the defendant Coffee, who maintains a ditch on Hat creek, with which he irrigates one hundred and sixty acres, the case is not so clear. But at the time the writs were served in this case, while there was abundance of water in his ditch, the sheriff found the creek dry a mile and a half below, and the bed of the creek opposite the plaintiff was so dry that dust blew in it. It is claimed that the character of the creek bed and nature of the soil in that vicinity, shown by the testimony to be close to the "bad lands," at an altitude of four thousand five hundred feet, in an arid region, is such that in a dry season the waters of the creek would evaporate or be absorbed in the ordinary course of things before they reached the plaintiff. This, if true, would be a strong circumstance to consider in determining what would be a reasonable use of the water: Union Mill etc. Co. v. Dangberg, 2 Saw. 450, 459, Fed. Cas. No. 14,370. But a large number of witnesses, well acquainted with the neighborhood, deny this, and the fact that in a former very dry season plaintiff had had water except for two or three days, and that as soon as the injunction was served, water flowed several inches deeper than usual past his land, would indicate that the condition of the creek when suit was brought was due to complete diversion of its waters by the dam above. With respect to the defendant Steele,

however, who is on Middle Hat creek, above Coffee, the evidence is that all of the water taken out by him, except what is consumed by evaporation, goes back to the creek, and there is no evidence of unreasonable use or of injury to the plaintiff.

The further claim of the defendants, based upon section 2339 of the Revised Statutes of the United States (United States Compiled Statutes of 1901, page 1437), so far as such section ⁵¹⁸ is relied upon in connection with the legislation of this state to set up rules at variance with the doctrines of the common law, is disposed of adversely in *Crawford Co. v. Hathaway*, 61 Neb. 317, 85 N. W. 303. But they also contend that by virtue of said section, as prior appropriators who have duly entered and received patents to their lands, they are entitled to take the waters of said streams as against the plaintiff, who is a subsequent patentee from the government. The section in question has been construed repeatedly by the federal courts, and its meaning is not open to question: *Basey v. Gallagher*, 20 Wall. (U. S.) 670, 22 L. ed. 452; *Broder v. Natoma Water etc. Co.*, 101 U. S. 274, 25 L. ed. 790; *Jennison v. Kirk*, 98 U. S. 453, 25 L. ed. 240. In *Jennison v. Kirk*, the court says (page 460): "In other words, the United States by the section said that whenever rights to the use of water by priority of possession had become vested, and were recognized by the local customs, laws, and decisions of the courts, the owners and possessors should be protected in them," although the title to the lands might be in the government. In *Basey v. Gallagher*, 20 Wall. 670, 22 L. ed. 452, it is said (page 683): "It is very evident that Congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition; and that law may be shown by evidence of the local customs, or by the legislation of the state or territory, or the decisions of the courts. The union of the three conditions in any particular case is not essential to the perfection of the right by priority; and in case of conflict between a local custom and a statutory regulation, the latter, as of superior authority, must necessarily control." In the Pacific and mining states, appropriation of water by squatters on the public land became the subject of legislation and judicial decision very early in the history of those communities, whereby cus-

toms that had grown up and come to be well defined, widely recognized, and generally respected in the regions in question were ⁵¹⁹ given legal force. Irrigation is very young in this state, as the semi-arid portions did not begin to be settled till about 1880. Neither by legislation nor by judicial decision had appropriation of water been recognized in this state as conferring any right until the statutory period of prescription had elapsed. Nor had any such general, well-recognized or widely respected custom grown up in this state as to justify the application of the federal statute thereto. The customs in the states to which Congress had reference were wide-spread and notorious. The custom attempted to be proved in this case was at best very confined in its limits, known to few, admitted by few, and as the testimony shows, often disputed. The defendants testify that they began taking the water "by squatter's right." One witness says that in 1880 and 1881 it was usual for every man in northwestern Nebraska to "take what water he could." Others testify that at that time no one respected any other's rights in this regard, but each put in a ditch wherever he could. Another says: "About all the rule there was, if a man went and took out a ditch, he went and took it out." There is some testimony of a custom of respecting prior appropriations. But the weight of the evidence is to the effect that there were very few settlers, and all took what was at hand, without regulation or custom of any sort. Hence we do not think use of the water under such circumstances for a less period than ten years operated to give any right to the defendants as against the plaintiff under the section in question. On the other hand, however, we are of the opinion that under that section the period during which the defendants maintained their ditches as squatters, and afterward under homestead entries, prior to obtaining patents for their land, may be counted by them in making out the statutory period of prescription as against the plaintiff, a subsequent patentee from the government. The statute has been construed to be a recognition by the government of all claims which might accrue to such squatters as against other settlers, and to intend that all patents which might ⁵²⁰ issue should be subject to such rights. As a right began to accrue as soon as the ditches were dug, we think the period during which the defendants appropriated water "by squatter's right," while giving rise to no rights against the government, is available in proving

rights by prescription against the plaintiff: *Tolman v. Casey*, 15 Or. 83, 13 Pac. 669.

This brings us to the last claim made by the defendants, namely, that they are entitled to divert the water of the several streams in question by virtue of ten years' adverse user. We may leave the defendant Steele out of account, because, as has been seen, the evidence does not show that his use of the water is unreasonable. Likewise the defendant Wilcox may be dismissed with a few words, since his dam was not built till 1884, and his ditch as it now stands was not dug till 1886. As this suit was begun in 1893, he can claim nothing by prescription. The defendant Brewster put in his dam in 1879 or 1880, and though he made some enlargements, his system of irrigation seems to have been in existence in its present condition for ten years before the bringing of this action. As to Coffee's ditch, the testimony is conflicting. It was begun in 1881, but seems to have been added to several times, and there is testimony that it was enlarged as late as 1886. But we need not review the testimony on this point, because, conceding that his ditch was in its present form ten years prior to the bringing of this action, neither he nor the defendant Brewster has proved a right to consume all the water of the streams by prescription. The plaintiff settled upon his land in 1886, five years after Coffee began his ditch, and from that time until 1893 there is abundant evidence that he had water in the creek at all times except for a day or two in 1890. No right to divert and dissipate the whole stream was acquired by making such use thereof as would still leave water for the plaintiff. So long as the water was sufficient for all, there was no adverse user: *Anaheim Water Co. v. Semi-Tropic Water Co.*, 64 Cal. 185, 30 Pac. 622; *Bathgate v. Irvine*, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442; *North Powder Milling Co. v. Coughanour*, 34 Or. 9, 54 Pac. 223; ⁵²¹ *Church v. Stillwell*, 12 Colo. App. 43, 54 Pac. 395; *Egan v. Estrada (Ariz.)*, 56 Pac. 721. One of the elements to be considered in determining what is a reasonable use of the water of a stream is the season of the year, and its effect upon the stream. Riparian owners are not to be debarred from use of water because the season is dry and the stream low. But at such time they must take care "to do no material injury to the common right of plaintiff, having regard to the then stage of the river": *Union Mill etc. Co. v. Dangberg*, 2 Saw. 450, 458, Fed. Cas. No.

14,370. The testimony is that the season of 1893 was unusually dry. Hence what might have been a reasonable use of the water, or at least such use as gave the plaintiff no ground of complaint, in other years, became highly unreasonable when it had the effect of giving Coffee and Brewster all the water and leaving none for other owners. Only a continuous and adverse user of the whole stream could give a right to take out a greater proportion of such water as was in the stream at the time than they had habitually taken in former years.

It is therefore recommended that the decree be affirmed as to the defendant Steele, but reversed as to the defendants Coffee, Brewster and Wilcox, with directions to make new and further findings of fact in conformity with this opinion, and to enter a decree enjoining the defendant Wilcox from wasting or unreasonably diminishing the waters of Munroe creek, and enjoining the defendants Brewster and Coffee from consuming all the waters of Warbonnet and Hat creeks, respectively, in the irrigation of their lands, or permanently diverting in any year a greater proportion of the water in such streams for the time being than they were accustomed to take out prior to the summer of 1893, having regard to the nature of the season and the condition of the stream at the time. In consequence, however, of the long time that has elapsed since the trial, we think it would be entirely proper to take further evidence upon the question of the amount of water ⁵²² which such defendants may divert, should the lower court so desire.

Sedgwick, C., concurs.

Oldham, C., having been of counsel in Crawford Co. v. Hathaway did not sit.

By the COURT. For the reasons set forth in the foregoing opinion, the decree of the district court is affirmed as to the defendant Steele, but reversed as to the defendants Coffee, Brewster and Wilcox, with directions to make new and further findings of fact in conformity with said opinion, and to enter a decree enjoining the defendant Wilcox from wasting or unreasonably diminishing the waters of Munroe creek, and enjoining the defendants Brewster and Coffee from consuming all the waters of Warbonnet and Hat creeks, respectively, in the irrigation of their lands, or permanently diverting in any year a greater proportion of the

water in such streams for the time being than they were accustomed to take out prior to 1893, having regard to the nature of the season and the condition of the stream at the time, that proportion and other questions of fact necessary to the rendition of such a decree to be ascertained from the evidence already taken or by taking further evidence at the discretion of the district court.

Judgment accordingly.

The Right of Riparian Owners to divert the water of a stream to use for irrigation purposes is discussed at length in *Crawford Co. v. Hathaway*, 67 Neb. 325, ante, p. 647, and see the cases cited in the cross-reference note thereto.

HOME FIRE INSURANCE COMPANY v. BARBER.

[67 Neb. 644, 93 N. W. 1024.]

CORPORATIONS—Subsequent Stockholders—Attack on Prior Corporate Management.—A purchaser of stock in a corporation cannot complain of the prior acts and management of the corporation. (p. 726.)

CORPORATIONS—Right of Stockholder to Sue for Corporate Mismanagement.—A purchaser of stock in a corporation cannot attack it by suit for prior acts of mismanagement unless such mismanagement or its effects continue and are injurious to him, or it affects him specially and peculiarly in some other manner. (p. 728.)

CORPORATIONS—Subsequent Stockholder's Right to Sue for Mismanagement.—Stockholders who have acquired their stock and their interest in the corporation from the alleged wrongdoers and through the prior mismanagement of the corporation affairs, have no standing to complain thereof. (p. 731.)

CORPORATIONS—Right to Maintain Suit in Equity.—If a corporation is not asserting, or endeavoring to protect a title to property, it can only maintain a suit in equity as the representative of its stockholders, and if they have no standing in equity to entitle them to the relief sought for their benefit, they cannot obtain such relief, through the corporation or in its name. (p. 734.)

CORPORATIONS—Stockholders—Beneficiaries.—In contemplation of law the property and rights of an incorporated company belong to the united association acting in the corporate name, and not to the stockholders. The latter, however, are the real owners, and a technical trust thus arises in their favor which will be protected and enforced by courts of equity. (p. 735.)

CORPORATIONS.—Stockholders, as Such, have no Title to the corporate property which they can convey or encumber in their own names, and this in substance is only another way of saying that the corporation must act through its proper agents and in the prescribed way. (p. 737.)

CORPORATIONS as Distinct from Stockholders.—If a corporation is proceeding at law, or where it is asserting a title to property, or the title to property is involved, the corporation is regarded as a person separate and distinct from its stockholders, or any or all of them. But if it is proceeding in equity to assert rights of an equitable nature, or is seeking relief upon rules or principles of equity, a court of equity will not forget that the stockholders are the real and substantial beneficiaries of a recovery, and if they have no standing in equity, and are not equitably entitled to the remedy sought to be enforced by the corporation in their behalf, the corporation will not be permitted to recover. (p. 738.)

CONTRACTS OF EMPLOYMENT—Fixed Period—Continuance—Presumption.—If persons have contracted for the performance of certain services for a definite period at a fixed salary, and the employment continues beyond the period agreed upon, in the absence of any new contract it will be presumed that the employment continued under the same contract and upon the terms originally fixed. But this presumption must yield to evidence showing a change of terms. (p. 743.)

CONTRACT OF EMPLOYMENT—Change in Terms—Recovery of Back Salary.—If an employé of a corporation, after the expiration of a contract fixing his salary at a certain sum per annum, continues in the same employment, without any new agreement, and then voluntarily reduces his own salary to a certain sum per annum, drawing it thereafter on that basis for many years, he is not entitled to recover as back salary the difference between the original sum contracted for and the sum to which he voluntarily reduced his salary. (p. 744.)

B. G. Burbank and H. F. Rose, for the appellant.

W. W. Morsman and V. O. Strickler, for the appellee.

645 POUND, C. The plaintiff is an insurance company, organized in 1884, with a capital stock of \$100,000, divided into one thousand shares of \$100 each. Its business is conducted by a board of directors, a finance committee, an executive committee and certain other officers, including a secretary and general manager. It appears that the secretary and general manager, at least down to December, 1899, was at all times intrusted with the active management and control **646** of the company's affairs, and the president and the remaining officers appear to have given very little, if any, attention thereto. The appellant and principal defendant, Charles J. Barber, was one of the original incorporators of the company and was a stockholder therein from its organization until December 2, 1899. During that period, he was secretary and general manager, one of the directors, and a member of the executive committee. His codefendants, Lovett, Woodman and Reynolds, were also original incorporators and stockholders, and from time to

time from its organization until December 2, 1899, were directors and members of the executive and finance committees. On December, 1899, the defendant Barber entered into a contract with one Funkhouser, whereby he agreed to sell to said Funkhouser all of the shares of the capital stock of said company, except two shares, which he was to obtain if possible, and to procure the resignation of all the officers and a majority of the directors. He also agreed not to engage in the insurance business directly or indirectly, for a period of three years. By the terms of the contract he was to furnish to Funkhouser a true and complete statement of all the assets and liabilities of the company, and if upon investigation the statement of assets and liabilities proved to be correct and satisfactory to Funkhouser, the latter was to pay the sum of \$75,000 for said shares, less \$200 for the two shares above mentioned, in case they could not be obtained, and a further sum of \$40,000 as a bonus for obtaining all of the shares of stock and for procuring the resignation of the officers, relinquishing his control of the company, and agreeing not to engage further in the business of insurance. On December 2, 1899, pursuant to said contract, the defendant Barber delivered to said Funkhouser all of the shares of the capital stock of said company except eight. He also delivered an option contract for six of the remaining shares, and subsequently procured and delivered the other two. In payment therefor he received the sum of \$94,380.60 in cash and \$20,619.40 in assets ⁶⁴⁷ of the company—namely, \$12,350 of collateral loans, which he had agreed to accept at the time when the contract of sale was made, and certain other assets amounting to \$8,269.40, which Funkhouser had refused to accept at the time when the list of assets was under consideration. Accordingly, the shares of stock were transferred on the books of the company, under the direction of Funkhouser, to himself and certain others, his associates in the transaction, and he and his said associates became thereupon, and now are, the only stockholders in the company. None of them had held stock therein theretofore. At the same time, pursuant to the contract, the defendant Barber resigned his office and procured the resignation of the defendants Reynolds, Woodman and Lovett and of the other principal officers and directors of the company, and a new board of directors was elected and new officers took charge. On November 20,

1899, evidently in contemplation of a transfer of all his interest in the corporation, the defendant Barber drew out \$2,200 of the company's money upon a claim of unpaid salary. Subsequently to the change in management of the company, this was discovered, and a controversy arose between Barber and the new management with reference thereto, as a result of which suit was brought by the company to recover said sum. Thereupon Barber made a counterclaim for some \$10,000 of salary alleged to be due him and not withdrawn, and as a result of examination and investigation of the company's books with reference to this claim, certain irregularities and mismanagement came to light, which were set forth in an amended petition and furnished the principal points of controversy in the case as finally tried.

Thus there are two branches to the case: Upon the one hand a suit by the corporation to recover the money taken out by Barber as back salary just prior to the time he sold his stock, and certain other money which at various times he is alleged to have appropriated wrongfully to his own use, and on the other hand a suit to recover for Barber's mismanagement and for profits made by him ^{as} through the use of the company's money at a time when he stood in a fiduciary relation thereto. The principal mismanagement consisted in borrowing funds of the company to purchase its stock and in making a profit out of the purchase of the stock and the dividends accruing thereon. At the time the stock was bought with money borrowed from the company it was worth about \$55 a share. But seven years later, when the defendant Barber sold out his interest in the company, it had come to be worth \$115 a share. During that time dividends had accrued in considerable amounts, and had been paid to and received by Barber. The decree compels Barber to account for the profits and for the dividends, on the ground that the loan of the company's funds and the use of those funds in purchase of the stock was unauthorized, and that the profits and the dividends belonged in equity to the company. Upon the issue as to salary, the court found that Barber was entitled to recover for back salary, as claimed, and applied the amount found to be due him thereon upon the amounts found due the company by reason of his mismanagement.

The facts with reference to the mismanagement, as found by the court, are substantially these: In January, 1892,

and for some time prior to that date, the stockholders of the company were divided into two factions. The one consisted of the defendants Barber, Lovett, Reynolds and Woodman, who held two hundred and thirty-seven shares and some other stockholders, not sufficient, however, to constitute a majority. The other faction was controlled by one Hamilton, and held in the aggregate five hundred and seven shares. As the controversy became acute, the Hamilton faction required the Barber faction to purchase their five hundred and seven shares of stock, or else to submit to the election of a board of directors who would choose a new secretary and general manager and entirely alter the policy and management of the company. It appears that Barber and his associates were experienced insurance men, while Hamilton and his faction were not, and the court has found that Barber, Lovett, Woodman ⁶⁴⁰ and Reynolds believed it to be for the best interests of the company, as well as for their own interest, that the company should be managed by persons of experience in the business. Accordingly, they agreed among themselves to purchase the five hundred and seven shares and thus preserve control of the company. For that purpose they agreed also to procure money temporarily by borrowing of banks on their own notes, paying said notes with money which they could borrow from the company as soon as they could obtain control thereof, unless in the meantime they were able to sell enough of the shares purchased to pay off their notes, or to pay them off by the sale of other property. In pursuance of this design, they borrowed the necessary funds of banks, purchased the shares, and distributed them among themselves, the majority going to the defendant Barber. A period of financial depression was imminent, and after the purchase it became impossible to dispose of the shares, as the defendants had hoped, so that it was necessary to borrow of the company in order to pay off their notes at the banks. Accordingly the defendants resorted to the company's funds, borrowing a portion upon real estate security and another portion upon notes secured by pledge of the stock. As to the money borrowed upon real estate security, the court has found that the loans were made in good faith, with bona fide intention of repaying them in full, principal and interest; that the security was fair and reasonable; that the loans were made according to the usual mode of business of the company; were entered upon the

books in the regular way; were known to the officers, directors and stockholders of the company; were in large part included in the annual reports of the company, and have all been paid in full, either by cash or conveyances of property to the company, except the interest on a mortgage loan to the defendant Barber. The loans on collateral security, on the contrary, were not carried on the books of the company openly in the name of the parties who obtained them. They were not such loans as the statute authorized the ⁶⁵⁰ company to make, and the court has found that they were not properly secured. The court has also found that it was agreed between the defendants Barber, Lovett and Reynolds, when these collateral loans were originally obtained from the company, that they would pay no interest thereon, and that after a short time they ceased to pay any. These loans were kept standing on the books, in one form or another, until the sale of the stock of Funkhouser in December, 1899, when the collateral loan account, which consisted of these items, was turned over to Barber, as before stated. The court found on this point that the apportionment of the consideration which Funkhouser was to pay and did pay to Barber for all the shares of stock in the company, as provided for in the contract, whereby \$75,000 was stated to be the consideration for the shares of stock, and the remaining \$40,000 a bonus, was made after the sale was practically consummated, to enable Barber to buy in the shares of the company held by other stockholders for the purpose of selling and delivering them, and that the real value of the stock and the true consideration received therefor was not \$75,000, but the full sum of \$115,000. Upon this basis the court found that the portion of said five hundred and seven shares of stock which was covered by the collateral loans, namely, two hundred and three and one-sixth shares, was at all times, after the sale by Hamilton, in equity the property of the company, and that the company was entitled to recover the full consideration which Funkhouser paid Barber therefor, namely, \$115 a share.

Another item of mismanagement grew out of a mortgage loan to the defendant Woodman. In 1886, Woodman and his wife borrowed \$1,400 of the plaintiff upon a mortgage. In January, 1898, there were \$1,600 due upon the loan, and on that date Woodman assigned to Barber his half interest in seventy-five shares of the stock purchased from Hamilton

and his associates, which had been apportioned to Lovett and Woodman as partners. Thereupon the company released the mortgage, and Barber charged the \$1,600 on the books of the company as cash. This item was ^{was} carried on the books in various ways until December 1, 1899, when Barber paid it. The court considered that this amounted to a use of \$1,600 of the company's funds in the purchase of the stock, and that the profits on thirty-seven and one-half shares, amounting to \$2,612.50, should be accounted for to the company.

A similar item grows out of the purchase by Barber from the plaintiff of twenty shares of stock, originally held by the wife of the defendant Reynolds. This stock was sold to the company on August 1, 1899, and applied on a mortgage of \$2,700, given by her and her husband to the company. The court found that Barber purchased the stock of the company, giving his note for a portion, and carrying the remainder upon the books of the company by various devices until December 1, 1899, when the whole was paid. It held, therefore, that he was liable to the company for the profit on these shares.

A further item of mismanagement grows out of a mortgage for \$2,600 executed by one Raff. In January, 1894, an installment of principal and a large amount of accrued interest and taxes had fallen due. At that time the mortgage was assigned by its then holder to the defendant Barber for about the sum of \$1,300. The court has found that Barber knew at the time that foreclosure would be necessary, and immediately instituted a suit in his own name for that purpose. Pending a stay on order of sale pursuant to decree in the foreclosure suit, Barber assigned the mortgage to the plaintiff company as collateral security for a note which he owed it, and afterward drew out \$2,500 of the company's money in payment therefor. Subsequently, the foreclosure sale was confirmed and a large deficiency judgment entered. This judgment was never assigned to the company; but after receiving a master's deed in the foreclosure proceedings, he conveyed the property by warranty deed to the plaintiff. The court found that the company paid taxes amounting to nearly \$1,200, and, taking this into account, held that the total amount of the company's money used in the transaction ^{was} over \$5,100. It found further that this was an improvident and unlawful investment, in case the mortgage was bought originally for the

company, as Barber alleged; and that if it was not so bought originally, the sale to the company pending stay in the foreclosure suit was a violation of his trust, so that in either event he did not act for the best interests of the company, and upon reconveyance should account to it for said sum of \$5,100.

The other items are of a different nature. In 1895 Barber, while secretary and manager of the company, drew two checks for \$1,500 each—one to the defendant Reynolds and the other to the defendant Lovett. These checks were indorsed, and deposited by Barber in his personal account. Thereupon he drew his check in favor of the company for the aggregate sum, deposited it to the credit of the company, and credited said sum of \$3,000 on collateral notes signed by himself and said defendants, as a payment thereon. These checks were issued in payment of alleged claims for services rendered by Lovett and Reynolds in preventing legislation hostile to the company and other similar matters, and the court has found that such claims were not bona fide and were barred by the statute of limitations, and that the transaction was in effect a conversion of \$3,000 of the company's money. It has also found that at various times the defendant collected sums amounting to \$237.37, belonging to the company, for which he failed to account. We think that the item of interest on the mortgage loan above mentioned is to be put in the same category. And here belongs also the claim for \$2,200 of the company's funds withdrawn by Barber on November 20, 1899, on account of back salary. Upon the issues as to salary, the court found that in 1890 a contract was entered into between Barber and the company, whereby he was to receive a certain salary for the remainder of that year and for the year 1891, and from January 1, 1892, to January 16, 1895, a salary at the rate of \$5,000 per annum. The term of employment under the contract was for five years. Barber served, however, continuously from ~~653~~ the inception of the contract until December 2, 1899, and after the expiration of the term provided, no action of any kind was ever taken by the company, by its board of directors or by any committee or officer, other than Barber, with reference to the amount of salary. But in 1895, on account of general financial depression, it became necessary to reduce the salaries of all employes, and at that time Barber voluntarily reduced his own salary to \$3,000 per annum. The court finds

that from that date he drew his salary from month to month substantially on the basis of such reduction until he terminated his connection with the company. The evidence tends to show that during the period from 1895 to 1899 he made repeated admissions that his salary was paid, that he made statements of the condition of the company from which it is evident he considered his salary was \$3,000 a year, and that the statement of the assets and liabilities which he made to Funkhouser, pursuant to his contract, was made upon the same basis. The court found, however, that he was not estopped by his voluntary action, but was entitled to receive salary at the rate of \$5,000 a year during the whole period from 1895, and that there was due him on account of undrawn salary the sum of \$9,485.22.

Thus, as already indicated, this suit involves two distinct questions. The liability of the defendant Barber to account to the company, as at present constituted, for his mismanagement and unauthorized dealings with the company's funds prior to the sale of all the stock to Funkhouser and his associates is one question. His liability to the company for money and assets of the company withdrawn and converted to his own use is quite another question. Connected with this last question is his claim for unpaid salary.

We shall first address ourselves to the question of Barber's liability for mismanagement. Complaint is made of the findings of fact of the trial judge upon the several items with respect to which mismanagement is charged. The evidence on these points is very voluminous, and in ⁶⁵⁴ some respects is conflicting. Much of it takes the form of expert testimony with reference to the company's books, and is made up of conclusions deduced by accountants from their examinations of the books and papers of the company, which are difficult to follow, and at times are somewhat conjectural. But upon review of the evidence, we are satisfied that the findings of fact are accurate and complete, and are well sustained by competent and credible evidence. We have no disposition to interfere with any of them. Accepting these findings of fact, however, several important questions of law arise with reference to which the decree rendered must be tested.

Counsel for the appellant makes three points. The first is that the several transactions recited amounted to loans of the company's money to Barber, and that, as the money

borrowed has been repaid, he and not the company is entitled to the profits. We cannot assent to this proposition. The use of the company's money amounted, as the court has found, to a speculation by one of the officers in violation of his trust, which resulted in a profit. Were this an ordinary case, we think there can be no question that the corporation would be entitled to sue, or a stockholder on its behalf and for the benefit of all others. But it is urged that this is not an ordinary case. None of the present stockholders were owners of stock in the corporation at any time previous to December 2, 1899. All of them acquired their interest in the corporation by and through the sale from Barber to Funkhouser on that date. Accordingly, the second point made by counsel is that as the defendant Barber came to own all of the stock, and the present stockholders acquired their stock through him, there was a merger in said defendant of all the claims which the corporation or its stockholders might have held against him, and such claims became extinguished thereby. We do not think this point is well taken. The trial court has found, upon conflicting evidence, that the defendant was never the owner of all the stock in the corporation, but was only the agent of some of those whose stock he ⁶⁵⁵ procured and sold to the present stockholders. There is ample evidence to show that this is true, and that as to several shares of stock he had at no time any beneficial interest. The third and most serious point is that a recovery in the present case would be entirely for the advantage and inure to the benefit of the present stockholders. It would amount in substance to a recovery back by them of the purchase money which they paid the defendant Barber for his stock, since the money, when recovered for the corporation, would be for distribution among them—the sole stockholders of the company as now constituted.

This raises numerous and difficult questions. It must be determined whether the present stockholders or any of them are entitled to complain of the acts of the defendant and of his past management of the company; for if any of them are so entitled, there can be no doubt of the right and duty of the corporation to maintain this suit. It would be maintainable in such a case even though the wrongdoers continued to be stockholders and would share in the proceeds: 1 Morawetz on Private Corporations, sec. 294. We have therefore to consider, first, how far, if at all, subsequent share-

holders may complain of prior mismanagement of the corporation. Next we must consider how far subsequent shareholders may complain of mismanagement when they hold through such mismanagement or have acquired their shares from persons who participated therein. The third question to be considered is whether the result of a recovery in this case would be inequitable, as permitting the present stockholders to recover back purchase money, or a portion thereof, for which they received full consideration, and to acquire shares worth \$115 each at \$55 a share, and in addition thereto, recover and divide among themselves a further sum of \$60 a share, imposed upon the defendant Barber for his delinquencies in matters which have in no way injured the present stockholders, or any of them, or their interests. Finally, assuming that by reason of the foregoing propositions ⁵⁵⁶ the present stockholders are in no position to complain and have no standing in equity, may the court look beyond the corporation to the ultimate and substantial beneficiaries of a recovery, or is it bound to deal with the corporation as a separate person in all respects?

Sound reason and good authority sustain the rule that a purchaser of stock cannot complain of the prior acts and management of the corporation: *Hawes v. Contra Costa Waterworks Co.*, 104 U. S. 450, 26 L. ed. 827; *Dimpfell v. Ohio etc. R. Co.*, 110 U. S. 209, 3 Sup. Ct. Rep. 573, 28 L. ed. 121; *Taylor v. Holmes*, 127 U. S. 489, 8 Sup. Ct. Rep. 1192, 32 L. ed. 179; *South West Natural Gas Co. v. Fayette Fuel-Gas Co.*, 145 Pa. St. 13, 23 Atl. 224; *Alexander v. Searcy*, 81 Ga. 536, 12 Am. St. Rep. 337, 8 S. E. 630; *Clark v. American Coal Co.*, 86 Iowa, 436, 53 N. W. 291, 17 L. R. A. 557; *United Electric Securities Co. v. Louisiana Electric Light Co.*, 68 Fed. 673; *Venner v. Atchison etc. R. Co.*, 28 Fed. 581; *Heath v. Erie R. Co.*, 8 Blatchf. 347, Fed. Cas. No. 6306; *Dannmeyer v. Coleman*, 8 Saw. 51, 11 Fed. 97; *Pennsylvania Tack Works v. Sowers*, 2 Walk. (Pa.) 416; 4 *Thompson on Corporations*, sec. 4569. In *Alexander v. Searcy*, supra, the court say (page 550): "The weight of authority seems to be that a person who did not own stock at the time of the transactions complained of, cannot complain or bring a suit to have them declared illegal." In *United States Securities Co. v. Louisiana Electric Light Co.* it is said (page 675): "As a general proposition, the purchaser of stock in a corporation is not allowed to attack

the acts and management of the company prior to the acquisition of his stock; otherwise, we might have a case where stock duly represented in a corporation consented to and participated in bad management and waste and, after reaping the benefits from such transactions, could be easily passed into the hands of a subsequent purchaser, who could make his harvest by appearing and contesting the very acts and conduct which his vendor had consented to." These remarks are not without application to the case at bar. The present shareholders are all subsequent purchasers; they obtained their stock through the defendant Barber; they hold a large number of their shares under a purchase from him and his associates through the very mismanagement now complained of; a majority of the remaining shares come directly from Barber and his associates in the wrongs upon which this suit is based. In other words, the present stockholders are contesting acts through which they get title to a large portion of their stock, and acts which those through whom they derived the greater part of the remainder could not have challenged because they participated therein, and, by contesting these acts, which did not injure any of the present stockholders in the least, are recovering back a large part of the purchase price of stock which was admittedly worth all that they paid for it. Such cases illustrate forcibly the wisdom of confining complaints of this kind to those who were stockholders at the time or their successors by operation of law.

The rule that a suit for mismanagement cannot be maintained by one who was not a stockholder at the time has been criticised as based on jurisdictional considerations peculiar to the federal courts and on obsolete common-law doctrines as to champerty and maintenance: 4 Thompson on Corporations, secs. 4569-4571; 1 Morawetz on Private Corporations, sec. 270. In our judgment it does not depend upon either. The federal equity rule, while designed in part to prevent collusive proceedings in fraud of the jurisdiction of those courts, goes far beyond the requirements of such a purpose. If that were the sole purpose of the rule, it should go no further than to prevent such suits where the vendor of the stock was a citizen of the same state as the corporation. If the vendor and purchaser were citizens of the same state, and the vendor, an original stockholder, had never had the same citizenship as the corporation, no fraud on the jurisdic-

tion of the court would be possible, and in such case, if recovery were ⁶⁵⁸ proper and the purchaser's cause were meritorious, it would be highly unjust for the court to abrogate its jurisdiction. This consideration alone disposes of the criticism. The rule has its foundation in a sound and wholesome principle of equity—namely, that the rules worked out by chancellors in furtherance of right and justice shall not be used, because of their technical character, as rules, to reach inequitable or unjust results. Resting on this basis, the "value and importance [of the rule] are constantly manifested": *Field, J., in Dimpfell v. Ohio etc. R. Co.*, 110 U. S. 209, 3 Sup. Ct. Rep. 573, 28 L. ed. 121. The right of the stockholder to sue exists because of special injury to him for which otherwise he is without redress. If his interest is trifling and the injury thereto of no consequence, he cannot sue to compel righting of wrongs to the corporation: *McHenry v. New York etc. R. Co.*, 22 Fed. 130; *Albers v. Merchants' Exchange of St. Louis*, 45 Mo. App. 206. Hence there is obvious reason for holding that one who held no stock at the time of the mismanagement ought not to be allowed to sue unless the mismanagement or its effects continue and are injurious to him, or it affects him specially and peculiarly in some other manner. *City of Chicago v. Cameron*, 22 Ill. App. 91, 120 Ill. 447, 11 N. E. 899, is a case of the first type; *Carson v. Iowa City Gaslight Co.*, 80 Iowa, 638, 45 N. W. 1068, is one of the second type. Except in such cases, the purchaser ought to take things as he found them when he voluntarily acquired an interest. If he was defrauded in the purchase, he should sue the vendor. As to the corporation and its managers, so long as he is not injured in what he got when he purchased, and holds exactly what he got and in the condition in which he got it, there is no ground of complaint: *Clark v. American Coal Co.*, 86 Iowa, 436, 53 N. W. 291, 17 L. R. A. 557.

The cases which hold that a subsequent stockholder may sue for mismanagement may be noticed briefly. Those commonly cited are: *Ramsey v. Gould*, 57 Barb. (N. Y.) 398; *Young v. Drake*, 8 Hun (N. Y.), 61; *Parsons v.* ⁶⁵⁹ *Joseph*, 92 Ala. 403, 8 South. 788; *Winsor v. Bailey*, 55 N. H. 218; *Forrester v. Butte & Montana Consolidated Copper etc. Min. Co.*, 21 Mont. 544, 55 Pac. 229, 353. In *Ramsey v. Gould*, 57 Barb. 398, plaintiff, believing that there had been mismanagement, bought shares for the purpose of proceeding against

the directors and officers and "bringing them to justice" The court permitted the suit upon the ground that plaintiff's motives were immaterial. But it is assumed, without discussion, that he had an interest to vindicate, and had suffered some wrong, which is the real question on which such cases depend. Moreover, it is by no means clear that the motives behind a stockholder's suit are immaterial. Where stock is acquired for the purpose of bringing suit, it has been held that the complainant is a mere interloper, entitled to no consideration: *Hawes v. Contra Costa Water Works Co.*, 104 U. S. 450, 461, 26 L. ed. 827; *Moore v. Silver Valley Min. Co.*, 104 N. C. 534, 10 S. E. 679; *Kingman v. Rome etc. R. Co.*, 30 Hun (N. Y.), 73; *Du Pont v. Northern P. R. Co.*, 21 Blatchf. 534, 18 Fed. 467, 471. And stockholders' suits not brought in good faith in the interests of the corporation have been dismissed on that ground: *Beshoar v. Chappell*, 6 Colo. App. 323, 40 Pac. 244; *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637. In *Young v. Drake*, 8 Hun, 61, the court follow *Ramsey v. Gould*, 57 Barb. 398. The further point is made that "the plaintiff acquired all the rights of the person of whom he purchased." Of course, in a case where those of whom he purchased had participated or acquiesced in the mismanagement, this view would preclude the purchaser from suing. And he could not sue as being a bona fide purchaser in ignorance of the disability attaching to his vendor, because shares of stock are not negotiable, and the sale cannot pass greater rights than those possessed by the vendor: *Clark v. American Coal Co.*, 86 Iowa, 436, 53 N. W. 291, 17 L. R. A. 557; 4 *Thompson on Corporations*, p. 3410. But it may be doubtful whether a purchaser of stock buys or intends to buy anything beyond the vendor's present interest in the corporation and its ^{own} assets. His vendor's causes of action for past injuries and rights to complain of past mismanagement are scarcely in contemplation of the parties. We must not suffer ourselves to be deceived by speaking of causes of action of the corporation in this connection, since causes of action of this character belong to the corporation for the benefit and in the interest of its stockholders. *Parsons v. Joseph*, 92 Ala. 403, 8 South. 788, and *Winsor v. Bailey*, 55 N. H. 218, adopt the view of Mr. Morawetz that the rule announced by the federal courts is a rule of practice based on jurisdictional peculiarities of those courts and not of general application. In *Forrester v. Butte etc.*

Min. Co., 21 Mont. 544, 55 Pac. 229, 353, the transaction was not complete and still required ratification by the stockholders. The complainants, although they bought after the acts were done, were stockholders while the matter was still formative, and had an undoubted right to interfere to prevent its consummation. Hence what is said as to the point in question is dictum only.

The fallacy in the view that one who has not been injured by a transaction and is not affected thereby can acquire a right to sue in equity to set it aside because he has acquired the shares of the person injured, is exposed in such cases as *Graham v. La Crosse etc. R. Co.*, 102 U. S. 148, 26 L. ed. 106, and *Hoffman v. Bullock*, 34 Fed. 248. The right to complain of such transactions is one which the stockholders injured may or may not exercise as they choose. Where such transactions are not absolutely void, they may, if they so elect, acquiesce and treat them as binding. The discretion whether to sue to set them aside or to acquiesce in and agree to them is incapable of transfer. If the new stockholder is injured, there is another question. In that case he also has a power of proceeding or remaining inactive as he may prefer. Where he is not injured, he can take no advantage of the power which was in his vendor, and the latter did not care to exercise. In *Graham v. La Crosse etc. R. Co.*, 102 U. S. 148, 26 L. ed. 106, the point was urged which is so often made in connection with suits by subsequent stockholders, and upon ⁶⁶¹ which Mr. Morawetz bases his statement that such stockholders should be allowed to sue. Bradley, J., says (page 153): "But it is contended that this is a case in which the debtor corporation was defrauded of its property, and that, as the company had a right of proceeding for its recovery, any of its judgment and execution creditors have an equal right; that it is a property right, and one that inures to the benefit of creditors. Conceding that creditors who were such when the fraudulent procurement of the debtor's property occurred . . . the question still remains, whether . . . subsequent creditors have such an interest that they can reach the property for the satisfaction of their debts. We doubt whether any case, going as far as this can be found. . . . It seems clear that subsequent creditors have no better right than subsequent purchasers to question a previous transaction in which the debtor's property was obtained from him by fraud, which he has acquiesced in, and which he has

manifested no desire to disturb. Yet, in such a case, subsequent purchasers have no such right." Hence, upon review of the authorities and the principles on which they appear to proceed, notwithstanding the position of some of the text-writers, the sounder doctrine, sustained by the better and more numerous adjudications, appears to be that subsequent stockholders have no standing, as a general rule, to attack prior mismanagement of the corporation.

It appears to be well settled, also, that stockholders who have acquired their shares and their interest in the corporation from the alleged wrongdoers and through the prior mismanagement have no standing to complain thereof: *Brown v. Duluth etc. R. Co.*, 53 Fed. 889; *Matter of Application of Syracuse etc. R. Co.*, 91 N. Y. 1; *Schilling & Schneider Brewing Co. v. Schneider*, 110 Mo. 83, 19 S. W. 67; *Langdon v. Fogg*, 14 Abb. N. C. (N. Y.) 435; *Parsons v. Hayes*, 18 Jones & S. (N. Y.) 29; *Hollins v. St. Paul etc. R. Co.*, 9 N. Y. Supp. 909; *Clark v. American Coal Co.*, 86 Iowa, 436, 53 N. W. 291, 17 L. R. A. 557; 4 Thompson on ⁶⁶² Corporations, p. 3410; *Cook on Corporations*, secs. 40, 736, note. If a stockholder's predecessor in title has acquiesced in a course of mismanagement, it has even been held that he cannot maintain a suit to restrain its continuance: *Trimble v. American Sugar Refining Co.*, 61 N. J. Eq. 340, 48 Atl. 912. In Thompson on Corporations the learned author says (page 3409): "But as share certificates do not, under any theory, rise to the grade of strictly negotiable paper, it should follow, and especially in regard to the transfer of any litigious rights which may attach to them, that their holder cannot, by selling them to another, transfer to that other any better litigious rights, inhering in them, than he himself possesses. If, therefore, he has, by his conduct as a shareholder, estopped himself from maintaining a suit in equity to undo corporate action, . . . this estoppel will attend the shares in the hands of his vendee." In consequence, it would make no great difference in the case at bar, as to the standing of the present shareholders of the company in a court of equity, if we held that subsequent shareholders could attack prior mismanagement. The present shareholders hold two hundred and sixty shares through a purchase from Barber, who acquired title through the acts complained of, and the money which they paid for those very shares, which they hold through such purchase, is now claimed to belong to the corporation, and is

sought to be recovered from their vendor. Nor is this all. The greater part of the remaining shares were held by Barber and his associates when the alleged wrongs were committed, and are now held by the present stockholders under a purchase from Barber. To allow them to open up these transactions is to allow them to go counter to their own title to a large part of the stock, and to assert rights and claims which their vendor could never have asserted, and this, too, as to past transactions, which have no present effect upon the value of their stock, and do not continue to be felt in any way in the corporate management.

There is another and still stronger reason why the ⁶⁸³ present stockholders have no standing in a court of equity to complain of the transactions on which this suit is based. To permit them to recover, under the circumstances of the case at bar, would be highly inequitably. It would be to give them moneys to which they have no just title or claim whatever, and enable them to speculate upon wrongs done to others with which they have no concern. It would enable them to recover back a large part of the purchase money they paid and agreed to pay for the stock, notwithstanding the stock was worth all that they paid for it, and notwithstanding they obtained and now retain all that they bargained for. So long as they received all that was contracted for, there is no equity in allowing them to recover back a considerable portion of what they paid, merely because their vendor had previously wronged some one else who could have obtained redress in the name of the corporation which they are now able to use. This is especially manifest in respect to the dividends. As Barber and his associates acquired shares by unauthorized borrowing of the company's money, and so held them in trust for the corporation, as representing all the then stockholders, in equity the dividends paid upon such shares doubtless were received impressed with the same trust. But who were the beneficiaries of that trust? Not the other stockholders only, but Barber and his associates, together with such remaining stockholders. Barber and his associates held most of the stock outside of the shares in question. Instead of receiving all the dividends on those shares, they should have received, in equity, the greater portion only. Had a stockholder gone into equity at that time and recovered the dividends for the company, they would simply have been for distribution among those who held the shares not

subject to a trust for the company, and Barber and his associates would still have been the heaviest beneficiaries. For it is well settled that a recovery in such case inures to the benefit of all stockholders, as well those who were wrongdoers as those who were innocent: 4 Thompson on Corporations, sec. 4491. But after an entirely ⁶⁶⁴ new set of stockholders have come in, holding these shares under Barber and his associates and the remainder of the latter's shares under purchase from them, to let them recover back these dividends is to let them reclaim over fifty per cent of the purchase money, and recover from Barber moneys which in equity belonged to him when he took them. The fact that a relatively small portion belonged to others cannot alter the unconscionable character of such a recovery, so long as the present stockholders are not those others and have no standing in equity as their representatives. Recovery by or for the benefit of the present stockholders means, to put it plainly, that through the instrumentality of a court of equity they are to get shares, worth by their own valuation \$115 each, for \$55 each; are to get back dividends which never would have been payable to them in any event and were not bargained for when they bought, and are to receive, in addition to the shares worth \$1.15 on the dollar, sixty cents more on each dollar, imposed on Barber for his delinquencies. Barber wronged the old stockholders. His conduct in many respects was unconscionable and indefensible. But his fellow-stockholders were supine for many years. They took no steps to investigate what he was doing, or to protect or assert their rights. Now third parties, who bought all of Barber's shares, including those which he held as a result of his wrongful manipulations, seek to assert those rights and reap a profit thereby. Because the inequitable conduct of Barber shocks the conscience of a chancellor is no reason why he should give his conscience a further shock by allowing Funkhouser and his associates to recover money to which they have no legal or equitable claim.

Conceding, then, that all of the present stockholders are so circumstanced that no relief should be afforded them in a court of equity, may the corporation recover, notwithstanding? We think not. Where a corporation is not asserting or endeavoring to protect a title to property, it can only maintain a suit in equity as the representative of its stockholders; if they have no standing in equity to ⁶⁶⁵ entitle them to the relief sought for their benefit, they cannot

obtain such relief through the corporation or in its name: *Arkansas River Land etc. Co. v. Farmers' Loan etc. Co.*, 13 Colo. 587, 22 Pac. 954; *Des Moines Gas Co. v. West*, 50 Iowa, 16; *Schilling & Schneider Brewing Co. v. Schneider*, 110 Mo. 83, 19 S. W. 67; *Flagler Engraving Machine Co. v. Flagler*, 19 Fed. 468; *Parsons v. Hayes*, 14 Abb. N. C. (N. Y.) 419; *Langdon v. Fogg*, 14 Abb. N. C. (N. Y.) 435. It would be a reproach to courts of equity if this were not so. If a court of equity could not look behind the corporation to the shareholders, who are the real and substantial beneficiaries, and ascertain whether these ultimate beneficiaries of the relief it is asked to grant have any standing to demand it, the maxim that equity looks to the substance and not the form would be very much limited in its application. "It is the province and delight of equity to brush away mere forms of law": Post, J., in *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb. 463, 492, 62 N. W. 899. Nowhere is it more necessary for courts of equity to adhere steadfastly to this maxim, and avoid the danger of allowing their remedies to be abused, by penetrating all legal fictions and disguises, than in the complex relations growing out of corporate affairs. Accordingly, courts and text-writers have been in entire agreement that equity will look behind the corporate entity, and consider who are the real and substantial parties in interest, whenever it becomes necessary to do so to promote justice or obviate inequitable results. In 4 Thompson on Corporations, section 4479, the learned author says: "As in point of substance and sense, the corporation consists of the aggregate body of its shareholders, it is obvious that, in the most substantial sense, the directors are trustees for the shareholders, and that in any action to redress breaches of trust on the part of the directors, the shareholders are the real parties in interest." Again: "For the purpose of substantial right, though not for the conveniences of legal procedure, the aggregate body of shareholders in a joint ⁶⁸⁸ stock company should be deemed the corporation": 1 Thompson on Corporations, sec. 17. Mr. Morawetz also writes very cogently to the same effect: "It is essential to a clear understanding of many branches of the law of corporations to bear in mind distinctly, that the existence of a corporation independently of its shareholders is a fiction; and that the rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it, and not of an imagin-

ary being": 1 Morawetz on Private Corporations, sec. 1. "While a corporation may, from one point of view, be considered as an entity without regard to the corporators who compose it, the fact remains self-evident that a corporation is not in reality a person or thing distinct from its constituent parts. The word 'corporation' is but a collective name for the corporators or members who compose an incorporated association": 1 Morawetz on Private Corporations, sec. 1. In *Moore v. Schoppert*, 22 W. Va. 282, 290, the court say: "The relation between a corporation and its several members may, for all practical purposes, be treated as that of trustee and cestui que trust. In contemplation of law, the property and rights of an incorporated company belong to the united association acting in the corporate name, and not to the stockholders. The latter, however, are the real owners; and a technical trust thus arises in their favor, which will be protected and enforced by the courts of equity."

This principle that in equity the corporation is regarded as a trustee for those who are the ultimate substantial beneficiaries of what is held and acquired in the corporate name finds many important illustrations in various departments of the law of corporations. Thus it has been held that a sole stockholder may be treated in equity as the corporation, when the equities of a case so require: *Swift v. Smith*, 65 Md. 428, 57 Am. Rep. 336, 5 Atl. 534; 7 *Thompson on Corporations*, sec. 8403; 4 *Thompson on Corporations*, sec. 5097. The case of *Swift v. Smith* has been criticised, as we think with some reason, so far as it deals with the ⁹⁶⁷ sole stockholder as if he had some title to the property. But so far as it sustains the proposition that between the corporation and the stockholder, the latter is to be recognized as the real beneficiary, and consequently that equitable rights and remedies the benefit whereof would inure solely to the shareholder are to be regarded as exercised for him by the corporation, and not as something belonging to it independently, the decision is in accord with the authorities. It has also been applied frequently where acts have been done or assented to by the whole body of shareholders and attempt has been made to evade liability by conjuring with the corporate name: 1 *Morawetz on Private Corporations*, sec. 262; *Sheldon Hat Blocking Co. v. Eickenmeyer Hat Blocking Machine Co.*, 90 N. Y. 607, 613; *Omaha Hotel Co. v. Wade*, 97 U. S. 13, 23, 24 L. ed. 917. Another case where this principle comes into play is

to be seen in attempts to place property beyond the reach of creditors by fraudulent incorporations. In such cases, courts do not hesitate to look behind the corporation to the real and substantial beneficiaries: *First Nat. Bank of Chicago v. Trebein Co.*, 59 Ohio St. 316, 52 N. E. 834; *Terhune v. Hackensack Sav. Bank*, 45 N. J. Eq. 344, 19 Atl. 377; *Kellogg v. Douglas County Bank*, 58 Kan. 43, 62 Am. St. Rep. 596, 48 Pac. 587; *Lusk v. Riggs*, 65 Neb. 258, 91 N. W. 243. In *First Nat. Bank v. Trebein Co.*, 59 Ohio St. 316, 52 N. E. 834, the court say (page 326): "The fiction by which an ideal legal entity is attributed to a duly formed incorporated company, existing separate and apart from the individuals composing it, is of such general utility and application as frequently to induce the belief that it must be universal, and be in all cases adhered to, although the greatest frauds may thereby be perpetrated under the fiction as a shield. But modern cases, sustained by the best text-writers, confine the fiction to the purposes for which it was adopted." It has likewise been applied to cases of estoppel. Thus Mr. Thompson says: "We may also conclude from the premise that the body of stockholders are in substance the corporation, ⁶⁰⁸ that estoppels are concurrent as between the stockholders and the corporation—in other words, that whatever will estop the stockholders will estop the corporation, and whatever will estop the corporation will estop the stockholders": 4 Thompson on Corporations, sec. 5269. But the commonest instance of application of this principle is in stockholders' suits for mismanagement. Ordinarily, such suits are to be brought in the name of the corporation, at the instance of the corporate authorities. But where, for some reason, this course is not open, the stockholders injured will not be deprived of all remedy, but upon proper showing will be permitted to sue directly by joining the corporation as a defendant. The very basis of these suits is that "courts of equity recognize that the stockholders are ultimately the only beneficiaries": *City of Chicago v. Cameron*, 120 Ill. 447, 457, 11 N. E. 899. Stockholders are allowed to sue in order to obtain redress for such wrongs because "in their effect and essential character they are wrongs to the individual shareholder, inflicted upon his corporate interests by means of the control over those interests secured through the corporate organization and management": *Brewer v. Boston Theater*, 104 Mass. 378. See, also, *State v. Holmes*, 60 Neb. 39, 82 N. W. 109.

It is but another application of the same principle to hold that where no question of title is involved, but some equitable remedy is sought in the corporate name, depending purely upon the doctrines of a court of equity, the court, to prevent abuse and perversion of its doctrines and remedies, will look through the corporation to the real parties in interest, and, if those parties have no standing in equity, will refuse the remedy.

Cases of this kind must be differentiated sharply from those where the proceeding is at law, or where a question of title to the corporate property is involved. There is no question that stockholders, as such, have no title to the corporate property which they can convey or encumber in their own names: *Humphreys v. McKissock*, 140 U. S. 304, 11 Sup. Ct. Rep. 779, 35 L. ed. 473; *Wheelock ~~669~~ v. Moulton*, 15 Vt. 519; *Smith v. Hurd*, 12 Met. (Mass.) 371, 46 Am. Dec. 690; *Parker v. Bethel Hotel Co.*, 96 Tenn. 252, 34 S. W. 209, 31 L. R. A. 706; *Button v. Hoffman*, 61 Wis. 20, 50 Am. Rep. 131, 20 N. W. 667; *Spurlock v. Missouri P. R. Co.*, 90 Mo. 199, 2 S. W. 219. But this, in substance, is only another way of saying that the corporation must act through its proper agents and in the prescribed way: 4 *Thompson on Corporations*, sec. 4476. It is also true, for convenience of legal procedure and to avoid confusion, that restitution or redress, even where the injury has affected the interests of the stockholders, is to be sought primarily through the corporation. But this rule must always yield to the requirements of equity, and is cast aside in view of the fact that the stockholders are the real beneficiaries whenever the usual course is not open: *Brewer v. Boston Theater*, 104 Mass. 378; 4 *Thompson on Corporations*, sec. 4477. Cases like the one at bar are obviously within the same reason. To permit persons to recover through the medium of a court of equity that to which they are not entitled, simply because the nominal recovery is by a distinct person through whom they receive the whole actual and substantial benefit, and that nominal person would, in ordinary cases, as representing beneficiaries having a right to recover, be entitled to relief, is a perversion of equity. It turns principles meant to do justice into rules to be administered strictly without regard to the result. It is contrary to the very genius of equity. When the corporation comes into equity and seeks equitable relief, we ought to look at the substance of the proceeding, and if the bene-

ficiaries of the judgment sought have no standing in equity to recover, we ought not to become befogged by the fiction of corporate individuality, and apply the principles of equity to reach an inequitable result.

Hence, we think the rule to apply to such cases is this: Where a corporation is proceeding at law, or where it is asserting a title to property, or the title to property is involved, the corporation is regarded as a person separate ⁶⁷⁰ and distinct from its stockholders, or any or all of them. But where it is proceeding in equity to assert rights of an equitable nature, or is seeking relief upon rules or principles of equity, the court of equity will not forget that the stockholders are the real and substantial beneficiaries of a recovery, and if the stockholders have no standing in equity, and are not equitably entitled to the remedy sought to be enforced by the corporation in their behalf and for their advantage, the corporation will not be permitted to recover. This rule finds many illustrations in the authorities.

In *Arkansas River Land etc. Co. v. Farmers' Loan etc. Co.*, 13 Colo. 587, 22 Pac. 954, the court said (page 598): "It is true that, for some purposes, a body corporate is sometimes regarded as a legal entity, or a fictitious person having a distinct existence. This fiction is not recognized in equity. The reason is clear. Without organization and members, without officers and stockholders, a corporation is but a naked body. It may be authorized to exercise corporate franchises, but is without means or instrumentalities for such exercise. It is clear, therefore, that a body corporate cannot maintain a suit for equitable relief, except as the representative of the stockholders. It necessarily follows that if the shareholders are without equity they cannot, through the corporate organization, or in its name, obtain relief either for themselves or for the corporation. 'In equity the conception of a corporate entity is used merely as a formula for working out the rights and equities of the real parties in interest, while at law this figurative conception takes the shape of a dogma, and is often applied rigorously, without regard to its true purpose and meaning. In equity the relationship between the shareholders is recognized whenever this becomes necessary to the attainment of justice; at law this relationship is not recognized at all': 1 Morawetz on Private Corporations, 227. At the very outset of the discussion, then, it must be assumed that, in a suit of this nature, the corporation and ⁶⁷¹ the in-

dividual plaintiffs cannot be separated. It follows that, if the individual plaintiffs are not entitled to relief, as counsel admits, the corporation is not, and the judgment dismissing the bill might, very properly, be affirmed without further discussion."

In *Parsons v. Hayes*, 14 Abb. N. C. (N. Y.) 419, 431, the court say: "Again, considering that the fundamental position is, that Catlow became, in fact, shareholder to the amount of all the capital stock, the following was the relation between the parties: The corporation was the holder of the legal title of the property of the corporation, subject to corporate uses. Excepting this legal title for corporate uses, the shareholders were the parties interested in the property, in fact, owning all of it, excepting the legal title, which, as against them, could be used for corporate purposes. The trustees were the statutory corporation. The shareholders were members or a part of the corporation. The corporation held the legal title for the pecuniary benefit of the shareholders having no beneficial or pecuniary benefit in it. On the claims for the plaintiff, the thing possessed is the right of the corporation to have an action against its trustees for damages for their acts, which it is claimed were wrongful to the corporation. This right, if it existed, was held by the same tenure and for the same purposes that other property would be held. The corporation would have a bare title to it for the beneficial use of shareholders. It seems to be evident that the corporation could not claim as damage to its interest what would be damage to the beneficial interest, when the owners of the latter had consented to the so-called injury."

In *Flagler Engraving Machine Co. v. Flagler*, 19 Fed. 468, the promoters and directors of a corporation put in certain patent rights as part of its capital. Afterward by fraudulent practices they induced others to buy stock at extravagant prices. The purchasers got control of the corporation and brought a suit in equity in the name of the corporation against the former directors for ⁶⁷²mismanagement. The court said that the purchasers might have a right to set aside the sales of stock made to them through fraud, but that they could not, by obtaining control of the company, set up an artificial case and recover through the company what was really their loss individually, and not as stockholders.

In *Schilling & Schneider Brewing Co. v. Schneider*, 110 Mo. 83, 19 S. W. 67, a corporation brought suit against cer-

tain stockholders to have shares which they held declared to be the property of the corporation. The court treated the remaining stockholders as the real parties in interest, and expressly referred to them as such, and held that as their predecessors in interest could not have complained of the use of money of the corporation in acquiring the shares, the stockholders in whose interest the suit was brought could not do so in their own name or in that of the corporation.

The only decision which has been cited to the contrary is *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb. 374, 59 N. W. 838. There it was held that a suit for mismanagement was maintainable in equity as to a transaction in which four-fifths of the stockholders participated and the remainder acquiesced. There had been no change in the stockholders. Suit was brought by one who had acquiesced to recover for the benefit of the corporation. It was said that the action was for the benefit of the corporation, which was a distinct person, and was not affected by the circumstance that the stockholder himself was in no position to complain. But a rehearing was granted, if we may judge from the motion and brief of counsel, on this very ground; and upon rehearing this branch of the case was decided upon an entirely different point, namely, that there had been no acquiescence on the part of the complaining stockholder: *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb. 463, 62 N. W. 899. Hence, while there is no express retraction of the statement in the former opinion, we are satisfied that the court intended to recede from it, and that we are not bound ⁶⁷³ thereby. We reach this conclusion the more readily because the proposition that acquiescence of all the stockholders does not preclude the right of the corporation to relief, as advanced in the first opinion, is contrary to the uniform and long-established course of decision in all courts and the understanding of all writers upon the subject: 2 Cook on Corporations, secs. 278, 279; 4 Thompson on Corporations, sec. 5269; 2 Beach on Private Corporations, sec. 887; 1 Morawetz on Private Corporations, secs. 262-264. The adjudications to the same effect as the statements of the text-writers cited are legion.

But it is said the defendant Barber, by reason of his delinquencies, is in no position to ask that the court look behind the corporation to the real and substantial parties in interest. The trial court took this view, saying: "I have

come to the conclusion that, there being no equities in this case in favor of Mr. Barber, it is not the duty of this court to look behind the entity of the corporation." We do not think such a proposition can be maintained. It is not the function of courts of equity to administer punishment. When one person has wronged another in a matter within its jurisdiction, equity will spare no effort to redress the person injured, and will not suffer the wrongdoer to escape restitution to such person through any device or technicality. But this is because of its desire to right wrongs, not because of a desire to punish all wrongdoers. If a wrongdoer deserves to be punished, it does not follow that others are to be enriched at his expense by a court of equity. A plaintiff must recover on the strength of his own case, not on the weakness of the defendant's case. It is his right, not the defendant's wrongdoing, that is the basis of recovery. When it is disclosed that he has no standing in equity, the degree of wrongdoing of the defendant will not avail him. This principle can hardly need demonstration; but abundant illustrations are at hand. For instance, a creditor cannot complain of a fraudulent conveyance by his debtor unless he is injured thereby: *Baldwin v. Burt*, 43 Neb. 245, 61 N. W. 601.

¹⁷⁴ The conduct of the debtor may have been ever so fraudulent. But if it appears that the creditor has not been prejudiced, he acquires no right merely from the evil intent of unconscientious acts of the debtor. Another example may be seen in *Roberts v. Northern P. R. Co.*, 158 U. S. 1, 13, 15 Sup. Ct. Rep. 756, 39 L. ed. 873. In that case a county had granted land to a railroad company without authority, and the grant, under statutes and decisions of the state, was of no effect. Afterward the county sold the same land to an individual. The court said: "Whatever might be the result in a court of law of a contest between these respective grantees of the county, it may well be doubted whether a court of equity could be successfully appealed to by a purchaser from the county of property worth upward of two hundred thousand dollars for a nominal consideration of less than four hundred dollars. If the county had found that it had been overreached in its bargain with the railroad company, or had learned that its grant of these lands was invalid for want of power, and had come into a court of equity, offering to do equity by an offer to return or account for the consideration received, the condition of things would have been

different from what it now is. In such a proceeding the rescission would have inured to the benefit of the taxpayers of the county; but under the present claim, the benefit would go to a private party, who bought with knowledge of the county's previous sale, and who admits in his answer that he secured his own grant for a grossly inadequate consideration because of the fact of such previous sale." In other words, the wrongdoing of the defendant will not blind a court to the fact that the plaintiff may have no standing in equity.

Counsel say that the court will not look through the corporation to the real plaintiffs in order to preserve to Barber the fruits of his wrongdoing. If such were the only purpose, we should agree. But the court will bear in mind the real parties in interest, in order to prevent those parties from misusing equitable rules and remedies ⁶⁷⁵ to obtain relief to which they have no right, and recover back money which they paid out voluntarily upon full consideration, without any deception, and to which they can assert no legal claim whatever.

Turning, now, to those items which involve withdrawal of money and assets of the company by Barber and conversion thereof to his own use, it must be evident that the foregoing discussion does not apply thereto. So far as its title to property and its right to its money and assets are concerned, a clear distinction between the company and its stockholders is always drawn. As we have seen, even if Barber had owned all the stock in the company, he would have had no title to the corporate property, so far as to be able to deal with it in his own rather than in the corporate name. But he was only a majority stockholder. When he withdrew money or assets of the corporation and converted it to his own use, there was as clear a conversion as if the transaction had taken place between natural persons. If he concealed and covered up these transactions by availing himself of the opportunities afforded him as secretary and manager of the company, and they were not discovered until a change in management resulted in an investigation of the books, we see no reason why the company should not recover the sums so misappropriated. We are therefore of opinion that so far as relates to the three thousand dollars converted under pretense of payment to Reynolds and Lovett for services as lobbyists, detailed in the twenty-third finding of the district court, and the conversion of the various collections, de-

tailed in the twenty-ninth finding, the plaintiff should have judgment. We think, likewise, that it ought to recover the interest on the mortgage loan as found in the sixteenth finding. The trial court held that this loan was made in good faith, was duly entered on the books of the company and properly secured and acquiesced in by the company and its officers. But it further found that a large amount of interest on the loan remained unpaid. There is nothing ⁶⁷⁶ in the record to justify any inference, much less a finding, that Barber was not to pay all the interest on this loan. He had charge of the books and accounts of the company, and the evidence shows conclusively that he manipulated them in many ways so as to conceal the true nature of his dealings and the actual condition of the transactions between himself and his employer. As to this item of interest, the case stands the same as any other between debtor and creditor.

The same considerations apply to the money withdrawn on November 20, 1899. Unless the claim for back salary is a just and valid one, this was simply a conversion of that amount of money of the company. It becomes necessary, therefore, in this connection, to pass upon the issues as to Barber's claim for unpaid salary, since the company has filed a cross-appeal from that portion of the decree in which such claim is allowed. Undoubtedly, as a general rule, when parties have contracted for performance of certain services for a definite period at a fixed salary, and the employment continues beyond the period agreed upon, in the absence of any new contract, it will be presumed that the employment continued under the same contract and upon the terms originally fixed: *Wallace v. Floyd*, 29 Pa. St. 184, 72 Am. Dec. 620; *Crane Bros. Mfg. Co. v. Adams*, 142 Ill. 125, 30 N. E. 1030. But this presumption must yield to evidence showing a change of terms: *Hale v. Sheehan*, 41 Neb. 102, 59 N. W. 554; *McCullough Iron Co. v. Carpenter*, 67 Md. 554, 11 Atl. 176; *Commonwealth Ins. Co. v. Crane*, 6 Met. (Mass.) 64. It may be conceded that it would take two to make the new agreement, and that a mere intention on the part of Barber to accept a less sum, or even an express statement by him that he would accept the less sum, would not of itself bind him so to do: *Richard Thompson Co. v. Brook*, 14 N. Y. Supp. 370. In that case certain employ  s of a corporation agreed among themselves to accept a reduction of salary. The corporation was not a party to the agreement, and it was never

communicated to or acted on by the corporation ⁶⁷⁷ or its directors. Such a case is very different from the one at bar. Here, while there was no action by the corporation expressly, the court has found that from the time Barber as general manager reduced his own salary, along with the salaries of other employés, till the time he ceased to be an officer of the company, he drew his salary from time to time substantially on the basis of the reduction; and the evidence is clear and convincing that he took the money withdrawn in full satisfaction of his claim for salary, and had no thought of claiming more until his right to withdraw the \$2,200 was challenged after the new management took charge. We think these circumstances are sufficient to show that the company relied on his voluntary action in reducing his own salary, and took no express action thereon, because none was necessary, and that it was understood by both parties that his salary was that which he had voluntarily fixed upon. In *Shade v. Sisson Mill & Lumber Co.*, 115 Cal. 357, 47 Pac. 135, the corporation rendered statements monthly to an employé, in which he was credited with a less salary a month than he should have received. It was held that the employé, by acquiescence in these statements so rendered him, was estopped to claim afterward a salary in excess of that for which he was given credit. So long as Barber's reduction of his own salary was carried out by himself for a long series of years, and even at the time when he withdrew the \$2,200 he did not claim the right to withdraw any such sums as would be due to him if his present claims were allowed, we see no ground whatever on which to sustain the judgment in his favor in this behalf. Hence we are of opinion that the company should recover the item of \$3,000 converted on April 17, 1895, the item of \$237.37 for collections unaccounted for, the unpaid interest on the mortgage loan, amounting at the date of the decree in the lower court to \$1,510, and the item of \$2,200 withdrawn on November 20, 1899.

It is therefore recommended that the decree of the ⁶⁷⁸ district court be reversed, and the cause remanded with directions to enter a new decree in favor of the plaintiff and against the defendant Barber for the several sums last above stated and interest thereon at the rate by law provided. We further recommend that each party pay his own costs in this court.

Barnes and Oldham, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion the judgment of the district court is reversed, and the cause is remanded with directions to enter a new judgment in favor of the plaintiff and against the defendant Barber in accordance with said opinion. It is further ordered that each party pay his own costs in this court.

Actions by Stockholders on behalf of their corporations are discussed in the monographic note to *Johns v. McLester*, 97 Am. St. Rep. 29-52. At pages 50-52 will be found a consideration of who are stockholders for purposes of such a suit. The supreme court of New Mexico has quite recently decided that a stockholder cannot complain of illegal salaries paid directors prior to his purchase of stock in the company: *Rankin v. Southwestern Brewery etc. Co.* (N. Mex.), 73 Pac. 614. See, too, *Alexander v. Searcy*, 81 Ga. 536, 12 Am. St. Rep. 337, where the general doctrine is announced that, by the weight of authority, a person who did not own stock at the time of the transaction complained of cannot maintain an action to have it declared illegal. Compare with these cases, however, the decision of *Forrester v. Butte etc. Consol. Copper etc. Co.*, 21 Mont. 565, 55 Pac. 353.

CASES
IN THE
SUPREME COURT
OF
NEW JERSEY.

STATE v. JAGGERS.

[71 N. J. L. 281, 58 Atl. 1014.]

CRIMINAL LAW—Evidence of Attempted Suicide.—Evidence is admissible to prove that the accused, while in custody, charged with the crime for which he is on trial, attempted to take his own life. (p. 747.)

CRIMINAL LAW—Review of Motion to Discharge.—The provision of the New Jersey statutes for the review of a denial of a motion to discharge the defendant in a criminal trial, or to direct a verdict of not guilty, at the close of the state's evidence, brings into review only the question whether, upon the evidence as it stood when the motion was made, there was a case for the jury. (p. 748.)

MURDER IN FIRST DEGREE—Necessity of Motive.—It is not error to instruct the jury that willful, deliberate, and premeditated killing is murder in the first degree, without proof, on the part of the prosecution, of a special motive for the killing. (p. 748.)

Theodore Simonson and Lewis J. Martin, for the plaintiff in error.

Henry Huston, for the defendant in error.

282 **MAGIE, C.** This writ of error was directed to the Sussex county oyer and terminer under the provisions of section 134 of the revised criminal procedure act of 1898: Pamph. Laws, p. 866. It brings into review the conviction of the plaintiff in error of the crime of murder in the first degree.

The cause has been argued as presented by bills of exception and assignment of errors, and also by a return of the entire record of the proceedings had upon the trial of plaintiff

in error, and causes specified thereon, pursuant to sections 136 and 137 of the criminal procedure act, *ubi supra*.

The assignments of error and the causes specified present substantially the same questions, and they will be considered in the order presented by the assignments of error.

The first and second assignments of error may be considered together. They are directed to the admission of evidence alleged to justify the inference that plaintiff in error, while confined in the county jail upon the charge in the indictment, attempted to take his own life. It has always been recognized that the flight of one accused of crime, or his escape from custody under a criminal charge, may be given in evidence upon the trial of an indictment for the crime charged. Such evidence is deemed, when unexplained, to raise some presumption of guilt, akin to the presumptions deemed to arise upon the fabrication of false evidence or the suppression of true evidence: Wharton on Criminal Practice, sec. 724; Wills on Circumstantial Evidence, sec. 78 et seq. The principle upon which such evidence is admitted against an accused person we deem applicable to evidence that the accused, when in custody charged with the crime, attempted to take his own life and thereby escape further prosecution. Upon this principle the evidence objected to in this case was plainly admissible.

²⁸³ The third assignment is based on an exception to the refusal of the trial court to discharge defendant, or to direct a verdict of not guilty, at the close of the state's evidence. This motion was addressed to the discretion of the court, and the action of the court is not reviewable on error. But we are required by the provisions of section 136 of the criminal procedure act of 1898 (*ubi supra*) to consider whether the plaintiff in error, who brings up the case under that section has suffered manifest wrong or injury in the denial of any matter by the trial court, which was a matter of discretion. This question is presented by plaintiff in error among the causes specified and relied on for relief or reversal under section 137.

When this court pronounced its opinion in *Kohl v. State*, 59 N. J. L. 445, 36 Atl. 931, 37 Atl. 73, there was in force the act of 1894 (Gen. Stats., p. 1154, sec. 170), which required us to determine whether plaintiff in error had suffered manifest wrong and injury "upon the evidence adduced at the trial." This requirement was held to bring into review the

evidence before the jury and to require reversal if that evidence would not justify their verdict.

The requirement which was operative in that case has been eliminated from section 136, above cited, and we are no longer required to review the whole evidence. The provision for review of a denial of a motion to discharge or to direct a verdict of not guilty, which is addressed to the discretion of the court, brings into review only the question whether, upon the evidence as it stood when the motion was made, there was a case for the jury. An examination of the evidence returned with this writ satisfies us that it was sufficient to justify and to require its submission to the jury. The action of the court under such circumstances did no manifest wrong or injury to plaintiff in error.

It is next urged that there was error in the charge of the trial court to the effect that the state was not required to prove motive for the killing. This is presented by an assignment of error based on a general exception to the charge and ²⁻⁴ by a cause specified under section 137 of the criminal procedure act. Under either aspect the contention brings into review the pertinent context and general statements of the charge on the subject: *State v. Zdanowicz*, 69 N. J. L. 619, 55 Atl. 743. In the immediate connection the trial judge charged that "willful, deliberate and premeditated killing, without any motive appearing at all, is murder in the first degree. The jury does not have to find that that sort of killing was done for some purpose if they find the existence of the requisites required." From this it is clear that the court designed to refer to some special motive other than that to be inferred from a willful and deliberate killing, when in the same connection it charged that "motive may be a circumstance giving point and direction to other circumstances but which of itself is no part of the crime." We think there was no error in the whole instruction and that no wrong or injury was thereby done to plaintiff in error.

The remaining objections seek to bring into review the charge and the verdict as being contrary to the weight of the evidence. The law now in force, as has been stated, does not require or permit this review.

As no error appears, and as no wrong or injury done to plaintiff in error has been manifested the judgment below must be affirmed.

The Flight of a Person Accused of Crime is admissible in evidence on his subsequent trial: See *State v. Poe*, 123 Iowa, 307, 101 Am. St. Rep. 307, and cases cited in the cross-reference note thereto.

Evidence of Motive or want of motive in prosecutions for murder is discussed in the recent case of *Cupps v. State*, 120 Wis. 504, 102 Am. St. Rep. 996.

ALBRIGHT v. SUSSEX COUNTY LAKE AND PARK COMMISSION.

[71 N. J. L. 303, 57 Atl. 398.]

EMINENT DOMAIN—Public Use a Judicial Question.—Whether the end sought to be attained by taking private property is a public use is a question to be determined by the courts. (p. 750.)

EMINENT DOMAIN—Public Use, What is.—In order that a use may be public, it is not essential that the whole community should be able directly to participate in it, but it is essential that the utility should in a substantial measure concern the public. (p. 750.)

EMINENT DOMAIN—Fishing Rights.—The power of eminent domain cannot be exercised to acquire a right to fish in the fresh-water lakes of New Jersey. (p. 752.)

C. D. Thompson, for the plaintiff in error.

Griggs & Harding, for the defendant in error.

³⁰³ DIXON, J. "An act to acquire rights of fishing common to all in fresh-water lakes in certain counties, to acquire lands adjoining thereto for public use and enjoyment therewith, and to regulate the same" (Pamph. Laws 1901, p. 333), declares that in any county of the state wherein are fresh-water lakes, having an area of water surface exceeding one hundred acres, a commission may be appointed which shall have power to take, in fee or otherwise, by purchase, gift, devise, or eminent domain, and to maintain and make available to the public the right of fishing in such lakes. Under this statute a commission has been appointed in Sussex county and is attempting to take, by eminent domain, the right of fishing in Swartswood lake, which belongs to the plaintiff in error. The ³⁰⁴ plaintiff resists this attempt upon the ground mainly that the power of eminent domain cannot constitutionally be exercised for the stated purpose.

In olden times the eminent domain seems to have been employed only in case of state necessity, and there is no instance of its exercise in New Jersey prior to 1776, except

for highways. But, undoubtedly, its scope has been much enlarged in recent times to keep pace with the advance in social conditions: *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 756. Still, even as late as 1852, Chief Justice Green spoke of the objects for which the state exercises this power as being few in number: *Smith v. Applegate*, 23 N. J. L. 357.

Under our state constitution (article 1, paragraph 16) private property can be taken only for public use. Whether the end sought to be attained by the taking is a public use is a question to be determined by the court, although it is said there is a presumption in favor of a use declared by the legislature to be public: *Mills on Eminent Domain*, sec. 10; *Lewis on Eminent Domain*, sec. 158; *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 756; *Olmstead v. Morris Aqueduct*, 47 N. J. L. 311; *National Docks R. R. Co. v. Central R. R. Co.*, 32 N. J. Eq. 755. The language of the constitution does not authorize property to be taken "for public enjoyment" or "for public purposes," or, generally, "for the public." Its expression is "for public use," which implies an idea of utility, of usefulness, not necessarily inherent in the other phrases mentioned.

The duty is therefore devolved upon this court to determine whether the object to be subserved by the condemnation of the right to fish in the plaintiff's lake is a public use.

In order that a use may be public, it is not essential that the whole community should be able directly to participate in it. Thus, a free school for children is for a public use, although only a fraction of the community can attend it. But it is essential that the utility should in a substantial measure concern the public, as, for example, the education of the young concerns the community.

³⁰⁵ The right to be condemned under this statute is merely the right to fish. Such a right is, in the ancient legal French, called a right profit a prendre, a right so peculiarly for personal enjoyment that it is incapable of being acquired by the general public, either by custom (*Cobb v. Davenport*, 32 N. J. L. 369) or by dedication: *Cobb v. Davenport*, 33 N. J. L. 223, 97 Am. Dec. 718; *Albright v. Cortright*, 64 N. J. L. 330, 81 Am. St. Rep. 504, 45 Atl. 634, 48 L. R. A. 616. No doubt there is a public right of fishing recognized by municipal law; it exists in the waters of the ocean along the coast and in the arms of the sea, as far as the tide ebbs and flows.

But this right differs from that now under consideration in several important respects. In the first place, it is a mere incident of the public ownership of the public waters, while the object of the present proceedings is to sever the right of fishing from the title to the lake and give it an independent existence. If the legislature had provided for the condemnation of the lake, so as to confer upon the public the right of resorting thereto for all purposes to which it is adapted, the condemnation might then have been supported on the precedents which find a public use in parks, and the right to fish would have passed as an incident of the public title. But under this statute the ownership of the lake is to remain private. In the next place, the natural supply of fish in the public waters is practically inexhaustible, if the right to fish therein be subjected to such regulations as will reasonably guard it for the free enjoyment of the general public. But the natural supply of fish in the inland lakes of New Jersey is so small that if the right to catch fish therein were exercised by persons sufficiently numerous to be deemed the public, the supply would soon come to an end. Lastly, fishing in the public waters has from time immemorial constituted an industry fostered by law for the supply of the general market, while fishing in these private waters has been and can be only for individual amusement and gain. We think, therefore, that for present purposes there is no substantial resemblance between the common right to fish in public waters and the right now in question.

306 I turn, then, to the consideration of the matter in view of the rules which have been laid down as aids in determining what is a public use within the meaning of this provision of the constitution. A definition of the phrase has not, I think, been judicially attempted, but among the statements of the doctrine to be found in the books that of Professor Cooley seems most likely to subserve the general welfare for which the constitutional power is delegated, and at the same time to protect private property, which is equally a ward of our constitution. He says (Cooley's *Constitutional Limitations*, 553): "The reason of the case and the settled practice of free governments must be our guides in determining what is, or is not, to be regarded as a public use, and that only can be considered such where the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience or

welfare which, on account of their peculiar character, and the difficulty of making provision for them otherwise, it is alike proper, useful and needful for the government to provide."

Applying this as the test, the present statute cannot be supported.

The right to be enjoyed under this statute is necessarily the right of each individual who exercises it to abstract from what is designed by the statute to be a common stock such portion as he can secure, and to appropriate that to his own benefit. This is for private, rather than public, advantage. The statute does, indeed, contemplate the acquisition of the common stock by public agents, but they are to acquire it for private benefit. If the common stock thus to be acquired were capable of supplying an unlimited number of persons, then they might be deemed, in a constitutional sense, the public; but, as already stated, the stock would be quite inadequate for such a demand. The fact that a small supply is tendered free to the first takers does not show that the public can enjoy it.

But not only does the constitution require that the property taken should be for the public; it is also necessary that ³⁰⁷ it should be for use. The chief purpose in the enjoyment of the property must be utility. But it cannot be doubted that the main object of the present statute is to furnish a means of amusement or sport to the few persons who have the inclination and leisure for such pastime. The public utility to be subserved by such indulgence is imperceptible. "The reason of the case," therefore, does not seem to warrant the conclusion that the proposed taking is "for public use."

When we look to "the settled practice of free governments," we find no parallel for the present enterprise. There are many instances of the exercise of eminent domain for the purpose of furnishing facilities to be enjoyed by individuals. Such are parks, highways, ferries, railways, telegraph and telephone lines, etc. But these differ from the right now under consideration in important respects—first, they are essentially useful; secondly, they are used by great numbers of people; and thirdly, their use by the individual abstracts nothing appreciable from the common opportunity of use.

There are also some instances of the exercise of the power in order to afford facilities for private enjoyment where it is intended that each individual shall abstract a portion from

the common stock. An example appears in the condemnation of water for domestic purposes in populous neighborhoods. But here, also, marked differences from the present scheme are observable. The end sought is utility of the greatest urgency, and the natural supply is so abundant that private abstraction cannot exhaust it. In all such instances these characteristics will be found in substantial measure to make them of use to the public. We have found no instance of the exercise of the power in order to afford a means of pastime capable of being enjoyed by only a few persons.

There is another consideration deserving of some weight. The constitution requires that on taking private property for public use just compensation should be made to the owner, and this implies that the property taken shall be reasonably capable of just estimation. The lake itself could, no doubt, be fairly appraised, as could, probably, the right of any ³⁰⁸ individual or of any specified number of individuals to fish therein. But I know of no criterion by which the right of an unlimited number of persons to spend their time upon the lake for the purpose of catching fish could be valued. It might be that the appraisers would evade the difficulty by awarding to the owner the full value of the lake, but in that case justice would require that the lake itself, and not a mere incidental right in it, should become public property.

We think, therefore, that neither in the reason of the case nor in the settled practice of free governments is there legal support for the proposed condemnation.

The power of eminent domain is one of the extreme powers of government. When employed for the purpose of enabling it to perform its own functions its scope is limited only by the wisdom of the legislature. But when it is exerted with the view of furnishing facilities to private individuals, it so easily runs into the taking of one man's property to give it to others, in disregard of that right which the constitution declares to be inalienable—the right of protecting property—that it behooves the courts, where private owners can be fully heard in their own behalf, to take care that constitutional rights are guarded and constitutional limitations observed.

On full consideration, we are constrained to adjudge that the present proceedings are designed to take the plaintiff's property for other than the public use, and are therefore illegal.

The judgment of the supreme court should be reversed and a judgment entered setting aside the proceedings taken under the statute.

Uses for Which the Power of Eminent Domain cannot be exercised is discussed at length in the recent monographic note to *Zircle v. Southern Ry. Co.*, 102 Am. St. Rep. 809-839.

The Existence of a Public Use as a question for the courts is the subject of an extended note to *Chicago etc. Ry. Co. v. Morehouse*, 88 Am. St. Rep. 926-946.

VAN CLEVE v. PASSAIC VALLEY SEWERAGE COMMISSIONERS.

[71 N. J. L. 574, 60 Atl. 214.]

CONSTITUTIONAL LAW—Local Act Respecting Public Improvement.—The New Jersey statute of April 22, 1903, which provides a legislative scheme to relieve the Passaic Valley sewerage district by requiring all the sewerage thereof to be discharged into New York bay through a system of main, trunk, and outlet sewers to be constructed by commissioners of executive appointment, is a local law for the prosecution of a public enterprise, and it is not a law to regulate the internal affairs of municipalities, but its effect is to repeal all prior legislation inconsistent with its provisions. (pp. 757, 758.)

CONSTITUTIONAL LAW—Delegation of Power of Taxation.—The legislature has no power to delegate to another body, having no governmental functions, the authority to determine in its judgment and discretion the amount to be raised by taxation. (pp. 759, 760.)

CONSTITUTIONAL LAW—Delegation of Power of Taxation. The legislature can delegate the taxing power only to political districts of the state, to be exercised within their respective limits; and some power of local self-government is essential to every political district. (p. 762.)

CONSTITUTIONAL LAW—Delegation of Power to Tax.—Where the legislature delegates the power to determine the amount of a tax to be levied in a district, such district must be coterminous with, and not extend beyond the limits of, a district to which some right of self-government is given. (p. 763.)

CONSTITUTIONAL LAW—Local Improvement—Taxation.—The provisions of the New Jersey act of April 22, 1903, authorizing the levy of a tax, for public improvements to relieve the Passaic Valley sewerage district from pollution, on all people and property within an area not coterminous with the Passaic Valley district, for an amount to be determined by an executive commission, is unconstitutional, since it contemplates a delegation of the power of taxation, and the sewerage district is not a political district of the state, and, if it were, could not be invested with power to levy a tax beyond its own limits. (p. 763.)

William B. Gourley, Thomas C. Simonton, John W. Griggs and Vivian M. Lewis, for the plaintiffs in error.

Joseph Coult, Chandler W. Riker and Richard V. Lindabury, for the defendant in error.

⁵⁷⁵ GARRISON, J. The writ of certiorari in this case brought up two resolutions passed by the Passaic Valley Sewerage Commissioners on the seventh day of July, A. D. 1903, one estimating the cost and expense of the whole work to be undertaken, provided and constructed by the said commissioners under and by authority of the law of this state, at the sum of nine million dollars, and another resolution by which the said commissioners provided for an issue of its corporate bonds to the amount of one million dollars, in order to provide money for the payment of the costs and expenses to be incurred by said board for the purchase of lands, rights ⁵⁷⁶ or interest in lands, and the construction of disposal works, power stations, sewers, drains and other works, and the expenses connected therewith, including interest during the construction, and directing that said bonds be sold at par and that notice calling for bids be published and presented at the office of said commissioners on the eighteenth day of August, A. D. 1903.

The reasons filed in the supreme court raise constitutional questions affecting the validity of an act of the legislature, approved April 22, 1903: Pamph. Laws, p. 777. The judgment of the supreme court dismissed the writ upon grounds that are stated in the opinion delivered by Mr. Justice Pitney (71 N. J. L. 183).

The title of the statute under review is, "An act to relieve from pollution the rivers and streams within the Passaic Valley sewerage district, established and defined by an act of the legislature, entitled 'An act to create a sewerage district to be called the Passaic Valley sewerage district,' approved March twenty-seventh, one thousand nine hundred and two, and for this purpose establishing therefor a district board of commissioners, defining its powers and duties, and providing for the appointment, terms of office, duties and compensation of such commissioners, and further providing for the raising, collecting and expenditure of the necessary moneys." The provisions of this act are set forth at length in the opinion delivered by Mr. Justice Pitney, in the supreme court.

Amidst a mass of details, three features of this legislation stand out prominently, namely: 1. What the legislature proposed to accomplish; 2. How it proposed to accomplish ⁵⁷⁷ it; and 3. How it proposed to pay for it. As succinctly stated in the title of the act, these three purposes are: 1. To relieve from pollution the rivers and streams within the Passaic Valley sewerage district; 2. To establish and empower a board of five commissioners for this purpose; 3. To raise the necessary moneys, which, by reference, to the body of the act, is to be by a general tax imposed upon a circumscribed area.

The validity of this statute in each of these respects is challenged by the prosecutors upon constitutional grounds.

For the accomplishment of the first of these objects, which is the upshot of the entire scheme, the legislature has put forward its police power to the extent of requiring that all the sewage of a designated locality, which had previously been erected into a sewerage district, should be discharged into New York bay through a system of main, trunk and outlet sewers and their appurtenances. The prosecutors deny in limine the right of the legislature to engage directly in such an undertaking, upon the ground that the disposal of its sewage is an internal affair of each of the towns included in the legislative scheme, and hence cannot be regulated ab extra by force of a law that is necessarily local. If the statute under review concerned itself with the internal sewerage of each or of any of the municipalities involved, prescribing rules for its collection and transmission, and substituting an alien commission to carry its requirements into effect, a different question would be presented. The statute, however, is not aimed at or addressed to the sewerage problem as it exists within any municipality. On the contrary, it takes up that problem at the precise point where the municipality normally, if not necessarily, lays it down. So that the only requirement to be found in the act that savors substantially of internal regulation is that which provides that sewers that do or may discharge into streams shall be connectible and connected with the external sewerage system established by the act. It is claimed that this requirement, as well as certain provisions for the temporary disturbance of highways and for their relocation with municipal consent, constitute regulations of ⁵⁷⁸ the internal affairs of towns of the sort that the legislature is forbidden to enact by local laws. Obviously, the act

is local, as from its nature it must be, but it is equally obvious that the purpose of the act is a public enterprise, as distinct from a municipal affair, and that the regulations referred to are purely incidental to such extra-municipal scheme. It is not, moreover, true that every public utility that exists in whole or in part within the geographical boundaries of a municipality is its internal affair in the same sense that every governmental function that has been committed to it is one of its internal affairs. So that it may well be, and often is, the case that the special license of municipalities to regulate instruments of public utility within their confines may coexist with the general legislative power to direct the larger scheme of which such instruments are a part. In such case, to direct is to repeal if the authority that rests in prior delegation be inconsistent with the later expression of the superior will. Even governmental functions may, by implication, be thus repealed; a fortiori may those that are geographical rather than governmental. Assuming such repealer to be necessary, that requirement is met by the statute under review, so far as its main purpose is concerned. To relieve a river from pollution, to construct and maintain for this purpose sewers running to the seaboard, or to other point of output, and to carry away in such sewers all that would otherwise pollute such river, is clearly within the power of the central legislative body; and inasmuch as such scheme would be futile if each municipality may set up an authority previously delegated to it in opposition to such legislative purpose, by refusing to connect its internal sewerage system with that of the larger scheme, it follows by necessary implication that so much of such delegated authority as could be used to this end is withdrawn by the very act of requiring that such connections be made. It is the familiar case of repeal by necessary implication. To hold otherwise is to decide that the constitution has unwittingly placed the agent above the principal, the delegated authority of the smallest borough above the legislative repository of the sovereignty of the state. Moreover, ⁵⁷⁹ the act in question, in its twenty-fourth section, contains an express repealer of all acts and parts of acts inconsistent with its provisions. I have, therefore, no hesitation in concluding that the legislature may directly engage in the main purpose of this act without unconstitutional infringement of the authority vested in any of the municipalities involved.

The second inquiry is that touching the manner in which it is proposed that this purpose be accomplished, namely, by a commission to be appointed by the governor of the state. The objection urged against the employment by the legislature of this instrumentality for effectuating its will is that it is in contravention of that clause of the constitution (article 4, section 7, subdivision 11) that prohibits the legislature from passing local or special laws appointing commissions to regulate municipal affairs. The commissioners appointed under this legislation, though incorporated, are not constituted a municipal body, and, as has already been said, the work committed to them is of a public, as distinguished from a municipal, character. Observing this distinction, which I take to be what the framers of the constitution had in mind, I find in this objection no overstepping by the legislature of any constitutional barrier.

Thus far the conclusions reached are in practical accord with those upon which the judgment of the supreme court was based, and result in sustaining the power of the legislature to engage directly in the undertaking of the purification of the Passaic Valley sewerage district, including its right to put forth directly for this purpose its police powers, and to exercise such powers through a board of commissioners selected and appointed in the manner provided by this act.

The remaining inquiry concerns the provisions of the act for raising the money to be expended by such commissioners in the course of such undertaking.

Shortly stated, the fiscal scheme of the act is that the expense incident to construction, which shall not exceed nine million dollars, is to be paid out of the proceeds of the sale of bonds, the principal of which, through the medium of a sinking fund, the interest currently accruing thereon, and all other ⁵⁸⁰ indebtedness incident to construction "shall be," in the language of the act, "a charge upon all persons and property in the municipalities or taxing districts lying in whole or in part within said sewerage district." For the objects thus mentioned the commission is empowered each year to determine the amount of money to be raised and to apportion the same among the respective taxing districts comprised in the above-described taxation area, in the ratio that the ratables of each taxing district within such sewerage district bear to the total ratables of the entire sewerage district. The amount so apportioned is to be each year assessed

upon all persons and property within the taxation area, as other general taxes are, and to be in like manner collected. The amount required for annual maintenance shall be assessed and collected in the same manner, except that the ratio of assessment is based upon the amount of sewage discharged into the sewers of the sewerage district by each municipality or taxing district.

The significant features of this taxing scheme are: 1. That the amount to be raised is committed solely to the commissioners, within the limit of nine million dollars, in the matter of construction, and without any limit in the matter of maintenance; 2. That the tax is laid upon a taxation area that is not coterminous with the sewerage district established by the legislature; and 3. That neither the taxation area nor the sewerage district is a political division of the state, or invested with any governmental function.

If the first of these features of the act is a grant to the commissioners of "the authority to determine in its judgment or discretion the amount to be raised by taxation," the act is unconstitutional under the decision of this court in the case of *Township of Bernards v. Allen*, 61 N. J. L. 228, 39 Atl. 716.

In that case commissioners appointed by the governor under legislative sanction had, in pursuance of the authority conferred upon them by their appointment, determined the amount of taxes to be raised and assessed in a township for township purposes at a sum that did not exceed one and one-fourth per cent on the ratables, which was the limit imposed by the legislature, beyond which the commissioners could ⁵⁸¹ not go. The case was argued and decided in the supreme court, and was argued upon error in this court, as one of statutory construction, without reference to the question whether the statute itself was not an unconstitutional grant of the taxing power. At the ensuing term this court, of its own motion, directed the case to be reargued upon this constitutional point, which was done. The reported decision, therefore, is the considerate determination of this court upon that precise question. The act was held to be unconstitutional for the reason stated, upon the ground that the authority given to the commissioners to determine the amount to be raised by taxation was in effect a grant of the power to tax that was controlled by the fundamental principles touching that subject.

The reasoning of the opinion delivered by Mr. Justice Depue was this: Every system of taxation consists of two parts—the elements that enter into the imposition of the tax and the steps taken for its assessment and collection. The former is a legislative function, conserved by constitutional prescriptions; the other is mere machinery. The latter may be delegated to other than governmental agencies; not so the former. Matters of computation, appraisement, adjustment and such like, involving mere certainty of detail, follow the delegable power, in illustration of which the learned justice instanced the taxation of railroads and canals, the equalization of taxes and the reassessment of benefits for improvements; but no element that enters essentially into the tax itself may be so delegated (citing *State v. Sickles*, 24 N. J. L. 125; *State v. Koster*, 38 N. J. L. 308, and *Munday v. City of Rahway*, 43 N. J. L. 338), and concluding with this statement of the result reached: "These decisions are precedents in our own courts, affirming the want of power in the legislative body in which the power of taxation is vested to delegate the authority to others to determine in its judgment or discretion the amount to be raised by taxation."

That the case then before this court was identical in principle with the present case, and not distinguishable upon its facts, must be apparent. The body to which the authority is ⁵⁸² delegated, namely, an executive commission, is the same; the delegation of the power to determine, in its judgment or discretion, the amount to be raised by taxation, is the same; the imposition of a limit beyond which the commission could not go is the same, the only difference being that in that case it was one and one-fourth per cent of the ratables, and in this the limit is nine million dollars for construction and no limit for maintenance. In these controlling particulars, therefore, the one act is, in effect, the repetition of the other. If it be urged that the determination of the amount of tax to be levied is the only element of the taxing power that is granted to the commissioners in the present case, whereas that feature, with others, existed in the decided case, the answer is that such feature was precisely the one singled out in the earlier case for exegesis and decision, and that a single overstepping of a constitutional prescription is, in its effect upon legislation, as fatal as a multiplication of like transgressions. That the amount to be raised by taxation is to be based upon the expense incurred by the commission in construction and

maintenance, does not render the determination of the amount of taxation any less a matter that is committed to the judgment and discretion of the commissioners, since the amount of such expense rests wholly with the commission up to the limit of nine million dollars, which, as has been shown, does not distinguish this case from the case cited, and in the matter of maintenance no limit whatsoever is imposed upon the judgment or discretion of the commissioners. Moreover, any indebtedness incurred in either of these ways is expressly charged upon all persons and property within the taxation area, and, under such circumstances, the grant of a discretionary power to incur indebtedness is a grant of a discretionary power to tax. The query of the court below, whether the doctrine of *Bernards Township v. Allen* would be applied to a taxing district established for purposes not municipal in character, can have but one answer; for, if the delegation be held to be illicit when the money raised by taxation is to be returned to the municipality from which it was exacted, a fortiori, it will be so held when such tax is to be diverted ⁵⁸³ to extra-municipal purposes. Moreover, the decision of *Bernards Township v. Allen* turned upon the delegation of legislative power, and not upon the derogation from municipal authority.

Upon the authority of the case cited, this court is unequivocally committed to the doctrine that the legislature of this state, in which the governmental power of taxation resides, does not possess the power to delegate to another body, having no governmental functions, the authority to determine, in its judgment or discretion, the amount to be raised by taxation, to which obviously must be added that such authority is in effect so delegated if such body may be empowered to levy taxes to the amount of an indebtedness to be incurred by it in its judgment or discretion.

Upon the authority of *Township of Bernards v. Allen*, this provision of the statute under review renders the act invalid.

The two other significant features of the act are: 1. That it authorizes the imposition of a tax for the purification of a sewerage district established by the legislature upon an area that is greater in extent than such district; and 2. That neither such taxation area nor such sewerage district are political divisions of this state. These features of the act may be conveniently considered together.

The decisions of this state establish two propositions touching the delegation of the power of general taxation: 1. That the legislature can delegate the taxing power only to political districts of the state, to be exercised within their respective limits; and 2. That some power of local self-government is essential to every political district: *Tidewater Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634; *State v. City of Newark*, 37 N. J. L. 415, 18 Am. Rep. 729; *State v. Fuller*, 39 N. J. L. 576; *Lydecker v. Englewood Tp.*, 41 N. J. L. 154; *Morgan v. Comptroller of Elizabeth*, 44 N. J. L. 571; *Kean v. Driggs Drainage Co.*, 45 N. J. L. 91; *Auryansen v. Hackensack Improvement Commission*, 45 N. J. L. 113; *Taylor v. Smith*, 50 N. J. L. 101, 11 Atl. 321; *Peck v. Tp. of Raritan*, 52 N. J. L. 319, 19 Atl. 610; *Carter v. Wade*, 59 N. J. L. 119, 35 Atl. 649; *Smith v. Howell*, 60 N. J. L. 384, 38 Atl. 180.

⁵⁸⁴ The cases cited sustain each of the above propositions. The language of their decisions is unequivocal. "Nothing has been better settled in this state," said Mr. Justice Magie, in *Taylor v. Smith*, "than that the legislature has no authority to delegate the power of general taxation over persons or property except to political divisions or corporations of the state, and that for the sole purpose of enabling them to exercise the powers of government conferred upon them within their locality."

"It must be regarded as settled in this state," is the language of Mr. Justice Dixon, in *Lydecker v. Englewood*, "that the legislature has no power to impose a tax upon any territory narrower in bounds than the political district of which it is a part."

"I think the true rule deducible from sound reason," said Mr. Justice Van Syckel, in the opinion adopted by this court in *Baldwin v. Fuller*, "is that legitimate taxation is limited to the imposing of burdens like those in question, as far as they are for the public benefit, upon the persons or property within the political district possessing powers of local government, so that the exactions are distributed over the entire territory upon the rule of uniformity."

The circumstance that these decisions were pronounced in cases where the taxation area was in fact narrower in extent than the political district has no controlling significance, in view of the principle that underlies the ground of decision. That principle, which is, in effect, a paraphrase of the maxim that taxation and representation go together, requires that

the district to be taxed shall be coterminous with a district to which some right of local self-government is given, and hence is, from its nature, equally applicable to a case in which the grant of governmental power does not extend over the whole of the area covered by the delegated power of taxation. In every such case, so much of the area of taxation as lies outside the political district would inevitably present the reprobated situation, in that it would be taxed by an agency with which it had no political relationship.

⁵⁸⁵ Deeming this principle to be firmly embedded in our jurisprudence, its application to the case before us rests in no uncertainty. The area selected for taxation is not a political district of the state. The sewerage district is not such a district, and, if it were, the area over which the power of taxation is extended by the act is not coincident with it. The act therefore runs counter, in both particulars, to the fundamental doctrine of taxation established by our courts. It is therefore invalid.

Having stated the considerations that lead me to the conclusion that the act before us is invalid because of its fiscal provision, I shall, to avoid misapprehension, add that nothing in this opinion is intended to imply a lack of power in the legislature to effectuate the object expressed in this act by means that are in harmony with the fundamental principles of taxation, illustrated by the decisions I have cited. If, for instance, as was suggested by the arguments before us, powers adequate to the execution of the legislative scheme of drainage were conferred upon the entire area to be taxed, and duties respecting the exercise of such powers constitutionally imposed in such manner as indicated that their exercise was compulsory, a question not touched upon in this opinion would be presented.

Inasmuch, however, as that question is not before us for decision, it is not before us for discussion.

My conclusion is that the judgment of the supreme court should be reversed, and that the resolutions of the board of commissioners should be set aside.

The Legislature may Delegate the power of taxation: Whiting v. West Point, 88 Va. 905, 29 Am. St. Rep. 750. But it cannot authorize a municipality to tax for its own local purposes property lying beyond its corporate limits: See the note to Mayor etc. of Baltimore v. State, 74 Am. Dec. 594. As to the power to delegate authority to fix the amount of a tax, see State v. Mayor etc. of Des Moines, 103 Iowa, 76, 64 Am. St. Rep. 157; State v. Ashbrook, 154 Mo. 375, 77 Am. St. Rep. 765.

FRIEDMAN v. SNARE & TRIEST COMPANY.

[71 N. J. L. 605, 61 Atl. 401.]

PUBLIC STREETS—Title of Abutting Owners.—The title and legal possession of the owner or occupant of land abutting on a street is presumed to extend to the middle thereof, subject only to the public easement. (p. 766.)

PUBLIC STREETS—Right to Place Building Material Therein. Land owners have the right to deposit in the street building materials required in the improvement of their abutting property. This right, however, must be reasonably exercised, and is subject to regulation in the public interest. (pp. 767, 768.)

PUBLIC STREETS—Placing Dangerous Building Materials Therein.—If the owner of property abutting on a street, or his agent standing in his right, deposits therein building materials attractive to children as a place to play or rest, he owes no duty to so arrange the materials that they will be safe for a child using them as a playground or resting place. (p. 770.)

Cowles & Carey and Hector M. Hitchings, for the plaintiff in error.

Collins & Corbin, for the defendant in error.

⁶⁰⁶ PITNEY, J. The defendant in error, who was plaintiff below, recovered a verdict and judgment for the damages that accrued to him through personal injuries sustained by his daughter, Fannie Friedman, a child between four and five years of age, by reason, as alleged, of the negligence of the defendant. Reversal is prayed because of alleged trial errors, evidenced by bills of exception.

The declaration sets up that a firm of Colgate & Company were proprietors and operators of a building and premises situate on the south side of York street, in Jersey City, used and operated as a manufactory for soaps and perfumes; that the defendant, Snare & Triest Company, was constructing an addition to the building, and was engaged in making certain repairs to the same under contract with Colgate & Company; that the defendant improperly placed and piled upon the sidewalk of the street adjacent to the building sundry iron girders, each twenty-two feet in length, fifteen inches in height and four inches in width, and each weighing about one thousand pounds, in such manner that the girders were piled, insecurely, one above the other, and so that one of the girders rested in an insecure position and was liable to fall suddenly and without warning and injure persons walking upon the street; that the defendant permitted the girders to

remain in this insecure and dangerous position without notice or warning to travelers, and that the insecure girder fell suddenly and without warning upon Fannie Friedman, while she was traveling, walking and passing upon the sidewalk adjacent to the building, and without negligence on her part, and thereby crushed her foot, etc. Upon the trial it was shown that the child was injured through the fall of one of ⁶⁰⁷ twelve girders, of the character described in the declaration, that had been piled upon the sidewalk in front of Colgate & Company's premises, and had been permitted to remain there between two and four weeks, awaiting use in certain repair work that was in progress upon the factory. It was in controversy whether the jury could reasonably find from the evidence that the Snare & Triest Company was responsible for placing the girders there, or for their care while remaining in that position, or that there was any want of care about placing or maintaining them. For the sake of simplicity, we will assume that the legal questions thus raised were properly disposed of by the learned trial justice. It was indisputable, however, that the girders were required as building materials for the repair of the Colgate factory; that the defendant, if connected with the transaction at all, had delivered the girders, under employment by Colgate & Company, and placed them longitudinally upon the sidewalk, piled one upon another, immediately adjacent to the front of the building, which abutted upon the side of the street. While numerous witnesses gave variant accounts of the way in which the Friedman child received her injury, it appears, from all accounts, that she was one of several small children who either were at the moment, or immediately before had been, playing upon the pile of girders. The evidence in no aspect sustained the averment of the declaration that at the time of her injury Fannie was walking and passing along the sidewalk as a traveler. She was either playing with the other children upon the girders or was at the moment seated upon a girder resting from her play. For this reason, at the close of the plaintiff's case, an offer was made to amend the declaration to conform to the facts in this respect, and while no amendment was actually made, the pleadings were treated, for the purposes of the trial, as if amended.

Under this state of the pleadings and proofs, therefore, we assume that the jury might reasonably find that if any legal duty was owing to the injured child, or to the plaintiff as her

parent, with respect to the condition of the pile of girders, it was owing by this defendant, and that if this duty included ~~was~~ the exercise of care that the girders should be so placed and maintained as not to cause injury to children playing upon them, or resting upon them during play, it might be found that the duty had been neglected. At the same time the question of defendant's responsibility must be viewed in the light of the uncontroverted fact that whatever it had done about placing and keeping the girders there had been done under employment of Colgate & Company, for the purpose of repairs upon their building, and done in their right as owners and occupants of the land.

Motions for nonsuit and for direction of a verdict in defendant's favor were overruled, and the case was submitted to the jury with instructions from the trial justice to the effect that the defendant company had the right to put the girders in the street, provided they were put there in a safe condition; that while they remained there the duty rested upon the defendant of exercising reasonable care to see that they were kept in a safe condition; that the propensity of little children to play upon the street and to rest from their play in the street was to be taken into consideration; that if through defendant's want of care the girders were left in the street in such condition that they would tempt little children to make use of them, either for play or for resting, and would be dangerous to the children thus using them, a case of actionable negligence was made out; and that the fact that Fannie Friedman was playing upon the girders, in view of her tender years, would not bar her right to recovery. Numerous exceptions challenged the propriety of these instructions, and of other rulings and instructions that were based upon the same theory.

There was nothing in the case to exclude the inference that the title and possession of Messrs. Colgate & Company extended to the middle of the street. In our courts it has long been established that, in the absence of anything to show the contrary, the title and legal possession of the abutting owner or occupant do extend to the middle of the road or street, the freehold remaining in him, subject only to the easement or right of passage in the public. So it was laid ~~down~~ down in our supreme court more than a half century ago in *Winter v. Peterson*, 24 N. J. L. 524, 61 Am. Dec. 675. The same rule was recognized ten years later by Chancellor

Green in *Hinchman v. Paterson R. R. Co.*, 17 N. J. Eq. 75, 82, 86 Am. Dec. 252, where he said: "The presumption of law is that the owners of the land on each side of the street own to the middle of the street, and have the exclusive right to the soil, subject to the right of way. It is objected by the defendant's answer that the complainant's titles do not extend to the middle of the street, because the lands as described are bounded by the sides of the streets. But the established inference of law is that a conveyance of land bounded on the public highway carries with it the fee to the center of the road as part and parcel of the land." This statement of the rule was referred to by Chief Justice Beasley, in delivering the opinion of this court, in *Salter v. Jonas*, 39 N. J. L. 469, 472, 23 Am. Rep. 229, and the rule was made the basis of deciding that in a conveyance of lands with abutments coinciding with the side of a street or highway, nothing short of express words of exclusion will prevent the title from extending to the middle of the street, if the grantor, at the date of such conveyance, is the owner of the street to that extent. In *Weller v. McCormick*, 52 N. J. L. 470, 473, 19 Atl. 1101, 3 L. R. A. 798, it was held by the supreme court that where one is in actual occupation as owner of the premises abutting upon the street, his title and possession presumably extend to the middle of the street, subject only to the public rights. The same doctrine is recognized in *Hoboken Land etc. Co. v. Kerrigan*, 31 N. J. L. 13, *State v. Mayor etc. of Hoboken*, 33 N. J. L. 280, *Green v. City of Trenton*, 54 N. J. L. 92, 102, *Ocean Grove Land Assn. v. Berthall*, 62 N. J. L. 88, and *Ocean City Assn. v. Shriver*, 64 N. J. L. 550, 51 L. R. A. 425. The substantial character of the rights of the abutting owner in the soil of the street is recognized in all our decisions that touch upon the subject. Besides the cases already noted, the following may be referred to: *Wright v. Carter*, 27 N. J. L. 76 (reversed, see *State v. Laverack*, 34 N. J. L. 201); *Burnett v. Crane*, 56 N. J. L. 285, 44 Am. St. Rep. 395, 28 Atl. 591; *Wuesthoff v. Seymour*, 22 N. J. Eq. 66, 70; *Avis v. Borough of Vineland*, 56 N. J. L. 471, 28 Atl. 1039, 23 L. R. A. 525; *French v. Robb*, 67 N. J. L. 260, 91 Am. St. Rep. 433, 51 Atl. 509, 57 L. R. A. 956.

¶ It is the undoubted right of land owners to deposit in the street building materials required in the improvement of their abutting property, although the public lawfully using

the street may be, as in many cases they necessarily are, to some extent, incommoded thereby: 27 Am. & Eng. Ency. of Law, 2d ed., 156, tit. "Roads and Streets." Of course, the right is to be reasonably exercised, in view of the rights of the public, and is subject to regulation in the public interest. Where the ownership of the soil of the street is not in the abutting owner, his right to use the street for this and other like purposes is vindicated on the ground of necessity, as in *Van O'Linda v. Lothrop*, 21 Pick. 292, 32 Am. Dec. 261. While not questioning that necessity would furnish a sufficient justification in the present case, yet since it appears that Messrs. Colgate presumably held the legal possession of the soil of the street, the right of the defendant, as their contractor, to store building materials there, may be simply and directly referred to the land owner's right to use the soil for all proper purposes, provided he avoid unreasonable interference with the public easement.

It is manifest that every deposit of building materials of the character now in question necessarily amounts to a temporary exclusion of the public from the space thus occupied. A reasonable interference with the public easement is rightful. If the public be unreasonably hindered or endangered, the party at fault may be indicted for maintaining a public nuisance, or may be required to remove the obstruction. And further, an individual member of the public, if specially damaged by the nuisance while in the exercise of his rights in the street, may maintain a private action. But this refers only to parties injured while using the street as a street, and not to those whose injuries arise from their attempted use of the obstructing materials for their own purposes, whether of pleasure, convenience or profit. For the building materials themselves do not in any sense become public property by being allowed to remain in the street. And neither a traveler, nor an idler, nor even a playful child, can gain rights against the land owner, or against his agent who stands in his rights,⁶¹¹ by using such building materials as a resting place or playground. In the absence of circumstances denoting invitation, one thus using the private property of another for his own purposes may be either a licensee or a mere trespasser, depending upon circumstances. In neither case is there any duty incumbent upon the proprietor to make his property safe for such use. Aside from the notion that temptation is equivalent to invitation (with which we cannot

concur), there is nothing in the mere existence of building materials as an obstruction in the street that denotes an invitation to the passer-by or to the idler or playful child to use the materials for his own purposes. The doctrine of invitation relates to the entry upon or user of lands. The very fact that materials piled upon the ground constitute a hindrance to travel negatives the idea of invitation in the ordinary sense.

The case for the plaintiff rests upon the theory that since these girders were so arranged as to be attractive to children, and since the injured child, with her companions, was using them as a place for play, or as a resting place during or after play, the proprietors of the premises, or the defendants, upon whom as independent contractors the matter had been devolved, owed a duty to the children to so arrange the girders as to render them safe for their use. With this view we do not agree.

No doubt, where a duty exists to take care with respect to the safety of children of tender years, their very age must be taken into account, so that what might be reasonable care with respect to the safety of adults, who are capable, to some extent, of looking out for themselves, might not be reasonable care with respect to children. But in the present case the very question is whether any duty existed, and we are not able to see that the age of the child is pertinent upon this inquiry. That the party injured in this case was less than five years of age did not at all tend to give her any property interest or right of user in the defendant's girders. Whether she used them as licensee or as trespasser, in either case there was no duty upon the owner to exercise active care with respect to her safety.

⁶¹² The fact that a dangerous place or object is attractive to children of tender years is legitimately significant where the question of their own want of care is raised. But there are fundamental, and, as we think, insuperable, difficulties standing in the way of adopting the rule that the mere attractiveness of private property gives to the person attracted rights against the owner. One difficulty is that the rule, pro tanto, ignores the distinction between *meum* and *teum*. And on what principle is it to be limited to cases of trespass? Why does it not apply equally to the conversion of personal property, or even to larceny? If those who temporarily and for limited purposes convert the private property of their

neighbors to their own use are to be not only excused but justified, where by reason of their tender years they were tempted to the trespass, and at the same time are to have rights of action against the true owners for the failure to exercise care about rendering the property suitable for their use, why may not those who under similar temptation convert the property of others wholly to their own use be likewise justified, and instead of a right of action gain a complete title to the property by simply appropriating it?

Another and a very practical difficulty that confronts the attempt to lay down any legal rule that depends for its limitations upon the attractiveness of objects to children of tender years, lies in the extreme improbability that any man, however prudent, will be able to foresee what may or may not be attractive to children. Certainly if a pile of steel girders, each weighing one thousand pounds, deposited in the street, as the girders in the present case were deposited, must be foreseen by a prudent man to be attractive to children, we are unable to say what object may not be thus attractive.

These are the views which we entertain after a careful consideration of the question at issue in this case, after most learned and able arguments by counsel on both sides, and a review of numerous reported decisions touching more or less closely upon the point.

Some reference to the English decisions will not be out of place.

⁶¹³ A case much relied upon to sustain the present action is *Lynch v. Nurdin*, decided by the court of queen's bench in the year 1841, and reported in 1 Ad. & E., N. S., 29, 41 Eng. Com. L. 422, 10 L. J. 73, 5 Jur. 797. There it appeared that defendant's servant, who was engaged in the delivery of goods sold by his master, had left a cart and horse standing in the street for a half hour, drawn up by the side of the footway at the door of a house in which he was transacting his master's business. Plaintiff, a child between six and seven years of age, began with other children to play about the cart, and as he was in the act of climbing upon it, another child urged the horse forward, so that the plaintiff was thrown to the ground and injured. (The facts of the case appear more fully from the *Jurist* and *Law Journal* reports than from that of *Adolphus & Ellis*.) The trial judge instructed the jury that if, in their opinion, the negligence of the defendant's servant had caused the injury, they

should find for the plaintiff. There was a verdict for the plaintiff accordingly. A rule nisi was then obtained for a new trial, because of misdirection, and because the verdict was against the evidence. So far as the report of the case shows, however, the latter ground was not relied upon, and the motion for new trial was rested solely on the ground that the plaintiff's injury arose in part from his own fault and in part from the fault of his playmate. Curiously enough, the existence of a duty to the playing children, whose breach would constitute actionable negligence, was not made the subject of argument. It appears clearly that no question was raised before the court upon this point. Defendant's negligence having been conceded by counsel, the remarks of Chief Justice Lord Denman are hardly to be treated as a considered judgment upon that question. The only controverted point that seems to have been determined was that although the plaintiff's own act co-operated to produce his injury, he was not for that reason debarred from recovering compensation in respect of defendant's negligence, and this because of the plaintiff's tender years. So far as defendant's liability was concerned, the case seems to have been rested upon the authority of *Dixon v. Bell*, ⁶¹⁴ 5 Maule & S. 198, 19 Eng. Rul. Cas. 26, *Daniels v. Potter*, 4 Car. & P. 263, and *Illedge v. Goodwin*, 5 Car. & P. 190.

In *Dixon v. Bell* (1816), 5 Maule & S. 198, 19 Eng. Rul. Cas. 26, the defendant intrusted a young mulatto girl, his servant, aged about fourteen, with the care of a loaded gun, having first caused the priming to be removed. The servant aimed the gun, in play, at the plaintiff's son, a child between eight and nine, saying she would shoot him, and thereupon pulled the trigger. The gun went off and destroyed the eye of the child. A verdict having been rendered in favor of the plaintiff, there was a motion for a new trial on the ground that the defendant had used every reasonable precaution. The motion was denied on the ground that it was incumbent upon him who, by loading the gun, had made it capable of doing mischief, to render it safe by withdrawing the load.

Daniels v. Potter (1830), 4 Car. & P. 263, was an action against a tradesman who had a cellar opening upon the public street, and the rule was laid down that he was bound to take reasonable care that the cover of the opening was so placed and secured that under ordinary circumstances it would not fall down. But the plaintiff was a passer-by, who was in-

jured by the fall of the cover through its being insecure, as alleged, by reason of the defendant's want of care.

Illedge v. Goodwin (1831), 5 Car. & P. 190: This is a meager report of the trial of a case in which it appeared that a scavenger cart, owned by the defendant, was backed up against the window of plaintiff's shop, breaking a quantity of china, and that the cartman was not present at the time. Defendant called two witnesses who swore to the striking of the horse by a person passing by, and one of them said that the horse backed against the window in consequence of the bad management of the plaintiff's shopman, who came out and laid hold of his head. During the cross-examination of the second of these witnesses the jury interposed and said they did not believe the evidence of either of them. From this it is inferable that the verdict for the plaintiff was based upon the ground that the horse, of its own motion, had backed the cart into the window, an act of trespass for which the owner of the cart was held responsible. Chief Justice Tindal, commenting upon the evidence of the witnesses who were disbelieved by the jury, said that, supposing them to be speaking the truth, it would not amount to a defense, since if a man chooses to leave a cart standing in the street he must take the risk of any mischief that may be done.

Dixon v. Bell, *Daniels v. Potter*, and *Illedge v. Goodwin* do not seem to us to furnish adequate authority for attributing actionable negligence to the defendant in *Lynch v. Nurdin*. That the court of queen's bench would have concluded there was such negligence, or any legal duty existing under the circumstances of that case, if these questions had been seriously discussed by defendant's counsel, is not to be taken for granted.

The authority of the latter case was doubted by Chief Baron Pollock, in *Lygo v. Newbold* (1854), 9 Ex. 302. In this case the plaintiff was riding in defendant's cart, by permission of the servant in charge, but without authority of the defendant. The cart, having broken down and injured the plaintiff, the question was whether defendant was liable for these injuries. Recovery having been denied by the trial judge, the court refused to disturb the verdict. In *Singleton v. Eastern Counties Ry. Co.* (1859), 7 Com. B., N. S., 237, the plaintiff, an infant three and a half years of age, strayed upon the railway track and had its leg cut off by a passing train. It was held that in the absence of any evidence to

show the child got there through some neglect or default on the part of the company, they were not responsible for the injury. *Lynch v. Nurdin* was cited by counsel, but was not considered by the court as sufficient support for the plaintiff's action.

In *Hughes v. Macfie* and *Abbot v. Macfie* (1863), 2 Hurl. & C. 744, 33 L. J. Ex. 177, defendants were occupants of a warehouse adjoining the street, with a cellar opening in the street, protected by a wooden lid. Their workmen, in order to lower casks into the cellar, had raised the lid and rested it against the wall, nearly upright. One of the plaintiffs, a child of seven years of age, was playing in the street with ⁶¹⁶ other children, when the other plaintiff, a child of five, climbed upon the lid, and in jumping down pulled it over, to the injury of the two plaintiffs. The court denied the right of recovery to the child who had caused the lid to fall, Chief Baron Pollock saying: "We think the fact of the plaintiff being of tender years makes no difference. His touching the flap was for no lawful purpose, and if he could maintain the action he could equally do so if the flap had been placed inside defendant's premises, out of sight and reach of the child. As far as the child's act is concerned, he had no more right to touch this flap for the purpose for which he did touch it than he would have had if it had been inside the defendant's premises. Cases were referred to, supposed to be in favor of the plaintiff. We think none are decisive of this case, and no case establishes a principle opposed to our view, which is that the nonsuit was right." As to the other action, in which Abbott was plaintiff, it was held that if he was playing with Hughes, so as to be a joint actor with him, he could not maintain his action; but if not, he could, as his injuries would then be the result of the joint negligence of Hughes and the defendant. In the argument, *Lynch v. Nurdin* was cited as express authority that in the case of an infant of tender years the circumstance that he was a trespasser and contributed to the mischief by his own act will not necessarily preclude the maintenance of the action, and it was attempted to be shown that the authority of that case stood unimpeached by later decisions. Chief Baron Pollock made no more specific reference to *Lynch v. Nurdin* than is above quoted, but the present decision was manifestly inconsistent therewith.

And in *Mangan v. Atterton* (1866), L. R. 1 Ex. 161, 4 Hurl. & C. 388, 35 L. J. Ex. 161, where defendant exposed in a public place for sale, unfenced and without superintendence, a machine which might be set in motion by any passerby, and which was dangerous when in motion, and the plaintiff, a boy four years old, by the direction of his brother, seven years old, placed his fingers within the machine whilst another boy was turning the handle, which moved it, and ⁶¹⁷ the plaintiff's fingers were crushed, it was held there was no ground of action.

In *Clark v. Chambers* (1878), L. R. 3 Q. B. D. 327, 47 L. J. Q. B. 427, 19 Eng. Rul. Cas. 28, defendant had unlawfully placed a barrier, armed with spikes, across a road, and some person other than he (presumably a person entitled to use the road, and to whom the barrier was a hindrance), had removed it from the position in which defendant left it, and placed it in an upright position across the footpath. Plaintiff, passing that way, in the dark, and ignorant of the obstruction, collided with it and sustained a severe injury. His action was sustained. In the judgment of Chief Justice Lord Cockburn there is a review of *Dixon v. Bell*, *Illedge v. Goodwin*, *Lynch v. Nurdin*, *Daniels v. Potter*, *Hughes v. Macfie*, *Abbott v. Macfie* and *Mangan v. Atterton*, but the sole point in controversy was whether defendant's act was the proximate cause of plaintiff's injury, and the affirmative decision was rested on the principle of *Scott v. Shepherd*, 3 Wils. 403, 2 W. Black. 892, *Smith's Lead. Cas.* Plaintiff, it will be observed, was lawfully using the way for purposes of passage, so that there was no question of his being within the class of persons for whose safety the defendant was bound to be careful. The distinction between such a case and one when the injured party is making use of defendant's private property for his own purposes is entirely clear.

It is safe to say, therefore, that so far as *Lynch v. Nurdin* is relied upon in support of the present action, it has been distinctly discountenanced, if not necessarily overruled by the later English decisions. It is true it was relied upon by our supreme court in *Danbeck v. New Jersey Traction Co.*, 57 N. J. L. 463, 31 Atl. 1038. But that was the case of a child injured while riding as a gratuitous passenger upon a railway car, having entered it upon the invitation of the conductor, and furnishes no support for the present action.

We deem it unnecessary to rehearse at length the decisions cited by counsel for the plaintiff from the courts of some of our sister states, affirming, as is claimed, the general principle upon which the present plaintiff's right of action is based. ⁶¹⁸ Many, if not most, of those decisions depend, fundamentally, upon the same notion that in many states, and in the supreme court of the United States, has been given effect in the so-called "turntable cases," which will be found collated in 29 American and English Encyclopedia of Law, second edition, 32. That is, that a land owner, who maintains upon his own premises, for his own purposes, that which is alluring or tempting to little children, is held to a duty of exercising care with respect to their safety, in anticipation of the probability that they may be tempted to make use of his property for purposes of play. This doctrine has been repudiated in this state by the cases of *Turess v. New York etc. R. R. Co.*, 61 N. J. L. 314, 40 Atl. 614, decided by the supreme court, and *Delaware etc. R. R. Co. v. Reich*, 61 N. J. L. 635, 68 Am. St. Rep. 727, 40 Atl. 682, 41 L. R. A. 831, decided by this court. The rule laid down in these cases is, as we think, wholly inconsistent with the asserted liability of the present defendant. That rule draws a clear distinction between temptation and invitation, and is to the effect that those who enter upon private property for their own purposes without invitation, but as trespassers or licensees, do so at their own peril, so far as any right on their part to call for active care on the part of the property owner for their welfare is concerned, and that although the injured party be an infant of tender years, and for that reason less able to care for its own safety, and more susceptible to the attractions that private property affords for purposes of play, this circumstance does not create a duty where none otherwise would exist. It is true that in our turntable cases the attractive objects were not within the limits of the public highway, but it is likewise true that in the present case, as already pointed out, while the building materials were within the street, they were deposited there, as private property, for lawful purposes by the defendant, in the exercise of the land owner's rights in that behalf. And although the representatives of the public might complain of the occupancy of a portion of the street by building materials if unreasonably prolonged, or if the materials were insecurely placed, and although anyone lawfully using the street as such might have

619 an action if specially injured by collision with the materials, or by their fall, if they were negligently left in an insecure position, we cannot see that these circumstances confer rights upon one who is using the building materials, as the injured child in the present case was doing.

We hold, therefore, that the rulings and instructions of the learned trial justice above referred to were erroneous. The judgment under review should be reversed, and a venire de novo awarded.

GARRISON, J., Concurring. From the testimony the jury could find that the plaintiff's infant daughter was sitting on one end of one of the girders and aiding in imparting to it the movement that is described as "teeter-tawter," and that the movement so imparted caused the fall of the girder, by which the infant was injured.

The jury was instructed that "the inquiry must be, Were these girders, at the time of the accident, in such condition that they would tempt little children to use them for play . . . and if they did so use them, would endanger them? If they did so tempt and endanger the children, then they were not proper to be left in the condition they were on the street."

I think that this instruction, under which there could be a recovery for injuries from the fall of a girder, resulting from a motion imparted to it by the infant, under the circumstances above detailed, was erroneous, and for this reason vote to reverse the judgment of the supreme court.

This conclusion does not in anywise rest upon the negligence of the infant, or upon her assumption of obvious danger, or upon the idea that she was a trespasser, or that she had no right to play while upon the highway; nor does it derive any support from the notion that the owner of the fee in a street may, by depositing building material thereon, invoke the doctrine of trespass as to persons using such part of the street without injury to the property so deposited.

My concurrence in the result reached by this court rests solely upon the consideration that the accident the jury may 620 have found in the present case involves no negligence on the part of the defendant, whose duty, under its qualified right to deposit its girders in the street, was to see that they did not render the street less safe, not that they should prove innocuous as playthings.

FORT, J., Dissenting. I am unable to agree with the result reached by the majority of the court in this case.

It may be conceded that the abutting owner, whose land abuts upon a public highway, if no other fact appears, owns to the middle of the street. But such ownership is, of course, subject to public user, and the public rights are, as I think, exclusive of any right of the abutting owner in the highway which is inconsistent with the public right. All parts of the street, from side to side and end to end, are for the public use in appropriate and proper methods, and not for permanent private use. A temporary use may, of course, often be made of the street, although it is not of a public nature, as for loading, unloading goods, and the like: *Elliott on Roads and Streets*, 17, 18; *People v. Cunningham*, 1 Denio, 524, 43 Am. Dec. 709, note; *Callanan v. Gilman*, 107 N. Y. 360 (Justice Earl), note to 1 Am. St. Rep. 840-844; *North Mannheim Township v. Arnold*, 119 Pa. St. 380, 4 Am. St. Rep. 650, 653, note.

An abutting owner has no right to put upon the street, except for temporary purposes, any article, dangerous, or which may become dangerous, to an adult or child using the street, in any way that the person placing it there should reasonably anticipate such adult or child would use it. This includes, as I think, a child at play.

In the case before us the child who was injured was but five years of age, and hence was not chargeable with contributory negligence. The defendant had stored, as I think, upon the street a lot of iron girders. They had been there for upward of three weeks. The injured child was resting upon the girders when one of them fell, and the injuries sued for were the result.

At the trial, Mr. Justice Dixon stated in his charge what I think is the true rule in the given conditions. He said: 621 "As I have said, if a person places his goods upon the street in a proper condition, and exercises reasonable care to see that they are kept in that or some other proper condition, he is not blamable. But if he has not exercised reasonable care, if he has not had some supervision over them and they have got out of condition, and been out of condition sufficiently long that he would have been apprised of their improper condition if he had exercised reasonable care, then he is blamable. So you see it is not only a question of their condition at the moment of the accident, but of their condition for some time previous."

Then, after quoting from the testimony, he proceeds as follows: "You see, the inquiry now is whether the person chargeable with the supervision of those girders exercised reasonable care and supervision over them. If he did, and that condition which was dangerous occurred, say, ten minutes before the accident, that person would not be responsible; but if the dangerous condition extended back for several days or weeks before the accident, then the question comes to you, Did the person in charge exercise reasonable care and supervision, and would he have discovered the dangerous condition with such care and supervision? The plaintiff claims that such care and supervision were not exercised. The plaintiff must make that out to your satisfaction, and, if she does so by a preponderance of the evidence, she has made out another element of her case."

This statement left it to the jury, as I read it, to determine whether or not the defendant, in leaving the girders upon the street for a long period of time (which he did, storing them there, in fact), had been negligent in the care of them while thus left, and whether that neglect had resulted in the injury to the child.

Unless it can be said that a child of tender years has no right upon the public highway for any other purpose than the mere passage and repassage thereon, and that such a child is a wrongdoer if he stop to rest upon girders left upon the highway, as in the case before us, then I am unable to see ⁶²² why it was not a question for the jury whether the plaintiff was or was not entitled to recover.

An examination of the authorities, both in this country and in England, as it seems to me, clearly sustains the right of action in the plaintiff in this case.

In order to sustain this action it has been found necessary to attempt to overthrow the case of *Lynch v. Nurdin*, 1 Ad. & E., N. S., 29, 10 L. J. 73, 5 Jur. 797, decided by the court of queen's bench, in 1841, and cited in the majority opinion. This case has never been repudiated by any court in this state, nor do I think it has been even inferentially, by any court in England.

It is unnecessary to review the cases in England, which are in principle similar to *Lynch v. Nurdin*, 1 Ad. & E., N. S., 29, 10 L. J. 73, 5 Jur. 797, further than has been done by Mr. Justice Pitney in his opinion in this case, but I am convinced that a careful review of the cases which he cites

as sustaining the contention that *Lynch v. Nurdin*, 1 Ad. & E., N. S., 29, 10 L. J. 73, 5 Jur. 797, has been distinguished, if not overthrown, by the English courts, will show no such result, but that *Lynch v. Nurdin*, 1 Ad. & E., N. S., 29, 10 L. J. 73, 5 Jur. 797, is still recognized by all the text-writers, and is not inconsistent with the decision in any of the cases cited from the English courts.

I think the true rule in this class of case is this: the line of liability lies in the affirmative or negative answer to this question: "Was the thing which did the injury, at the time it did it, rightfully or wrongfully upon the highway?" If rightfully, then, if there for a temporary purpose, no liability. But if there, stored for a time, and hence wrongfully there, then liability if injury result from a negligent act of the owner; and, in such case, any act resulting in injury, which the owner should have reasonably anticipated would happen, and which has happened, may constitute negligence: *McDonald v. Snelling*, 14 Allen, 290, 295; *Dixon v. Bell*, 14 Maule & S. 198; *Wright v. M. & M. R. R. Co.*, 4 Allen, 283. For cases in point, decided in other states, the following references are made: *Knuz's Admrs. v. City of Troy*, 104 N. Y. 344; *Donohoe v. Vulcan Iron Works*, 7 Mo. App. 447; *Chicago v. Keefe*, 114 Ill. 222; *McGarry v. Loomis*, 628 63 N. Y. 108; *District of Columbia v. Boswell*, 6 App. Cas. 420; *Gibson v. Huntington*, 38 W. Va. 117; *Straub v. City of St. Louis*, 14 Am. Neg. Rep. 384.

If I were unwilling to enforce the rule which I have stated, as between an adult and an abutting proprietor, storing articles upon the sidewalk or street, I should still feel clear, in the case of a non sui juris child, that the rule stated by the trial justice in this case was applicable.

Chief Justice Beasley, in *Danbeck v. New Jersey Traction Co.*, 57 N. J. L. 463, 31 Atl. 1038, when he stated: "Very few of the rules that regulate the conduct of a man with his fellow can be applied with the less show of reason to his intercourse with children. It is the legal duty of everyone dealing with a child to protect it against its own indiscretion."

And in this opinion the distinguished chief justice quotes *Lynch v. Nurdin*, with approval.

I think that an abutting owner, placing materials upon the public highway, in front of his premises, is bound to anticipate the possible use which a child may make of them,

in its innocency, and in accordance with the instincts and impulses naturally incident to child life, and that a duty is cast upon such abutting owner to exercise reasonable care and caution with respect to the probable conduct of such a non sui juris person: *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257 (Chief Justice Cooley); *Rachmel v. Clark*, 205 Pa. St. 314, 54 Atl. 1027, 62 L. R. A. 959.

This rule is not in conflict with the rule declared in the turntable cases: *Delaware etc. R. R. Co. v. Reich*, 32 Vroom, 635. The conclusion in those cases, as I understand them, is expressly upon the ground that the turntables were upon private property, and that the plaintiff was a trespasser when injured.

I am unable to conceive how a child, resting upon the public highway, as the plaintiff was in this case, or even if in play, can in any sense be deemed a trespasser. The child, I think, was where the defendant should have reasonably anticipated that she might come.

⁶²⁴ Judge Bogert requests me to say that he concurs in this dissent.

The Law Appears to Impose No Duty, as a rule, on the owner of property to keep it in a safe condition for those who come to or upon it for their own convenience or pleasure, without invitation: See *Harris v. Cowles*, 38 Wash. 331, 107 Am. St. Rep. 847, and cases cited in the cross-reference note thereto. We must confess surprise, however, to the extension given this doctrine by the New Jersey court in the principal case.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

PEOPLE v. VANDECARR.

[175 N. Y. 440, 67 N. E. 913.]

CONSTITUTIONAL LAW—Regulating Sale of Milk.—Section 66 of the Sanitary Code of the city of New York, which provides that no milk shall be sold in the city without a written permit from the board of health, is constitutional. (p. 784.)

Frank Moss, for the appellant.

George L. Rives, Theodore Connolly and Frederick W. Stelle, for the respondent.

442 BARTLETT, J. The relator Lieberman was arrested on the eighth day of October, 1902, for a violation of section 66 of the Sanitary Code of the board of health of the health department of the city of New York, which violation is made by section 1172 of the charter of the city of New York a misdemeanor.

Section 66 of the Sanitary Code reads: "No milk shall be received, held, kept, offered for sale or delivered in the city of New York without a permit in writing from the board of health and subject to the conditions thereof."

It is admitted that relator sold milk without a permit, as alleged. It is conceded that this appeal, the relator having been arrested, held for trial, and sued out a writ of habeas corpus, presents the single question of law as to the constitutionality of the section quoted.

It is argued that this section on its face is violative of section 1, article 1 of the state constitution, reading: "No member of this state shall be disfranchised or deprived of any

of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers."

It is claimed also that it infringes section 1 of the fourteenth amendment of the federal constitution, providing: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, ⁴⁴³ nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The appellant also makes the point that even if this section be deemed constitutional it is invalid, because it is an unreasonable and arbitrary assumption of power that was not granted to the local board of health by the legislature. Provisions regulating the vending of food, in the interest of the public health, have been a part of the statute law for a century, or more. The courts have regarded the principle involved as a proper and necessary municipal regulation, sanctioned by the police power.

In *Metropolitan Board of Health v. Heister*, 37 N. Y. 661, where the act to establish a metropolitan sanitary district was held to be constitutional, the following language was used by the court, after pointing out various acts from 1784 to 1866, enacted in the exercise of the police power for the protection of the public health: "These acts show that, from the earliest organization of the government, the absolute control over persons and property, so far as the public health was concerned, was vested in boards or officers, who exercised a summary jurisdiction over the subject, and who were not bound to wait the slow course of the law; and that juries had never been used in this class of cases. The governor, the mayor, health officers under various names, were the persons intrusted with the execution of this important public function; and they were always empowered to act in a summary manner. Scarcely a year passes, or did pass, prior to 1846, in which the legislature did not charter some city or village, and give to the local powers full authority, by their own action and in their own way, to regulate, abate or remove all trades or manufactures that might be by them deemed injurious to the public health. I have examined the statutes from 1832 onward, and find that scarcely a year passed by in which these powers were not given to many cities or villages by original authority or by amendments to these ⁴⁴⁴ charters. I see, among the laws of the session just closed, several of the same

character, among them one to incorporate the village of Gouverneur, which gives the trustees full power to prohibit and abate nuisances, to compel the owners of a butcher's stall, sewer, privy, or other unwholesome thing, to cleanse the same, or cause the same to be removed, or otherwise disposed of, as may be necessary for the public good: See, also, *Van Wormer v. City of Albany*, 15 Wend. 262."

The section we are called upon to construe is a part of the Sanitary Code which has legislative and legal sanction. It is recognized and adopted by the original and amended charter of the city of New York (sections 1168-1172).

The Sanitary Code is a gradual growth and made up, in part, of laws and ordinances enacted during a period of many years, invoking the exercise of the police power for the protection of the public health. It contains about fifty sections, among others, providing for the issuing of permits regulating the conduct of business and the vending of food. It has at least ten sections regulating, among other things, the quality of milk to be offered to the citizen and the details involved in the sale thereof.

In the case of *Polinsky v. People*, 73 N. Y. 65, at page 69, Judge Andrews said: "That the legislature in the exercise of its constitutional authority may lawfully confer on boards of health the power to enact sanitary ordinances, having the force of law within the districts over which their jurisdiction extends, is not an open question. This power has been repeatedly recognized and affirmed: *Metropolitan Board of Health v. Heister*, 37 N. Y. 661; *Health Department v. Knoll*, 70 N. Y. 530; *People v. Justices of Special Sessions*, 7 Hun, 214. And ordinances designed to prevent the sale of adulterated milk are manifestly within the scope of sanitary regulations."

The only question presented by this appeal is whether it was lawful for the health authorities in the city of New York to require the relator to obtain a permit under section 66 of ⁴⁴⁵ the Sanitary Code in order to receive, hold, offer for sale and deliver milk, and failing so to do, to arrest and punish him.

In great cities, where, in certain sections, life exists under crowded conditions that cannot be fully comprehended unless seen, and where many articles for table consumption by all classes of the community are liable to pass through processes and conditions little short of appalling unless regulated by

law, the full and vigorous exercise of the police power in the interests of the public health and general welfare is absolutely essential. It is quite impossible that every offender against the provisions of the Sanitary Code should be accorded due process of law as embracing jury trial and the slow results of the ordinary procedure in the courts.

The vesting of powers more or less arbitrary in various officials and boards is necessary if the work of prevention and regulation is to ward off fevers, pestilence and the many other ills that constantly menace great centers of population.

It is true that there may be provisions inserted in a sanitary code that, after giving the police power full effect, are unconstitutional, violative of well-established legal principles, and subversive of the rights of the citizen. The courts are always open for the correction of such evils.

In the case before us the requirement of section 66 of the Sanitary Code that the relator should not sell milk without a permit is reasonable and violates neither the federal nor state constitution, is in accordance with law and long-established precedent.

In the argument of this case several questions have been discussed that are not presented by the appeal. It is, for instance, argued that even conceding a permit to be necessary, the provision that the holder is to be "subject to the conditions thereof" cannot be sustained for a variety of reasons suggested.

It is a complete answer that the form of the permit is not in the record; it does not appear that it has, attached to it, conditions reasonable or otherwise. We consequently express no opinion on the subject.

⁴⁴⁶ What we have already said applies with equal force to the argument that the permit might be loaded with conditions, the nature of which is not limited or stated; that it may be used to build up monopoly, to help a favored few as opposed to the many; that there is no other statute which presents such possibilities for blackmail and oppression. These and many other like criticisms are indulged in by appellant.

If the question was before us, the well-settled canon of construction permits of no such argument. It is presumed that public officials will discharge their duties honestly and in accordance with the rules of law.

The suggestion that the original and amended charter of the city of New York sought to perpetuate statutes not in

force is without merit when the entire body of legislation relating to the subject is examined from 1866 to 1901.

It is not necessary to pursue this matter in detail. We hold that the Sanitary Code is in full force and effect.

The order and judgment appealed from should be affirmed.

Justice Cullen Dissented from the opinion of the majority of the court, saying in part: "I do not believe the legislature has empowered the board of health of the city of New York to require permits to enable one to engage in the business of selling milk: *Village of Flushing v. Carraher*, 87 Hun, 63, 33 N. Y. Supp. 951. Doubtless, the board of health may prescribe such conditions relating to the character of milk offered for sale as may be necessary to secure public health, but the vending of milk is one of the ordinary vocations of life, in which anyone has a right to enter, on compliance with the health laws and regulations."

The Decision in the Principal Case was Affirmed in the supreme court of the United States (*New York v. Vandecarr*, 199 U. S. 552, 26 Sup. Ct. Rep. 144, 50 L. ed. 144), Mr. Justice Day delivering the opinion therein, the essential parts of which are the following: "The section of the Sanitary Code complained of is as follows: 'No milk shall be received, held, kept, either for sale or delivered in the city of New York, without a permit in writing from the board of health, and subject to the conditions thereof.'

"The violation of the Sanitary Code is made a misdemeanor. That the board of health had power to pass the Sanitary Code, which includes this section, is not open to question here, as it has been affirmatively decided in the state court. The objections on federal grounds for our consideration are twofold: First, that the section under consideration devolves upon the board of health absolute and despotic power to grant or withhold permits to milk dealers, and is, therefore, not due process of law; second, that singling out the milk business for regulation is a denial of the equal protection of the laws to people engaged therein. . . .

"The contention of counsel for plaintiff in error is not that a business so directly affecting the health of the inhabitants of the city as the furnishing of milk may not be the subject of regulation under the authority of the state, but that the court of appeals of New York has sustained the right of regulation to the extent of authorizing the boards of health to exercise arbitrary power in the selection of those it may see fit to permit to sell milk under the section quoted; and, thus construed, it works the deprivation of the plaintiff in error's liberty and property without due process of law. We do not so understand the decision of the highest court of New York. As we read it, the authority sustained is the grant of power to issue or withhold permits in the honest exercise of a reasonable discretion.

In the opinion of the appellate division, whose judgment was affirmed in the court of appeals, it was said: 'Such regulations, however, should be uniform, and the board should not act arbitrarily; and if this section of the Sanitary Code vested in them arbitrary power to license one dealer, in a lawful commodity, and refuse a license to another similarly situated, undoubtedly it would be invalid (*Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, 30 L. ed. 220; *Gundling v. Chicago*, 177 U. S. 183, 20 Sup. Ct. Rep. 633, 44 L. ed. 725; *Noel v. People*, 187 Ill. 587, 79 Am. St. Rep. 238, 58 N. E. 616, 52 L. R. A. 287; *Dunham v. Trustees of Rochester*, 5 Cow. 462; *City of Brooklyn v. Breslin*, 57 N. Y. 591); but such was not its purpose, nor is that its fair construction. It is unnecessary now to determine whether the action of the board in refusing or revoking such a permit would be judicial, and thus reviewable by mandamus or certiorari, or whether, if the authority should be arbitrarily or improperly exercised, the only remedy would be an application for the removal of the officers; for those are questions that may arise in the administration of the law but do not go to its validity. The section, properly construed, does not permit unjust discrimination, and therefore it is valid': 81 App. Div. 132, 80 N. Y. Supp. 1108.

"The court of appeals, affirming the decision of the appellate division, did not speak with equal emphasis upon this point, but it leaves no doubt that it sustained the statute as authorizing the exercise of a reasonable discretion. While that court held that the discretion to grant or withhold permits might be vested in a board of health with opportunities to know and investigate local conditions and surroundings, it is further said: 'In the case before us the requirement of section 66 of the Sanitary Code, that the relator should not sell milk without a permit, is reasonable, and violates neither federal nor state constitution, is in accordance with law and long-established precedent. In the argument of this case several questions have been discussed that are not presented by the appeal. It is, for instance, argued that even conceding a permit to be necessary, the provision that the holder be subject to the conditions thereof cannot be sustained for a variety of reasons suggested. It is a complete answer that the form of the permit is not in the record; it does not appear that it has attached to it conditions reasonable or otherwise. We consequently express no opinion on the subject. What we have already said applies with equal force to the argument that the permit might be loaded with conditions, the nature of which is not limited or stated; that it may be used to build up monopoly, to help a favored few as opposed to the many; that there is no other statute which presents such possibilities for blackmail and oppression. These and many other like criticisms are indulged in by the appellant. If the question was before us, the well-settled canon of construction permits of no such argument. It is presumed that public officials will discharge their duties honestly, and in accordance with the rules of law.'

"We do not think that this language leaves any question as to the disposition of the higher court of New York to prevent the oppression of the citizen, or the deprivation of his rights, by an arbitrary and oppressive exercise of the power conferred. That this court will not interfere because the states have seen fit to give administrative discretion to local boards to grant or withhold licenses or permits to carry on trades or occupations, or perform acts which are properly the subject of regulation in the exercise of the reserved power of the states to protect the health and safety of its people, there can be no doubt. In *Davis v. Massachusetts*, 167 U. S. 43, 17 Sup. Ct. Rep. 731, 42 L. ed. 71, an ordinance of the city of Boston, providing that no person shall make any public address in or upon the public grounds, except in accordance with a permit from the mayor, was held not in conflict with the fourteenth amendment to the constitution of the United States. In *Wilson v. Eureka City*, 173 U. S. 32, 19 Sup. Ct. Rep. 317, 43 L. ed. 603, an ordinance requiring persons to obtain written permission from the mayor or president of the city council, or, in their absence, a counselor, before moving a building upon any of the public streets of the city, was sustained as not violative of the federal constitution. In the opinion of the court a number of instances were given in which acts were prohibited except with the consent of an administrative board, and which were sustained as proper exercises of the police power. In *Gundling v. Chicago*, 177 U. S. 183, 20 Sup. Ct. Rep. 633, 44 L. ed. 725, an ordinance was sustained permitting the mayor to license persons to deal in cigarettes when he was satisfied that the person applying for the license was of good character and reputation, and a suitable person to be intrusted with their sale. And in the recent case of *Jacobson v. Massachusetts*, 197 U. S. 11, 25 Sup. Ct. Rep. 358, 49 L. ed. 643, this court sustained a compulsory vaccination law which delegated to the board of health of cities or towns the determination of the necessity of requiring the inhabitants to submit to compulsory vaccination. And in *Fischer v. St. Louis*, 194 U. S. 361, 24 Sup. Ct. Rep. 673, 48 L. ed. 1018, an ordinance of the city of St. Louis providing that no dairy or cow-stable should thereafter be built or established within the limits of the city, and no such stable not in existence at the time of the passage of the ordinance should be maintained on any premises, unless permission should have been first obtained from the municipal assembly by ordinance, was sustained as a proper exercise of the police power. After sustaining the right to vest in a board of men acquainted with the local conditions of the business to be carried on power to grant or withhold permits, this court said: 'It has been held in some of the state courts to be contrary to the spirit of American institutions to vest this dispensing power in the hands of a single individual (*City of Chicago v. Trotter*, 136 Ill. 430, 26 N. E. 359; *In re Frazee*, 63 Mich. 396, 6 Am. St. Rep. 310, 30 N. W. 72; *State v. Fiske*, 9

R. I. 94; *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239; *City of Sioux Falls v. Kirby*, 6 S. Dak. 62, 60 N. W. 156, 25 L. R. A. 621), and in others that such authority cannot be delegated to the adjoining lot owners (*City of St. Louis v. Russell*, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721; *Ex parte Sing Lee*, 96 Cal. 354, 31 Am. St. Rep. 218, 31 Pac. 245, 24 L. R. A. 195). But the authority to delegate that discretion to a board appointed for that purpose is sustained by the great weight of authority (*Quincy v. Kennard*, 151 Mass. 563, 24 N. E. 860; *Commonwealth v. Davis*, 162 Mass. 510, 44 Am. St. Rep. 389, 39 N. E. 113, 26 L. R. A. 712), and by this court the delegation of such power, even to a single individual, was sustained in *Wilson v. Eureka City*, 173 U. S. 32, 19 Sup. Ct. Rep. 317, 43 L. ed. 603, and *Gundling v. Chicago*, 177 U. S. 183, 20 Sup. Ct. Rep. 633, 44 L. ed. 725.'

"These cases leave in no doubt the proposition that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the state is not violative of rights secured by the fourteenth amendment. There is no presumption that the power will be arbitrarily exercised, and when it is shown to be thus exercised against the individual, under sanction of state authority, this court has not hesitated to interfere for his protection, when the case has come before it in such manner as to authorize the interference of a federal court: *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, 30 L. ed. 220. In the case of *Jacobson v. Massachusetts*, 197 U. S. 11, 25 Sup. Ct. Rep. 353, 49 L. ed. 643, it was insisted that the compulsory vaccination ordinance was broad enough to require a person to submit to compulsory vaccination when his physical condition might be such as to render such treatment dangerous to life and even cruelly oppressive. But it was held that the case presented no such situation; that the person complaining of the enforcement of the ordinance was, for aught that appeared, an adult in good health and a proper subject for vaccination; that the supreme court of Massachusetts had not sustained the authority of the board in the extreme case supposed, and that the individual complaining made no case wherein the operation of the statute deprived him of his constitutional right of protection. So, in the present case, there is nothing in this record to show why the permit which had been granted to the plaintiff was revoked or the conditions upon which, in the exercise of the power conferred by section 66, a permit to carry on the business was granted or withheld. It is true that a conversation was proved in which the milk inspector said to Lieberman that the milk sold by him 'stood well'; but there is nothing to show upon what ground the action of the board was taken. For aught that appears, he may have been conducting his business in such wise, or with such surroundings and means, as to render it dangerous to the health of the community;

or his manner of selling or delivering the milk may have been objectionable. There is nothing in the record to show that the action against him was arbitrary or oppressive and without a fair and reasonable exercise of that discretion which the law reposed in the board of health. We have, then, an ordinance which, as construed in the highest court of the state, authorizes the exercise of a legal discretion in the granting or withholding of permits to transact a business which, unless controlled, may be highly dangerous to the health of the community, and no affirmative showing that the power has been exerted in so arbitrary and oppressive a manner as to deprive the appellant of his property or liberty without due process of law.

"In such cases it is the settled doctrine of this court that no federal right is invaded, and no authority exists for declaring a law unconstitutional, duly passed by the legislative authority, and approved by the highest court of the state. Nor do we think there is force in the contention that the plaintiff in error has been denied the equal protection of the laws because of the allegation that the milk business is the only business dealing in foods which is thus regulated by the sanitary code. All milk dealers within the city are equally affected by the regulations of the sanitary code. It is primarily for the state to select the kinds of business which shall be the subjects of regulation, and if the business affected is one which may be properly the subject of such legislation, it is no valid objection that similar regulations are not imposed upon the business of a different kind: *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. Rep. 730, 28 L. ed. 1145; *Fischer v. St. Louis*, 194 U. S. 361, 24 Sup. Ct. Rep. 673, 48 L. ed. 1018.

"We find no error in the judgment of the supreme court of New York, and the same is affirmed."

Mr. Justice Holmes: "I do not gather from the statute or from the decision of the court of appeals that the action of the board of health was intended to be subject to judicial revision as to its reasonableness. But whether it was or was not, I agree that the statute, which in substance is older than the fourteenth amendment, was not repealed or overthrown by the adoption of that amendment."

For Decisions in this Series on the right of municipal corporations to regulate the sale of milk and dairy products, see *Norfolk v. Flynn*, 101 Va. 473, 99 Am. St. Rep. 918, and cases cited in the cross-reference note thereto; *St. Louis v. Fischer*, 167 Mo. 654, 99 Am. St. Rep. 614.

SCHNAIER v. NAVARRE HOTEL AND IMPORTATION COMPANY.

[182 N. Y. 83, 74 N. E. 561.]

CONSTITUTIONAL LAW—Registration of Plumbers.—The legislature cannot prevent an association of persons in a partnership from carrying on the plumbing business because some of the partners, who have nothing to do with the plumbing work or its supervision, are not registered as plumbers. (pp. 792, 793.)

Milton Mayer and J. Ard Haughwout, for the appellant.

Jacob H. Shaffer and Claude L. Coon, for the respondent.

⁸⁵ O'BRIEN, J. The learned court below directed judgment for the defendant on a submission of facts under section 1279 of the code. The facts agreed upon are as follows:

A firm composed of two persons in the city of New York performed certain work and furnished certain materials for the defendant at the agreed price and reasonable value of two hundred and thirty and eighty-five one hundredths dollars. The work and materials done and furnished consisted of plumbing work, and the firm acted solely as master plumbers. That firm assigned the claim to the plaintiff.

One member of the firm was not a licensed plumber, nor registered pursuant to the statute of the state and the city ordinances in regard to licensed or registered plumbers, nor was he entitled to be registered under said laws and ordinances; his duties as a member of the firm were confined exclusively to attending to the financial affairs of the firm and keeping the books.

The duties of the other member of the firm were confined exclusively to superintending and attending to the plumbing work of the firm, and he was duly registered as required by the statute and city ordinances on that subject. The only defense to the claim is that both members of the firm were not registered as plumbers, but only one of them, the other not being a plumber at all, but the financial or business member of the firm.

This court has held that the failure of a plumber to register as required by the statute precludes him from recovering for work performed in violation of the statute: *Johnston v. Dahlgren*, 166 N. Y. 354, 59 N. E. 987. That case, however, throws no light upon this case where the work was done by a firm, one of whom was registered and qualified, the other

not. The English courts have held, when dealing with statutes of similar character and applying them to partnerships, that a case like this is not within the statute: *Raynard v. Chase*, 1 Burr. 2; *Turner v. Reynell*, 14 Com. B., N. S., 328; *Candler v. Candler*, Madd. & G. 141. Practically the same thing was held by this court: *Harland v. Lilienthal*, 53 N. Y. 438. It does not appear that the partner who was not registered engaged in the trade or calling of a plumber at all. He had nothing to do with the trade or calling. He was the financial member of the firm. The registered member did the plumbing work and the purpose of the statute was to have persons of skill to do such work. The English cases cited above hold that the purpose of the act is satisfied when one member of the firm, who does the work, has the statutory qualifications. That is enough, and since such statutes change the common law and are highly penal they should be strictly construed. I should be inclined to follow these cases but for the broad language of our statute.

The law of 1896 (chapter 803) applies to the city of New York only. It is there provided that every employing or master plumber shall be registered once a year, but in order to be registered he must hold a certificate of competency from the examining board of plumbers of the city. That it shall not be lawful for any person or copartnership to engage in, or carry on the trade, business or calling of employing or master plumber unless the name and address of such persons and of each and every member of such copartnership shall have been registered as above provided. This statute and the building code enacted by the city in pursuance of it, and which has the force of law, are doubtless broad enough to cover this case. The case is clearly within the letter of the law, but I am not so sure that it is within the spirit and purpose of the law. However, it would savor somewhat of judicial legislation to attempt to take this case out of it. If the law is valid it would seem to control this case whether it is wise or unwise. The English courts have often indulged in what we would call judicial legislation, for the reason that parliament is not restricted by any written constitution as is the case with us. Hence, the courts in that country are at liberty to construe statutes in such a way as to make them conform to reason, justice and common sense, and they have seldom failed to find a way to give to an absurd law some semblance of reason and justice in its practical operation.

That is what Lord Mansfield did in the leading case of *Raynard v. Chase*, 1 Burr. 2.

But I do not think that the statute upon which the judgment in this case rests is a valid law, for the reason that it is in conflict with constitutional restrictions.

Both the federal and state constitutions provide that no person shall be deprived of life, liberty or property without due process of law, and these restrictions upon legislative power have been given a very wide application.

In the case of *People v. Warden etc.*, 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718, the statute (Laws 1892, c. 602) was held to be constitutional as an exercise of the police power for the protection of health. There was a strong dissent, but a bare majority of the court concurred in holding that the statute was valid. I will, therefore, assume that the validity of that statute is no longer open to question, the decision of this court having removed it from the domain of debate. But that is not the statute that stands in the plaintiff's way in this case. It is another and later statute. In fact, the statute then considered by the court was repealed by chapter 327 of the Laws of 1900 (sections 40-57). The latter statute differs but little from the former, and there is nothing in either of them that would prevent the plaintiff from recovering in this case. It is the act of 1896 alone that stands in the way of the plaintiff's right of recovery, since by the first section of that act it is made unlawful for any copartnership to engage in or carry on the trade, business or calling of employing or master plumber unless the name and address of each and every ^{ss} member of the firm shall have been registered. In this case only one of the two members of the firm was registered and he attended to the plumbing work. The other member was the financial man and was not registered, and could not be registered, since he was not a plumber and could not stand the required examination, but it is because he was not registered that the plaintiff has been defeated in this case. Of course, that means that a firm constituted as this firm was cannot recover for their work unless both of the members comply with an impossible regulation.

The right to follow any lawful pursuit is one of the inalienable rights of a citizen of the United States, and a law which prevents or hinders a man from going into partnership with another for the purpose of carrying on the trade, busi-

ness or calling of employing or master plumbers, infringes his natural rights as secured by the constitution.

There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor. All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his house or restrain his otherwise lawful movements, are infringements upon his fundamental rights of liberty, which are under constitutional protection.

The common business and callings of life, the ordinary trades and pursuits which are innocent in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same terms.

The liberty of pursuit, the right to follow any of the ordinary callings of life, is one of the privileges of a citizen of the United States.

These propositions are taken from some of the numerous cases on the subject and they are now so familiar that it is scarcely necessary to cite the cases where they may be found: ⁸⁹ Butchers' Union Co. v. Crescent City Co., 111 U. S. 746, 4 Sup. Ct. Rep. 652, 28 L. ed. 585; Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, 30 L. ed. 220; Slaughterhouse Case, 16 Wall. 36, 106, 21 L. ed. 394; Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; People v. Marx, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; In re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.

The recent case of *Lochner v. State of New York*, 198 U. S. 45, 25 Sup. Ct. Rep. 539, 49 L. ed. 937, is far-reaching in its scope and effect. The principle that the individual right to make contracts in relation to business is a part of that liberty protected by the constitution was asserted and maintained, and a statute of this state which made it a penal offense for a master to permit his servant to work more than ten hours in the day has been held to be in conflict with that right, and was, therefore, unconstitutional and void. That case amply vindicates the right of the individual to freedom in the conduct of any legitimate business and his right to make contracts concerning the same.

It cannot be denied that the statute in question operates to prohibit two persons, situated as the firm in this case was, to enter into partnership for conducting a legitimate business.

It prohibits a business man, with financial means and business ability, and a registered master plumber, with the requisite mechanical skill, from uniting the financial and business ability of the one with the energy and mechanical skill of the other in a partnership for conducting a legitimate business. The right to form partnerships for the conduct of business has existed from time immemorial, and any interference with that right must be regarded as an unwarranted interference with individual freedom condemned by the constitution. The feature of the statute to which I have referred would deprive a firm engaged in the plumbing business, composed of half a dozen persons, from enforcing contracts and collecting their bills for work done unless they could show that each and every member of the firm was a registered plumber, and if, as in this case, it was impossible for one of them to become registered, the firm must dissolve. A law that produces such results in its operation cannot be valid.

In the case of *People v. Warden etc.*, 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718,⁹⁰ when the general plumbing statute first came before this court Judge Gray, who wrote for the majority of the court, used the following very significant language concerning the law then before the court. The italics are my own.

"It seems to me that the constitutionality of this act is to be tested by its effect upon the citizen's right to pursue a lawful employment. If it imposes an *arbitrary restriction* and if it has no reference to the welfare and health of the people, it must be condemned. *I am not unwilling to concede that the act skirts pretty closely that border line*, beyond which legislation ceases to be within the powers conferred by the people of the state, through the constitution, upon its legislative body."

If the statute then under consideration "skirted pretty closely that border line" what is to be said of the later statute upon which this case rests? The former act merely provided that every person who actually carried on the business or trade of master plumber should be registered. What the act now under consideration does or attempts to do has been clearly shown. It goes far beyond the line which the first

act skirted closely, and cannot be sustained as a valid exercise of legislative power. It is not within any reasonable or proper exercise of the police power, since a provision for the registration of the firm as such, or for the registration of one or more members of the firm who were skilled plumbers to act for the firm, would be a sufficient protection to the public from all the dangers that the legislation was supposed to prevent or mitigate. The judgment should be reversed and judgment directed for the plaintiff on the submission, with costs in all courts.

GRAY, J. I vote for the reversal of this judgment. The legislature has the power to require of a person, before he engages in the work of a plumber, or as a master, or employing, plumber, that he should be examined, and registered, as to his competency. It was so held in *People v. Warden etc.*, 144 N. Y. 529, 39 N. E. 689, 27 L. R. A. 718, and for reasons which⁹¹ were there expressed such legislation seems to me to be properly within the exercise of the legislative prerogative, as a measure in the interest of the public health. But I am clear in my opinion that the legislature cannot prevent an association of persons in a partnership from carrying on the plumbing business, because some of the partners, although having nothing to do with the plumbing work, or its supervision, are not registered as plumbers. That would be an unjustifiable interference with fundamental rights, against which the constitution furnishes a guaranty. The question turns, as I think, upon the act of 1900, and it is not, when reasonably read, open to such a construction. The act continued to require, as did the original act of 1892, examination and registration as before; but only as to such persons who were plumbers, or who were acting as employing, or as master, plumbers. In the present case, the fact, as stipulated, is that one partner, exclusively, attended to the plumbing part of the firm business, and that the other, exclusively, attended to the bookkeeping and financial part of it. The law applied to the former; but not to the latter. It discloses no intent, and none should be presumed, to impair the common-law right of a person to engage in a lawful business pursuit. He may contribute his capital, or his clerical services, to the business concern and become a partner and, if not a plumber, nor proposing to act as a master plumber in the undertaking of the concern, the act has no reference to him. I think the law

governing the case should be construed as it is enacted and defined in the act of 1900; but should the act of 1896 be deemed to be, nevertheless, applicable and not limited in its meaning by the later act, then I agree with Judge O'Brien that it was not a valid exercise of the legislative power.

Bartlett, Haight and Vann, JJ., concur with O'Brien, J.

Cullen, C. J., and Werner, J., concur with Gray, J.

Judgment reversed, etc.

For a Recent Decision in support of the principal case, see *State v. Brown*, 37 Wash. 97, 107 Am. St. Rep. 798.

MATTER OF BORUP.

[182 N. Y. 222, 74 N. E. 838.]

CONSTITUTIONAL LAW—Payment of Claims.—Where a statute authorizes towns to improve highways, but makes no provision for the payment of damages from changes in the grade, a subsequent statute authorizing the recovery of such damages is not unconstitutional in its application to damages sustained prior to its enactment. (pp. 797, 798.)

EMINENT DOMAIN.—No Measure of Damages can be Adopted, under the New York statute authorizing the recovery of damages for changes in the grade of highways, that will permit the owner of property to recover more than the actual amount of his damages, deducting all benefits properly chargeable to the property. (pp. 798, 799.)

Isaac N. Mills, for the appellant.

Alfred E. Smith, for the respondent.

224 O'BRIEN, J. The question certified to us upon this appeal is thus stated in the record: "Is chapter 610 of the Laws of 1903, so far as it may be construed to make the town of East Chester liable for damages sustained through change of grade made prior to the enactment of that act, unconstitutional and void?" The statute referred to enacts that the owners of land adjacent to a highway shall be entitled to recover their damages from the town for any change of grade in the highway or any repairs by the authorities of the town made under and in accordance with the provisions of section 69 of chapter 686 of the Laws of 1892.

The statute last named authorizes towns and town authorities to repair, grade and macadamize highways at the expense of the town upon complying with certain conditions which were complied with in the present case. The statute referred to applies to any town in which a highway has been or hereafter shall be repaired, graded and macadamized from curb to curb.

²²⁵ The petitioner alleges that in March, 1901, before the passage of the act in question, the town authorities caused the highway in front of or adjacent to his house and other buildings to be repaired, graded and macadamized, and that in consequence of the change made in the grade of the highway his property had been damaged in the sum of three thousand dollars. He asks that commissioners be appointed under the provisions of the statute to determine the amount of his damages. The application was granted and the order affirmed at the appellate division, and the town has appealed to this court.

The improvement of the highway in front of the petitioner's property was, as we have seen, authorized by section 69, chapter 686 of the Laws of 1892. That act, however, made no provision for the damages that property owners might sustain by the change of grade or otherwise, and it was not until two years after the grading and improvement of the highway that there was any law under which the petitioner was entitled to assert his claim against the town for damages, and it is this retroactive feature of the law upon which the contention on the part of the town chiefly rests.

It will not be, and is not, contended that when the act of 1892, under which the change of grade was made, was enacted the legislature had not ample power to provide for the payment of any damages which property owners might suffer from the improvement of the highway. There is not, we think, anything in the constitution that prevents the legislature in 1903 from enacting a law that it might have enacted in 1892. When an individual is injured or damaged in his property rights by reason of a public work authorized by the legislature, there is nothing in the constitution to prohibit the legislative body from providing for just compensation for the injury thus inflicted under its authority. While there was no legal right to damages prior to the act in question, yet the claim of the property owner to compensation for the injury was founded in equity and justice, and

it was competent for the legislature to recognize the justice of such a ²²⁶ claim by making it obligatory upon the town to pay it when the amount was ascertained in due course of law.

The payment of compensation by the town to the property owners, which the statute provides for, is in no proper sense a gift or gratuity of either the money or property of the town, or a loan of its money or credit to an individual. It is simply a method which the legislature adopted to repair an injury to an individual inflicted by the town under the authority of law, and the mere fact that the injury was suffered at a time when the property owner was without remedy could not prevent the law-making power from providing a remedy afterward. There is no provision of the constitution that restricts the legislature from providing for the payment by a municipality of claims against it that are founded in equity and justice and which could have been authorized originally. The claim in question is of that character. What the constitution forbids the legislature to do is to impose upon the municipality the obligation or give it the power to make gifts or gratuities, or to loan its money or its credit for the benefit of individuals, or to devote its funds or its credit to purposes foreign to those of the particular municipality. The power to make compensation for injuries such as are claimed to have been sustained by the petitioner in this case is not restricted either in terms or by any fair implication, and so we think that the statute in question is not in conflict with any provision of the constitution. The fair scope and purpose of the statute was to compensate for damages caused by the carrying out of a public work which the town was authorized by the legislature to inaugurate and complete at the expense of the local taxpayers, and whether provision for the payment of such damages was made in advance of the improvement or subsequently is not material.

We do not think that the statute when properly construed authorizes any new or improper rule of damages. The damages to land in such cases are to be ascertained under rules of evidence that have been well settled and are well understood. They cannot in any case exceed the diminution in the market ²²⁷ value of the property which may be attributed to the change of grade, and a deduction from that may be made on account of any benefits to the property in consequence of the improvement of the highway. The legislature could not

have intended to permit the property owner to measure his damages by the expense of filling up or sinking his land in order to create the same relations between the grade of the highway and the adjacent land as existed before the improvement was made. That rule might in some cases call for an amount of damages in excess of the value of the whole property, and it cannot be supposed that the legislature intended to make such a rule obligatory upon the town board or the commissioners. All that the law means is that the whole situation shall be considered, and if it would cost less to the town to repair the injury than it would be liable for under the general law of damages, the commissioners or the town board may limit the property owner to such cost, but no measure of damages can be adopted that will permit the owner to recover more than the actual amount of his damages measured by the principles that prevail in condemnation proceedings, deducting all benefits which are properly chargeable to the property by reason of the improvement of the highway. The statute may be construed as permitting an award of damages less than the diminution in the market value of the property, but in no case a greater sum, since it provides for charging the owner with benefits conferred by the improvement.

The order appealed from should be affirmed, with costs, and the question certified answered in the negative.

Cullen, C. J., Gray, Bartlett, Haight, Vann and Werner, JJ., concur.

Order affirmed.

For Authorities bearing upon the decision in the principal case, see State v. Froehlich, 118 Wis. 129, 99 Am. St. Rep. 985, and cases cited in the cross-reference note thereto; Steger v. Traveling Men's Bldg. Assn., 208 Ill. 236, 100 Am. St. Rep. 225; McManus v. Hornaday, 124 Iowa, 267, 104 Am. St. Rep. 316.

KENNEDY v. LAMB.

[182 N. Y. 228, 74 N. E. 834.]

PROCESS—Affidavit for Service by Publication.—Under a statute providing that an order may be made for service by publication upon a defendant who is a nonresident of the state, provided "the plaintiff has been or will be unable with due diligence to make personal service" within the state, an affidavit which avers that a defendant resides in an adjoining state, but which discloses no effort to find or serve him, and no reason why such effort if made would be useless, is insufficient to authorize an order for publication. (p. 801.)

Frank Walling and Siegmund Rosenthal, for the appellants.

Addison S. Sanborn, for the respondent.

²²⁰ VANN, J. The purchasers at the sale in this action, which was brought to partition lands in the borough of Brooklyn, refused to complete their purchase upon the ground that the title was defective. By an order made at special term and affirmed by the appellate division they were directed to comply with the terms of sale and they now appeal to this court for relief from what they consider an unlawful command. They claim that the court which rendered the judgment in partition did not acquire jurisdiction of several persons, each a necessary party defendant, because they were not personally served with process and the effort to serve them by publication was void, owing to a vital defect in the affidavits upon which the order to publish was made.

From the affidavits presented to the justice who granted the order of publication, one made by the plaintiff and the other by his attorney, it appeared that six of the defendants resided in the state of New Jersey—four at Jersey City and two at Plainfield. The only attempt to show compliance with the command of the statute in reference to "due diligence to make personal service of the summons" was an allegation in the affidavit of the attorney that "the plaintiff will be unable with due diligence to make personal service of the summons ²³⁰ within the state as appears by the affidavit of Peter J. Kennedy hereto annexed." The affidavit thus referred to contains nothing whatever upon the subject of diligence, discloses no effort to serve the summons in this state,

and gives no reason for not making the effort, aside from the bare fact of nonresidence. It does not appear that the summons had been issued or that it was placed in the hands of anyone for service upon the defendants named, and for aught that appears they could have been served in this state without difficulty. They were nephews and nieces of the plaintiff and had visited and corresponded with him "for several years past," as he stated in his affidavit. He did not state how recently they had visited him, when he last heard from them, nor where he himself resided. Four of them lived just across the state line and two of them but a short distance therefrom. All may have been engaged in business in the state of New York and in daily attendance there for that purpose, as is the case with so many residents of the state of New Jersey. The affidavit did not state that they were not in New York or that they were actually in New Jersey when the affiant swore to it.

An order may be made for service by publication upon a defendant who is a nonresident of the state, provided "the plaintiff has been or will be unable with due diligence to make personal service" within the state: Code Civ. Proc., secs. 438, 439. The bare fact of nonresidence is not enough to authorize the order, for the plaintiff must also show due diligence to make personal service, or state facts tending to show why personal service cannot be made. The statute now in force differs from the one which formerly governed the subject when some of the cases cited were decided, in that the latter authorized service by publication when the person to be served could not "after due diligence be found within the state": Code of Proc., sec. 135. The old statute was satisfied with due diligence to find the defendant, while the present statute requires either due effort to serve, or sufficient reasons for not making the effort.

In the case now before us there was no attempt to make ²³¹ personal service and no reason was given for not trying to serve personally, except the fact of nonresidence. Even if residence in a distant state or in a foreign country permits the inference that the person to be served cannot be found in this state, residence in an adjoining state, just across the line, with no evidence that the nonresident is not in business in this state, or that he does not sojourn here, and no explanation whatever for not trying to serve him here, is not

sufficient. As was said by this court in *Carleton v. Carleton*, 85 N. Y. 313, 315: "It is a well-known fact that many persons who are residents of one state have places of business and transact such business in a state different from that in which their residence is located. They are frequently in the latter state, and pass most of their time there. Such persons could be readily found in the state where they do business if due diligence was used for that purpose and nonresidence, of itself, does not necessarily show that they cannot be found within the state, or raise a presumption that due diligence has been used, or that it was not required."

In a later case it was said: "Where the proof of non-residence is clear and conclusive, and that the defendant is living out of the state and in a distant state, there may be strong reasons for holding that proof of diligence is not required"; and as it appeared that the defendant resided in Maryland, and that the summons, which had been duly issued and some effort made to serve it, could not be served owing to that fact, the affidavit was held sufficient: *Kennedy v. New York Life Ins. etc. Co.*, 101 N. Y. 487, 5 N. E. 774.

In *McCracken v. Flanagan*, 127 N. Y. 493, 24 Am. St. Rep. 481, 28 N. E. 385, it appeared that a summons had been issued against the defendant and "that defendant is a non-resident of this state, nor can be found therein, but has a place of residence at Matewan, in the state of New Jersey." After a careful review of the leading cases it was held that the affidavit, which was made when section 135 of the Code of Procedure was in force, was insufficient to give jurisdiction. The court said: "Some degree of diligence must be exercised to find the party, and ²³² what is a due degree depends upon circumstances surrounding each case, and the simple averments in the affidavit that the defendant is a non-resident and cannot be found within the state are not alone sufficient to support an order for the service of a summons by publication. Those facts do not imply that any diligence has been exercised to find and serve the defendant personally with process. It needs no argument to show that the averment in the affidavit that the defendant cannot be found in the state does not tend to prove the exercise of due diligence to find the defendant, for the statute in question not only requires that it be stated in the affidavit that the defendant cannot be found, but expressly requires the averment that he cannot be found after due diligence."

In *Belmont v. Cornen*, 82 N. Y. 256, the order was sustained upon proof of nonresidence, followed by an averment that the summons had been issued to the sheriff of the county where the premises, covered by the mortgage sought to be foreclosed, were situated; that the sheriff "had used due diligence to find the defendants and after such due diligence and inquiry they could not be found within said county or state."

In *Crouter v. Crouter*, 133 N. Y. 55, 30 N. E. 726, an affidavit was held sufficient which stated the nonresidence of the defendants; that they had no place of business in this state; that plaintiff believed that a summons could not, with due diligence, be served personally within the state, and that he had present knowledge of defendants' movements and was satisfied that they frequent no place in the state.

In *Fetes v. Volmer*, 28 N. Y. St. Rep. 317, 8 N. Y. Supp. 294, the court said: "Though a nonresident, the defendant may be at the time temporarily in the state to the knowledge of the plaintiff, and within easy reach of personal service of the summons. No such proof was made by the plaintiff in this case. The affidavit of his attorney, upon which the order was procured, states only that the action has been commenced, that a summons has been issued, and that the two defendants named ²³³ are nonresidents of the state and that they reside at Marion, Washington county, Iowa. The affidavit was, in this respect, plainly insufficient and the county judge was without jurisdiction to grant the order."

While any evidence having a legal tendency to show compliance with the statute, even if inconclusive, would warrant the exercise of judgment and thus confer jurisdiction to make the order, in this case there was no evidence as to the use of diligence, or to excuse the omission of effort to serve in this state. Even if a judge reached a wrong conclusion upon the facts presented, so that his order would be set aside on direct attack by motion to vacate, still if he had some legal evidence to act upon, the order would be protected from collateral attack after the entry of judgment. There was no evidence presented to the justice who made the order now before us which authorized him to act judicially or to decide that the plaintiff would be unable with due diligence to make personal service in this state. An affiant who simply repeats the words of a statute merely states his opinion upon the prop-

osition to be proved. Proof requires that facts be stated from which the conclusion sought may be logically drawn. We find no case in this court and no well-considered case in any court which sustains an order founded simply on proof of nonresidence in an adjoining state with no effort made to find or serve, and no reason given why such effort if made would be useless.

The purchasers were entitled to a marketable title, free from reasonable doubt, and they were justified in refusing to complete their purchase because the affidavits upon which the order of publication was based were insufficient to confer jurisdiction.

The order of the appellate division as well as that of the special term should be reversed and the motion denied, with costs in all courts.

Cullen, C. J., Gray, O'Brien, Bartlett, Haight and Werner, JJ., concur.

Order reversed, etc.

The Sole Purpose of an Affidavit for the publication of summons is to enable the court on inspection to determine whether the action is one in which jurisdiction may be obtained by service by publication: *Leigh v. Green*, 62 Neb. 344, 89 Am. St. Rep. 751. The affidavit is of itself the prerequisite upon which jurisdiction is based, and it must contain and state positively all the facts required by the statute, otherwise it is fatally defective: *Gilmore v. Lampman*, 86 Minn. 493, 91 Am. St. Rep. 376. An affidavit which states that the defendant resides in another state, naming it, and that he is not within the state where suit is brought, shows that he cannot be served within the state, and is therefore sufficient as against collateral attack: *Bank of Colfax v. Richardson*, 34 Or. 518, 75 Am. St. Rep. 664. See, also, *Taylor v. Coots*, 32 Neb. 30, 29 Am. St. Rep. 426.

FRANK v. MERCANTILE NATIONAL BANK.

[182 N. Y. 264, 74 N. E. 841.]

BANKRUPTCY—Setoff of Unmatured Notes.—Notes given by a bankrupt, though not matured at the time of his insolvency, are provable against his estate, and may be set off in an action in a state court by the assignee in bankruptcy upon a claim against the holder of the notes, to an extent necessary to extinguish the claim. (p. 806.)

BANKRUPTCY—Setoff of Claims Acquired After Insolvency. In an action by an assignee in bankruptcy, the defendant may set off a claim against the estate of the bankrupt acquired after his insolvency, but before the defendant entered into the obligation upon which he is sued. (p. 808.)

Charles Grossman and Morris J. Hirsch, for the appellant.

William V. Rowe and E. H. Sykes, for the respondent.

²⁶⁰ CULLEN, C. J. The action is brought by an assignee in bankruptcy to recover the amount of a deposit made by the bankrupt in the National Broadway Bank. It is alleged in the complaint "that prior to the commencement of the action and in or about the month of May, 1903, the National Broadway Bank duly assigned, transferred and set over to the defendant all the property, assets and effects of said bank, and the defendant agreed to assume the payment of and to pay all the liabilities of said bank." The answer of the defendant admitted the plaintiff's claim and pleaded as a setoff and counterclaim seven promissory notes made by the bankrupt to the National Broadway Bank and assigned to it by that bank in April, 1903. Of these notes only one had matured before the adjudication in bankruptcy. That note is conceded to be a proper setoff. The question presented is whether the defendant has the right to set off the six other notes. The special term held that they were not a good setoff because they had not matured at the time the title passed from the bankrupt to his assignee. The learned appellate division has held to the contrary.

If the defendant's rights depended on the equitable rule of setoff as it obtains in this state, it is clear that the notes held by it which had not matured at the time of the transfer of the ²⁶⁷ title from the bankrupt to his assignee could not be setoff against the plaintiff's claim. *Fera v. Wickham*, 135 N. Y. 223, 31 N. E. 1028, 17 L. R. A. 456, is a conclusive authority to that effect, and so the respondent's counsel con-

cedes. The defendant's claim to a setoff, however, is not based upon the rule in equity which prevails with us, but on the provisions of the bankrupt law. Section 68 (30 Stats. 565, U. S. Comp. Stats. 1901, p. 3450) of that law provides that "In all cases of mutual debts or mutual credits between the estate of the bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid." Section 63 (30 Stats. 562, U. S. Comp. Stats. 1901, p. 3447) provides: "Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, . . . with a rebate of interest upon such as were not then payable and did not bear interest."

The argument is that as unmatured claims against the bankrupt are provable against his estate, they necessarily are the subject of setoff under the provisions of section 68. We think that this position is well taken, but we shall refrain from entering into any discussion of the question, as the proposition seemed to be settled by decisions of the federal courts. The uniform current of authority in the district and circuit courts of the United States is to that effect and the law is so stated in the text-books on bankruptcy: *In re City Bank of Savings*, Fed. Cas. No. 2742; *Ex parte Howard Nat. Bank*, 2 Low. 487, Fed. Cas. No. 6764; *In re Kalter*, 2 Nat. Bank. Rep. 264; *In re Little*, 6 Am. Bank. Rep. 681, 110 Fed. 621; *In re Meyer & Dickinson*, 5 Am. Bank. Rep. 595; *Union Nat. Bank v. McKay*, 2 Nat. Bank. Rep. 913, 102 Fed. 662, 42 C. C. A. 583; *In re Phillip Semmer Glass Co.*, 11 Am. Bank. Rep. 665; *Collier on Bankruptcy*, 4th ed., p. 498; *Brandenburg on Bankruptcy*, sec. 1131.

Moreover, the very point seems to have been decided by the supreme court of the United States in *Scammon v. Kimball*, 92 U. S. 362, 23 L. ed. 483, which arose under the bankrupt law of 1867, the provisions of which, so far as they deal with the questions involved in this case, are substantially the same as the present ²⁰³ law: *New York County Nat. Bank v. Massey*, 192 U. S. 138, 24 Sup. Ct. Rep. 199, 48 L. ed. 380. That was an action against the assignee in bankruptcy of a fire insurance company. The complainant was allowed to set off the sums owing him on certain policies as against a claim of the assignee for money on deposit with

the complainant as a banker. The report of the case does not show when the claim on the insurance policies matured, but that fact appears from the opinions in two subsequent cases decided by the same court (*Carr v. Hamilton*, 129 U. S. 252, 9 Sup. Ct. Rep. 295, 32 L. ed. 669; *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. Rep. 148, 36 L. ed. 1059), in which it is stated that the claim for fire losses in the *Scammon* case did not mature until after the insolvency of the insurance company.

It may be further stated that the law of equitable setoff in the supreme court of the United States seems to be different from that which prevails with us. In *Schuler v. Israel*, 120 U. S. 506, 7 Sup. Ct. Rep. 648, 30 L. ed. 707, which arose out of the attachment of a deposit in a bank, it was held that the bank could, as against the attaching creditor, set off all notes of the debtor in the attachment suit held by it, whether matured or not matured at the time of the attachment. Judge Miller there said: "While it may be true that in a suit brought by Israel against the bank it could, in an ordinary action at law, only make plea of setoff of so much of Israel's debt to the bank as was then due, it could, by filing a bill in chancery in such case, alleging Israel's insolvency, and that if it was compelled to pay its own debt to Israel, the debt which Israel owed it, but which was not due, would be lost, be relieved by a proper decree in equity." So, also, in *Carr v. Hamilton*, 129 U. S. 252, 9 Sup. Ct. Rep. 295, 32 L. ed. 669, which was an action brought by the receiver of an insolvent life insurance company to foreclose a mortgage given to it by the holder of an endowment policy, the policy-holder was allowed to set off as against the mortgage the present value of the policy which would not mature for some years. As the bankrupt law operates through the whole country, the construction to be given to it must necessarily be uniform throughout all the states, not varying with the local law. Therefore, in construing it we should be governed by the law of setoff as it ²⁶⁰ prevails in the federal courts and not in our own. In the light of the decisions quoted, as well as under the terms of the bankrupt law, we conclude that the defendant had the right to set off the notes which it held against the bankrupt, even though these notes had not matured at the time of the insolvency.

The counsel for the appellant objects to the validity of the setoff on the further ground that the defendant acquired the

notes in controversy after the proceedings in insolvency. It is, doubtless, as claimed, the law that after insolvency a debtor to the insolvent cannot acquire his obligation for the purpose of using it as a setoff or counterclaim. It was stated on the argument of this appeal that the notes were acquired in the same transaction by which the defendant assumed the liability on which it is now sued; that is to say, when it took over the assets of the National Broadway Bank, in consideration thereof it assumed this obligation. This fact was not challenged on the argument, although it does not seem to be distinctly stated in the answer. Nevertheless, it does appear by the allegations of the complaint and answer that the defendant acquired the notes in April, 1903, while it assumed the obligation on which it is sued in May of that year. As on the face of the pleadings the notes were acquired before any obligation was entered into by the defendant to pay the plaintiff's claim, it is difficult to see how they could have been procured with any intention to defeat that claim. Doubtless, the fact is as was stated by the counsel, and we have, therefore, treated the defendant as being in the same position and entitled to the same rights as those occupied and possessed by the Broadway bank previous to the assignment.

Of course, the defendant is not entitled to any affirmative judgment against the assignee for the excess in the amount of the notes over the amount of the deposit. It is entitled to use those notes solely as a setoff. The judgment of the appellate division simply overrules the demurrer without stating the extent of the relief to be awarded the defendant. The opinion, however, shows that the court intended to allow ²⁷⁰ the defendant's counterclaim only to the extent necessary to extinguish the plaintiff's claim.

The order and interlocutory judgment appealed from should be affirmed, with costs, and the questions certified answered in the affirmative.

Gray, O'Brien, Bartlett, Haight, Vann and Werner, JJ., concur.

Order affirmed.

The Right to Set Off unmatured claims against an assignee in insolvency or for the benefit of creditors is discussed in the monographic note to *St. Paul etc. Trust Co. v. Leck*, 47 Am. St. Rep. 580-582. The right to purchase claims to use as setoffs against a

corporation has been held to continue up to the time of the filing of a petition for the appointment of a receiver, although the purchaser knows of the insolvency of the concern: *Nix v. Ellis*, 118 Ga. 345, 98 Am. St. Rep. 111. See, further, the note to *St. Paul etc. Trust Co. v. Leck*, 47 Am. St. Rep. 582.

MATTER OF MAYOR ETC. OF NEW YORK.

[182 N. Y. 361, 75 N. E. 156.]

BOUNDARIES—Grant of Tide Lands.—Under the royal grant in 1686 to the city of New York of all waste and vacant lands in the city and on Manhattan Island to low-water mark, the city took the land between high and low water mark in trust for the public; and when the city subsequently conveys to an individual a portion of such lands described as bounded by the Hudson river, the boundary of the grant is presumed to extend only to high-water mark, so that the city retains the tideway and lands under water as trustee. (p. 814.)

William C. Beecher and Bache McE. Whitlock, for the appellant.

John J. Delany, Theodore Connolly and Charles D. Olen-
dorf, for the respondent.

³⁶³ **HAIGHT, J.** These proceedings were instituted on behalf of the mayor, aldermen and commonalty of the city of New York to acquire the title and interest of all persons interested in the lands and premises, including upland and land under water or rights therein, not then owned by or vested in the mayor, aldermen and commonalty of the city of New York, abutting upon the Riverside drive between 72d street and 129th street.

The lands in question were part of a tract of land which was granted to the mayor, aldermen and commonalty of the city of New York by Thomas Dongan, then lieutenant-governor under his majesty the king of England, by his charter, bearing ³⁶⁴ date the 22d of April, 1686, which grant included the tideway of the lands upon the eastern side of the Hudson river to low-water mark. On the 21st of July, 1701, the mayor, aldermen and commonalty of the city of New York conveyed to one Jacob De Kay a tract of upland abutting upon the lands under water, in dispute, and bounded by the Hudson river, which conveyance was subsequently confirmed by Lord Cornbury, the captain-general of the province under

Queen Anne. In 1839 one William Whitlock became the owner of the lands in question, claiming title through several mesne conveyances to the lands acquired by De Kay from the city in 1701. The claimants derived their title through Whitlock. On November 9, 1847, Whitlock conveyed to the Hudson River Railroad Company a strip of land sixty-six feet wide across his premises upon the river front for a right of way, a small portion thereof being above high-water mark and the remainder thereof below high-water mark, leaving, however, a narrow strip of the tideway on the lower side thereof unconveyed. Subsequently, the city of New York acquired the lands between the railroad's right of way and the Riverside drive for park purposes and the same is now known as Riverside park.

The rights of claimants depend upon the construction that is to be given to the deed of 1701, by which the city conveyed the uplands abutting upon the premises in question to De Kay. It is contended on behalf of the claimants that under the provisions of that deed De Kay acquired the tideway in front of the uplands described in the deed, and that it was the intention on the part of the city to convey to him all the title that it had to the lands under water, while on behalf of the city it is contended that the lands conveyed were, by the terms of the deed, bounded west by the Hudson river, and that being a navigable river in which the tide ebbs and flows, the presumption arises that high-water mark was intended to be the boundary line. We shall assume for the purposes of this case that, if the conveyance was by an individual who owned the tideway and who had bounded his ³⁶⁵ deed upon the river, the presumption would be that he intended to include in the conveyance the tideway: *Smith v. Bartlett*, 180 N. Y. 366, 73 N. E. 63, and *Archibald v. New York etc. R. R. Co.*, 157 N. Y. 574, 52 N. E. 567. But the conveyance in this case, as we have seen, was by a municipal government, the city of New York, and the question arises as to whether a different presumption arises with reference to its deed.

The rights of the sovereign, whether crown or state, to land under water in navigable streams and arms of the sea are doubtless twofold—proprietary and governmental. As proprietor, the sovereign may sell or convey to others, but as to the power to govern, the sovereign holds as trustee for the use of the public, under such laws, rules and regulations as

may from time to time be adopted and which shall be deemed to best serve the interests of commerce and the state. These powers may be transferred by the sovereign to local subordinate governments which have been established, constituting such governments the trustees of the public and the guardians of the rights and privileges of the people. The king of England, therefore, during our colonial period had the power to grant a charter to the mayor, aldermen and commonalty of the city of New York, constituting it a body corporate and politic with powers of local government, and to convey to it the lands under water surrounding Manhattan island, on which the city is located. This power the king exercised through his colonial governors, who from time to time have enlarged the powers and jurisdiction of the city. While the king had the power to convey the tideway on the shores of the high seas and navigable rivers, he will not be presumed to have done so by merely bounding the conveyance upon the sea or the river; such conveyance will carry title only to high-water mark. Other words must be employed in the conveyance which would clearly indicate his purpose and intent to convey the lands under water in order to pass the title thereto: *Trustees of Brookhaven v. Strong*, 60 N. Y. 56; *Sage v. Mayor etc. of New York*, 154 N. Y. 61, 61 Am. St. Rep. 592, 47 N. E. 1096, 38 L. R. A. 606; *Mayor etc. of New York v. Hart*, 95 N. Y. 443.

³⁰⁸ The charter issued to the mayor, aldermen and commonalty of the city of New York in 1686 by Governor Dongan recites that the city of New York is an ancient city, and that the citizens have anciently been a body politic and corporate, and have held, used and enjoyed divers and sundry rights, liberties, privileges, franchises, free customs, pre-eminences, advantages, jurisdictions, emoluments and immunities, as well by prescription as by charter, letters patent, grants and confirmations, not only of divers governors and commanders-in-chief in the said province, but also of several governors, directors, generals and commanders-in-chiefs of the Nether Dutch nation, whilst the same was under their power and jurisdiction; and the citizens and inhabitants of said city have erected and built at their own costs several public buildings, including a city hall or stadt house, and have constructed a bridge into the dock or wharves and established a ferry between the city and Long Island for the convenience of travelers. He then, on behalf of the king, grants, rati-

flies and confirms to the mayor, aldermen and commonalty of the city all and every such and the same liberties, privileges, franchises, rights, royalties, free customs, jurisdictions and immunities which they have anciently held, used or enjoyed; provided, always, that none of the said liberties, privileges, franchises, rights, free customs, jurisdictions or immunities be inconsistent with or repugnant to the laws of his majesty's kingdom of England, or any of the laws of the general assembly of the province; the public buildings, with the ground thereunto belonging, two market-houses, the bridge into the dock, the wharves or dock, and the aforementioned ferry, with their rights and appurtenances, together with all the profits, benefits and advantages which shall or may accrue and arise at all times hereafter, for dockage or wharfage, within the said dock, with all and singular the rents, issues, profits, gains and advantages, which shall or may arise, grow or accrue by the said city hall, or stadt house, and ground thereunto belonging, market-houses, bridge, dock, burying place, ferry; together with full power, license and authority to the said mayor, ³⁰⁷ aldermen and commonalty, and their successors forever, to establish, appoint, order and direct the establishing, making, laying out, ordering, amending and repairing of all streets, lanes, alleys, highways, watercourses, ferry and bridges, in and throughout the said city and Manhattan island, needful and convenient for the inhabitants and for all travelers and passengers, is likewise granted, ratified and confirmed unto all the inhabitants of the city and of the island. He then grants to the mayor, aldermen and commonalty of the city all the waste, vacant, unpatented and unappropriated lands lying within the city and on Manhattan island, extending and reaching to low-water mark through all parts of the city and Manhattan island, together with all rivers, rivulets, coves, creeks, ponds, waters and watercourses. Also to the officers of the city and their successors forever, the right to extend itself, as well in length and in breadth as in circuit, to the farthest extent throughout Manhattan island, and in and upon all the rivers, rivulets, coves, creeks, waters and watercourses belonging to the island as far as low-water mark, and jurisdiction over the same, "without the let, hindrance or impediment of me or any of my successors, governors, lieutenants or other officers whatsoever." He creates the offices of mayor, chamberlain, treasurer, sheriff, coroner, clerk, constable, marshal, etc., with a common

council, naming the persons that shall fill such offices until their successors are appointed and qualified; and provides that the aldermen and assistant aldermen shall constitute a common council of the city, and "that they, or the greater part of them shall or may have full power and authority, by virtue of these presents, from time to time, to call and hold common council within the common council house or city hall of the said city; and there as the occasion shall be, to make laws, orders, ordinances and constitutions in writing; and to add, alter, diminish or reform them, from time to time, as to them shall seem necessary and convenient (not repugnant to the prerogative of his most sacred majesty aforesaid, his heirs and successors or to any of the laws of the kingdom of England, or other of the laws ³⁰⁸ of the general assembly of the province of New York) for the good rule, oversight, correction and government of the said city and liberties of the same, and of all the officers thereof and for the several tradesmen, victualers, artificers, and of all other the people and inhabitants of the said city, liberties and precincts, aforesaid, and for the better preservation of government, and disposal of all the lands, tenements and hereditaments, goods and chattels of the said corporation; which laws, orders, ordinances and constitutions shall be binding to all the inhabitants of the said city."

It is quite apparent from a reading of the charter that a local subordinate municipal government was here established, to which the sovereign delegated the powers of local government, not inconsistent with the laws of England or of the province of New York, and to which he conveyed the tideway surrounding the island. While we have no express provision of the charter delegating to the municipality the sovereign power to hold the tideway as trustee for the use of the public and for commerce, and to make laws, rules and regulations with reference thereto, we think this power was intended to be delegated to the municipality, and that such intent is clearly inferable from the provisions of the charter growing out of the general powers given to its common council to make laws, ordinances and constitutions, and to amend the same from time to time as may be deemed necessary, and from the fact that he conveyed to the city the land between high and low water mark. The conveyance of the tideway to the city interposed a barrier between the body of the river and the uplands which would prevent the sovereign from

erecting docks, piers or wharves thereon for the accommodation of commerce, and is inconsistent with the purpose of the sovereign to longer retain jurisdiction, control and management thereof for the interest of the public. We, therefore, are of the opinion that it was the intention of the sovereign to delegate to the municipality the power to hold and control the tideway in the interest of commerce and of the public; and that this is apparent from the fact that the ³⁶⁹ charter not only conveyed to the city the tideway, but also granted to it the bridge, docks and piers already constructed, with the right to collect wharfage therefrom. If we are right in this conclusion, it follows that the officers of the city, in conveying to De Kay in 1701, did so as the representatives of the sovereign power delegated to it as a municipal government; and it is deemed, therefore, to have intended only to have included in the conveyance the uplands to high-water mark, retaining the tideway and lands under water as trustee of the public domain in the interests of commerce and of the state.

The order should be affirmed, with costs.

Cullen, C. J., Gray, O'Brien, Bartlett, Vann and Werner, JJ., concur.

Order affirmed.

Waters as Boundary Lines are discussed in the monographic note to *Allen v. Weber*, 27 Am. St. Rep. 56-63. Where lands are described in a deed as bounded by a navigable river where the tide ebbs and flows, the title ends at high-water mark: *Sage v. Mayor*, 154 N. Y. 61, 61 Am. St. Rep. 592. See, also, *Cox v. Arnold*, 129 Mo. 337, 50 Am. St. Rep. 450. A riparian owner on a navigable stream who derives his title from the United States takes to high-water mark only: *St. Louis etc. Ry. Co. v. Ramsey*, 53 Ark. 314, 22 Am. St. Rep. 195. Compare, however, *Stanberry v. Mallory*, 101 Ky. 49, 72 Am. St. Rep. 389; *Bellefontaine Imp. Co. v. Neidringhaus*, 181 Ill. 426, 72 Am. St. Rep. 269. As to the title of land in general which is covered by tidal and other navigable waters, see the monographic note to *People v. Kirk*, 53 Am. St. Rep. 289-300.

ALFSON v. BUSH COMPANY.

[182 N. Y. 393, 75 N. E. 230.]

DEATH—Action for in Behalf of Aliens.—The benefits of the statute of New York, giving a right of action for wrongful death, may be claimed in behalf of nonresident alien relatives of a person negligently killed in that state. (pp. 819, 820.)

Ernest F. Eidlitz and Frederick Hulse, for the appellant.

Carlisle J. Gleason, Abram I. Elkus and Adolph Ruger, for the respondent.

³⁰⁴ **BARTLETT, J.** The plaintiff, as administrator of the deceased, brings this action under section 1902 of the Code of Civil Procedure to recover damages of the defendant corporation for negligently causing the death of the intestate. This section reads as follows: "The executor or administrator of a decedent, who has left him or her surviving, a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect, or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent, by reason thereof, if death had not ensued. Such an action must be commenced within two years after the decedent's death."

On the thirteenth day of November, 1902, the intestate, a ship carpenter in the employ of the defendant corporation, was ³⁰⁵ engaged in repairing a float, moored alongside one of its piers, and by reason of the alleged negligent acts of the defendant was instantly killed, being crushed between the float and the pier. The jury rendered a verdict in favor of the plaintiff for two thousand dollars, and the appellate division having unanimously affirmed the judgment entered thereon, the facts are conclusively settled in favor of plaintiff, to the effect that the defendant was negligent and the intestate free from contributory negligence.

The counsel for the appellant calls our attention to several alleged legal errors founded on the refusal of the trial judge to charge certain requests as to the negligence of the intestate and as to his assumption of obvious risks. The answer to these questions depended upon the conclusion reached by the jury on conflicting evidence, and the trial judge, in a

charge that was eminently fair to both parties, properly submitted the points in controversy to the triers of fact.

The appellant's counsel, however, raises an interesting question of law as to the proper construction to be given section 1902 of the Code of Civil Procedure, already quoted in full, and other sections to which reference will be presently made. It is a conceded fact that the intestate's widow and next of kin are nonresident aliens, domiciled in Norway, and the appellant insists that this action cannot be maintained for their benefit.

This court, so far as we are advised, has never passed upon the question, although it has been considered in the lower courts: *Tanas v. Municipal Gas Co.*, 88 App. Div. 251, 84 N. Y. Supp. 1053, and cases cited. The courts of other states are at variance, Indiana, Pennsylvania and Wisconsin holding the action cannot be maintained, while Massachusetts, Illinois, Alabama and Arizona take the contrary view.

It is to be observed that section 1902 of the Code of Civil Procedure is general in its terms, providing in case of death by negligent act the legal representative may maintain an action for the benefit of husband, wife or next of kin; there are no words of limitation, no expression of the legislative ³⁰⁶ will that the recovery authorized shall be distributed to residents only.

It is argued that this statute has no extraterritorial effect and that public policy requires it should be construed as limited to beneficiaries residing within the jurisdiction. It is well to bear in mind at the outset of this inquiry the precise character of our statute, which differs in some respects from Lord Campbell's Act (9 & 10 Victoria, chapter 93), which is one of the earliest departures from the rule of the common law, that purely personal wrongs died with the person who suffered them; this act has been copied to a greater or less extent in many of our sister states. The first section creates the cause of action and the second section authorizes the executor or administrator of the deceased to bring the action, and the damages, "after deducting the cost not recovered from the defendant, shall be divided between the before-mentioned parties (wife, husband, parent and child of deceased), in such shares as the jury, by their verdict, shall find and direct."

In *Adam v. British etc. Steamship Co.*, [1898] L. R. 2 Q. B. D. 430, it was held that this act and its amendments (27 & 28 Victoria, chapter 95) did not apply for the benefit of aliens abroad. The learned court said: "The intention of the legislature is to be collected from the statute; and I see no implied, and certainly no express, intention to give to foreigners out of the jurisdiction a right of action which even British subjects had not until the passing of 9 & 10 Victoria, chapter 93. Moreover, the statute provides in section 2 for the division of the damages recovered amongst the various persons to be benefited in proportion to be assessed by the jury. It appears to me impossible to hold that it was intended, there being no expression to that effect, to cast upon juries such a duty as this in regard to the distant family of a deceased, and possibly polygamous, alien." The foregoing case was dissented from in *Davidson v. Hill*, [1901] L. R. 2 K. B. D. 606.

Our Code of Civil Procedure contains a somewhat different ³⁹⁷ legislative scheme. Section 1902, which creates the cause of action, has already been discussed. Section 1903 provides as follows: "The damages recovered in an action, brought as prescribed in the last section, are exclusively for the benefit of the decedent's husband or wife, and next of kin; and, when they are collected, they must be distributed by the plaintiff, as if they were unbequeathed assets, left in his hands, after payment of all debts and expenses of administration. But the plaintiff may deduct therefrom the expenses of the action, the reasonable funeral expenses of the decedent and his commissions upon the residue, which must be allowed by the surrogate, upon notice, given in such a manner and to such persons as the surrogate deems proper."

By this section the damages recovered, while not subject to payment of the debts of deceased and the general expenses of administration, are charged with the expenses of the action, the reasonable funeral expenses of deceased and the commissions of plaintiff on the residue.

Section 1904 defines the precise nature of the recovery as "a fair and just compensation for the pecuniary injuries, resulting from the decedent's death, to the person or persons, for whose benefit the action is brought." Section 1905 reads: "The term 'next of kin,' as used in the foregoing sections, has the meaning specified in section 1870 of this act." Sec-

tion 1870 reads: "The term 'next of kin,' as used in this title, includes all those entitled, under the provisions of law relating to the distribution of personal property, to share in the unbequeathed assets of a decedent, after payment of debts and expenses, other than a surviving husband or wife."

It thus appears that if the alien husband, or wife, or next of kin, residing abroad, are permitted to share in the distribution of damages, the jury are not required, as under Lord Campbell's Act, to find and direct how the fund shall be distributed, the statute of distributions having been made applicable.

It is desirable to ascertain the conditions that doubtless induced the legislature more than half a century ago to abrogate ³⁹⁸ the principle of the common law which declared that the cause of action for purely personal wrongs died with the person, and to create a new cause of action in favor of those who had suffered pecuniary injuries, resulting from death by negligence: Laws 1847, c. 450, p. 575; Laws 1849, c. 256, p. 388.

This rule of the common law, judged by the standards of to-day, rested on a foundation that was neither just nor enlightened; it had its origin in an age when the many phases of our modern civilization, which must have impelled the legislature to act, did not exist. During the nineteenth century the world witnessed many and important changes; national isolation passed away; international communication became universal; all civilized mankind were brought together in commercial, social and intellectual intercourse; foreign travel became general; the result of these conditions was that the old prejudice against the foreigner practically disappeared.

Out of this complete revolution in the character of international relations there arose a condition in the world of labor having a direct bearing on the question we are considering. Throughout the last century the emigrants from many lands came to us in constantly increasing numbers, swelling the ranks of labor and a majority of them ultimately attaining the dignity of citizenship. Many of these toilers in mines, on public works, railroads and the numberless fields of manual labor, receive a moderate wage and are compelled to leave in foreign lands those who are dependent upon them and for whose support they patiently work on, indulging the

hope that ultimately they may bring to these shores a mother, or wife and children.

The principle underlying the legislation we are considering is manifestly the protection of those who suffer pecuniary loss when a laborer or servant is killed by the negligent act of the individual or corporation employing him. The clear intention of the legislature is that the negligent employer shall no longer escape the consequences of his act by the death ^{and} of his servant, but shall respond in damages to those who have suffered pecuniary loss.

It is difficult to conceive of any argument springing from public policy, sound reason, or a proper discrimination between the rights of the citizen and the alien, that should prevent the alien husband, wife, or next of kin of a laborer killed by reason of his employer's negligence, from receiving those damages that a jury has awarded a local legal representative who derives his authority from, and acts under the control of, the surrogate's court. The damages are imposed upon a negligent employer as compensation to those who suffer by his act, and there is no valid reason, as it seems to us, why they should not be paid to the survivors whether residing here or in some foreign jurisdiction. The statute not only benefits the survivors, but protects the laboring man, as it tends to enforce observance, by the employer, of the rule requiring him to furnish his servant a safe place in which to work. The laborer, leaving wife and children behind him and coming here from abroad, has a right to enter into the contract of employment, fully relying upon the statute. The conflict of authority in England and our sister states leads us to deal with this question on principle and to base our answer to it on reasons that are weighty and controlling.

In *Mulhall v. Fallon*, 176 Mass. 266, 268, 79 Am. St. Rep. 309, 57 N. E. 386, 54 L. R. A. 934, Holmes, C. J., said, in discussing this question: "It is true that legislative power is territorial and that no duties can be imposed by statute upon persons who are within the limits of another state. But rights can be offered to such persons, and if, as is usually the case, the power that governs them makes no objection, there is nothing to hinder their accepting what is offered." Again, at page 269 (176 Mass.), the learned judge, referring to the argument that words of limitation must be read into

the statute, said: "We cannot think that workmen were intended to be less protected if their mothers happen to live abroad, or less protected against sudden than against lingering death. In view of the very large amount of foreign labor employed in this state, we cannot believe that so large an ⁴⁰⁰ exception was silently left to be read in." This reasoning of the learned judge meets our approval.

The judgment and order appealed from should be affirmed, with costs.

Cullen, C. J., Gray, O'Brien, Haight, Vann and Werner, JJ., concur.

Judgment and order affirmed.

The Principal Case is supported by the weight of authority: See *Romano v. Capital City Brick etc. Co.*, 125 Iowa, 591, 106 Am. St. Rep. 323; *Benlund v. Commodore Min. Co.*, 89 Minn. 41, 99 Am. St. Rep. 534; *Kellyville Coal Co. v. Petraytis*, 95 Ill. 215, 88 Am. St. Rep. 191; *Mulhall v. Fallon*, 176 Mass. 266, 79 Am. St. Rep. 309. Some courts, however, have denied to nonresident alien relatives the benefits of statutes giving a right of action for wrongful death: See *Deni v. Pennsylvania R. R. Co.*, 181 Pa. St. 525, 59 Am. St. Rep. 676; *McMillan v. Spider Lake etc. Co.*, 115 Wis. 332, 95 Am. St. Rep. 947.

WILSON v. HINMAN.

[182 N. Y. 408, 75 N. E. 236.]

ALIMONY—Termination by Death of Husband.—The obligation to pay a wife alimony during her life terminates on the death of the husband, although, in pursuance of the directions of the court, he gave a mortgage to secure the performance of the decree awarding alimony. (p. 822.)

Harvey D. Hinman and Lewis Seymour, for the appellant.

Henry A. Yetter, for the respondent.

⁴⁰⁰ CULLEN, C. J. This action is brought for the foreclosure of a mortgage. The complaint states that the plaintiff recovered a judgment of absolute divorce against one Balis L. Hinman, by which judgment, as amended, the plaintiff was awarded as alimony the sum of three hundred dollars annually "so long as she shall live, to be paid by the

said defendant in equal monthly payments"; that said judgment further provided that the defendant in the action should give security for the payment of such alimony by the execution and delivery of a mortgage on certain specified real estate; that in pursuance thereof that defendant and the defendant in this action, to whom it is alleged said real estate had been fraudulently conveyed, executed a mortgage to the plaintiff conditioned for the payment of said alimony to her as long as she should live. The complaint further alleged the death of ⁴¹⁰ Balis L. Hinman, the defendant in the divorce action, and that default had been made in the payment of the installments accruing subsequently to such death. The defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. At the special term the demurrer was overruled and that decision was affirmed by the appellate division, from the judgment of which an appeal is taken by certification to this court.

The objection to the maintenance of the action raised by the demurrer is that the obligation to pay alimony ceased with the death of the defendant in the divorce suit, and that is the question we are now called upon to determine. Clearly, at common law, the obligation ceased with the expiration of the life of the husband, but the common law granted no divorce which dissolved the marital tie between the parties, the divorces awarded by the ecclesiastical courts being merely what are known in this country as separations. Moreover, it is settled law with us that the jurisdiction of courts over divorces is statutory, not inherent, and that the powers of the court are to be determined by the provisions of the statutes. Nevertheless, the principles on which alimony was awarded in the ecclesiastical courts have been generally adopted by the English courts in actions for absolute divorce which have been authorized by recent legislation, and to a certain extent have been followed by the courts of this country. It cannot be denied, however, that on the question whether the obligation to pay alimony survives the death of a husband, there is great conflict between the decisions of the courts in the various states, though the preponderance of authority is to the effect that it does not survive: *Knapp v. Knapp*, 134 Mass. 353; *Smith v. Smith*, 1 Root (Conn.), 349.

This conflict in authority is, as shown by a recent text-writer (Nelson on Divorce, secs. 930, 932), principally occa-

sioned by the differing views entertained by the courts as to the nature of alimony awarded in a decree for absolute divorce under the statutory provisions of the various states. Of course, alimony awarded on the dissolution of a marriage⁴¹¹ differs in one element from that of a separation; in the latter case the decree merely defines the continuous duty still existing on the part of the husband to support the wife, while in the former the marital obligation is terminated, and the sole liability of the husband toward the wife springs from the decree. In some states, therefore, a judgment of absolute divorce has been considered as a decree settling the property rights of the parties and as a distribution of the assets of the quasi partnership hitherto existing between them (a view in cases justified by the statutory law of the state), while in others alimony awarded by a final decree has been considered as essentially of the same character as the right of support which the wife loses by the dissolution of the marriage. It is the latter view which has been adopted by all the recent decisions of this court. Thus in *Matter of Ensign*, 103 N. Y. 284, 57 Am. Rep. 717, 8 N. E. 544, Judge Finch, while holding that a divorced wife could not share in the estate of an intestate, said: "The court is authorized to give by its decree, in the form of an allowance, a just and adequate substitute for the right of the innocent wife (the right of support to which he had previously alluded) which the divorce cuts off and forbids in the future." In *Romaine v. Chauncey*, 129 N. Y. 566, 26 Am. St. Rep. 544, 29 N. E. 826, 14 L. R. A. 712, it was held that the alimony awarded to an innocent wife by a decree of divorce in her favor is an allowance for her support and maintenance, the award of which is not the enforcement of a simple debt from the husband, but of his marital obligation of support, from which he would be relieved by the dissolution of the marriage were it not for the decree. In *Wetmore v. Wetmore*, 149 N. Y. 520, 52 Am. St. Rep. 752, 44 N. E. 169, 33 L. R. A. 708, the doctrine of the *Romaine* case, that alimony is founded upon the marital obligation of support, was reaffirmed, and it was held that a divorced wife was entitled to have the income of a trust fund created for the benefit of her husband applied upon that alimony. It is true that in two cases—*Walker v. Walker*, 155 N. Y. 77, 49 N. E. 663, and *Livingston v. Livingston*, 173 N. Y. 377, 93 Am. St. Rep. 600, 66 N. E. 123, 61 L. R. A. 800—we have held that where a de-

cree of divorce contained no reservation of the right to modify the award of alimony the court was without power to make such modification, and that ⁴¹² the legislature could not confer that power in the case of decrees entered prior to the enactment of the statute. We there held that the right of the plaintiff was a property right of which she could not be deprived. Those decisions, however, did not proceed on any theory that alimony was merely a debt; they recognized that the foundation for an award of alimony rested in the marital obligation of the husband's support, but held that the obligation, theretofore indefinite, having been liquidated by the divorce decree at a specific sum, the adjudication was final.

If this view of the nature of alimony be correct, then it seems clear on principle that the obligation to pay it ceases at the death of the husband. A wife's right of support does not survive her husband's life as a claim against his estate. On the death of the husband the wife has her dower in his real estate if he was possessed of any and her share in the personalty if he died intestate. The husband, if he choose, may dispose of all his property by will to the exclusion of the wife. It is difficult to see why the rights of the divorced wife should be greater than those she would have enjoyed had she not been divorced. Moreover, there is this practical objection to considering the decree for alimony as surviving the demise of the husband. In this country, at least till very recent times, the class of persons whose incomes are derived solely from accumulated wealth is comparatively small. The income of most men is derived from their professional or business exertions, and the award of alimony is usually based on such an income, not on one accruing from accumulated property. An allowance of an amount, which it would be entirely just that a man should pay during his life to the wife whom his misconduct has compelled to seek a divorce, might be grossly extravagant if imposed as a charge upon his estate after his death and very unjust to other claimants of his property.

The respondent relies upon the case of *Burr v. Burr*, 10 Paige, 37, as a controlling authority upon the question before us. The opinion of the chancellor in that case certainly does decide the question in his favor, but we are of opinion that it ⁴¹³ is not controlling. The case was carried to the court of errors and is reported in 7 Hill, 207. The report of the case shows that in the court of errors the substantial

contest was as to the amount of the alimony, there being in none of the opinions any discussion as to the period during which the alimony should be paid. Moreover, the case arose under a statute different in its terms from the present law. It provided that the court might make decree for the suitable support and maintenance of the wife by the husband, "or out of his property, as may appear just and proper": 2 Rev. Stats. 147, sec. 54. Now the provision is that the court may require the defendant to provide for the support of the plaintiff as justice requires: Code Civ. Proc., sec. 1759. Thus the court is now empowered only to impose a personal obligation upon the defendant. It cannot deprive him of his property, though it may compel him to give security for the discharge of his obligation, to which I shall allude hereafter. Moreover, the authority of *Burr v. Burr*, 10 Paige, 37, has been much shaken, if not entirely overthrown, by the recent decision of this court in *Johns v. Johns*, 166 N. Y. 613, 59 N. E. 1124; affirmed on opinion below, 44 App. Div. 533, 60 N. Y. Supp. 865. In that case a divorced wife brought an action against the executor of a deceased husband to enforce the payment of alimony awarded her by a decree of divorce. It was held that the obligation to pay alimony ceased at the death of the husband and did not survive against his estate. That case can be differentiated from the one before us only in one respect. In the present case the husband was directed to give security for the performance of his obligation, out of which direction sprung the mortgage in suit, while in the *Johns* case there was no such direction. On this difference in circumstance there has been founded a doctrine suggested in *Galusha v. Galusha*, 43 Hun, 181, and apparently adopted by the learned appellate division in this case, that a general award of alimony against the husband terminates at his death, but if he be directed to give security for its payment it survives. Such a doctrine can rest on no solid foundation. Section 1772 of the Code provides that "where a judgment rendered, ⁴¹⁴ or an order made . . . requires a husband to provide for the education or maintenance of any of the children of a marriage, or for the support of his wife, the court may, in its discretion, also direct him to give reasonable security, in such a manner, and within such a time, as it thinks proper, for the payment, from time to time, of the sums of money required for that purpose." This section does not purport or assume to grant to the wife alimony

for any longer period nor impose upon the husband or his estate any greater obligation than that awarded by the previous provisions of the decree; it is merely security for the performance of the obligation already imposed that the court is authorized to require. It would be an unnatural construction to give it any other effect. The security required might not be in the shape of a lien on any specific property, but merely the personal obligation of sureties. In that case it would hardly be contended that the obligation of the sureties would extend beyond that of their principal. There is nothing in the opinion rendered by Judge Hatch in the Johns case, 166 N. Y. 613, 59 N. E. 1124, that supports such a doctrine; on the contrary, the court expressly declined to pass upon the question as it was not involved in the case. It may very well be that by the agreement of the parties alimony might be awarded in a different form from that provided for in the statute; that is to say, the parties might agree that a gross sum should be paid as alimony, or that an allowance should be made to the wife which would bind the husband's estate after his death. An agreement of that character would in no way contravene public policy, and the performance of it would, doubtless, be enforceable by the courts. It is on this ground that the decision in *Storey v. Storey*, 125 Ill. 608, 8 Am. St. Rep. 417, 13 N. E. 329, 1 L. R. A. 320, proceeded. The present case is barren of any such feature.

The judgments appealed from should be reversed and the complaint dismissed, but without costs in any court.

The question certified should be answered in the negative.

Gray, O'Brien, Bartlett, Haight, Vann and Werner, JJ., concur.

Judgments reversed, etc.

Where Alimony is decreed in terms for the natural life of a wife, it subsists, according to Stratton v. Stratton, 77 Me. 373, 52 Am. Rep. 779, even after the defendant's death. See, however, Gaines v. Gaines, 9 B. Mon. 295, 48 Am. Dec. 425; Lockbridge v. Lockbridge, 3 Dana, 28, 28 Am. Dec. 52. In Storey v. Storey, 125 Ill. 608, 8 Am. St. Rep. 417, it is held that a consent decree which provides for the payment of alimony to a divorced wife "so long as she may be and remain sole and unmarried," is binding upon the estate of the husband after his decease, so long as she remains unmarried, especially when security for the payment is given.

SANDERS v. SAXTON.

[182 N. Y. 477, 75 N. E. 529.]

STATE—Immunity from Suits.—A state of the Union, being a sovereign, cannot be sued, except with its own consent. (p. 827.)

STATE OFFICERS—Immunity from Suit.—Although a state cannot be subjected to hostile legislation at the instance of an individual, this immunity cannot be claimed by its officers. They can be held responsible for illegal trespasses or torts on the rights of an individual, even though they act or assume to act under the authority and pursuant to the directions of the state. (p. 827.)

STATE—Suit Against Officer to Cancel Tax Deed.—The owner and possessor of land cannot maintain an action against the commissioner of the state land office and the comptroller of the state, they not having committed or threatened to commit any illegal act jeopardizing the plaintiff's rights, to cancel and remove tax deeds executed by the comptroller to the state on sales of the land for unpaid taxes, for the state is a necessary party to the action, and it has not consented to being sued. (p. 828.)

Julius M. Mayer, attorney general, and Horace McGuire, for the appellants.

Robert Goeller, for the respondent.

⁴⁷⁸ CULLEN, C. J. The action was brought by the plaintiff as the owner in fee and possessor of certain lands in the late town of New Utrecht in the county of Kings (now part of the borough of Brooklyn in the city of New York) against the defendants, except the defendant Roberts, as commissioners of the land office of the state of New York, and against the defendant Roberts, as comptroller of said state, to have certain deeds executed by the comptroller to the people of the state on sales of said lands for unpaid taxes adjudged illegal and void and the record of the same in the registrar's office to be so marked and to require the comptroller to cancel and vacate the record thereof in his office. Judgment was granted substantially as prayed for in the complaint, and that judgment affirmed by the appellate division, from which affirmance an appeal has been taken to this court.

At the threshold of the examination of this appeal there is presented to us the question of the right of the plaintiff to maintain an action of the character specified against the defendants as officers of the state. This question was raised in the trial court by a motion made at the opening of the case to dismiss the complaint on the ground that it stated

no cause of action against the defendants and that the court had no jurisdiction of the subject matter of the suit. To the denial of that motion the appellants properly excepted. The motion being made on the pleadings no consideration of the sufficiency of the evidence is involved, and the exception survives the unanimous affirmance by the appellate division. We think the question has been erroneously decided by the courts below, that the action was not maintainable and that the complaint should have been dismissed on the defendants' motion.

It is elementary law that the state being a sovereign cannot be sued except with its own consent (*Cohens v. Virginia*, 6 Wheat. 264, 5 L. ed. 257; *Matter of Hoople*, 179 N. Y. 308, 72 N. E. 229), subject, ⁴⁷⁹ of course, to the one qualification found in the federal constitution, that an action may be maintained by one state against another state. But though the state cannot be subjected to hostile litigation at the instance of the individual, that immunity is not possessed by its officers, who can be held responsible for illegal trespasses or torts on the rights of an individual, even though they act or assume to act under the authority and pursuant to the directions of the state. This principle was established at quite an early period in our history by the decision of the supreme court of the United States in *Osborne v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204. There the taxing officers of the state of Ohio threatened to collect a tax imposed by the state on a bank chartered by the United States and had already seized part of the specie held by the bank. It being determined that the state could not constitutionally impose the tax on the bank, it was further held that the officers of the state were properly restrained from collecting the tax and compelled to restore the funds they had already taken. In *Davis v. Gray*, 16 Wall. 203, 21 L. ed. 447, it was held that a state officer might be enjoined from executing a state law in conflict with the federal constitution and from encumbering, by patents to others, lands which had been contracted to a railroad company. In *United States v. Lee*, 106 U. S. 196, 1 Sup. Ct. Rep. 240, 27 L. ed. 171, it was held that while the United States could not be sued without their consent, still an action might be brought in ejectment to recover lands in the possession of the officers and agents of the United States. These cases and others fully support the doctrine that the officers and agents of the United

States and of the states may be sued for their illegal acts or to recover property illegally possessed by them despite the immunity of their principal. That doctrine, however, does not cover the case now before us. The defendants are not in possession of the plaintiff's property, nor have they been. They have not committed, nor do they threaten to commit, any trespass thereon, or any other illegal act by which the rights of the plaintiff may be jeopardized or impaired. The action is both in effect and in ^{also} form to cancel and remove the deeds to the people of the state of New York as clouds upon the plaintiff's title. The grantee in such a deed is plainly a necessary party to such an action, as it is the title of that grantee that is to be passed upon, and it cannot be adjudged void unless he is brought in court. No one would ordinarily think of disputing this proposition. The only reason for omitting to make the state a party in this case is that it cannot be made a party, and for that reason it is sought to avoid the immunity that the state possesses by making its officers parties in its stead. But it is also settled by the decisions of the supreme court that "the United States are not bound by a judgment to which they are not parties, and that no officer of the government can, by defending a suit against private persons, conclude the United States by the judgment": *Carr v. United States*, 98 U. S. 433, 25 L. ed. 209; *United States v. Lee*, 106 U. S. 196, 1 Sup. Ct. Rep. 240, 27 L. ed. 171. Now, as the only object and purpose of a suit in equity to remove a cloud on the title to property is to have any adverse title that may be asserted under such cloud passed on and adjudged void so that the plaintiff in possession may be forever afterward free from any danger of the hostile claim, it would seem plain that where the judgment in an action cannot conclude or bind a party claiming under the adverse title the action must fail. It is true that in one of the earlier cases (*Davis v. Gray*, 16 Wall. 203, 21 L. ed. 447), it is said: "Where the state is concerned the state should be made a party if it could be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the state in all respects as if the same were a party to the record." If these remarks are to be construed apart from the context of the opinion in which they are found the proposition stated therein is far too broad, as it would entirely abrogate the immunity from suit which all the authorities

concede the state possesses. But that the court intended to lay down no such rule is apparent from its subsequent decision in *Louisiana v. Jumel*, 107 U. S. 711, 2 Sup. Ct. Rep. 128, 27 L. ed. 448. In that case the state passed a statute compromising the claims of its bondholders ⁴⁸¹ by the issue of a new consolidated bond in substitution of its former debt and declaring that the statute should be deemed a contract between the state and its bondholders. Subsequently, by an amendment to the state constitution, the amount authorized to be raised by taxation of property within the state was limited and the interest on the consolidated bonds reduced. The holders of the consolidated bonds presented their coupons for payment, which was refused, and thereupon brought an action in equity to restrain the state officers from applying the proceeds of the state taxes to other purposes than the payment of said coupons. The court held that the statute under which the bonds were issued constituted a contract between the state and the holders of the bonds within the protection of the federal constitution. But it further held that in reality the suit was a suit against the state itself, and, therefore, could not be maintained. In the prevailing opinion there is an exhaustive review of all the earlier decisions of the subject. It is shown that in the *Osborne*, the *Davis* and the *Lee* cases the actions were to restrain the commission of unlawful acts by the state or government officers for which the command of their principal afforded no justification, or to recover possession of property held equally without warrant of right. The distinction between those cases and the one then before the court is clearly pointed out in that in the latter case the moneys sought to be reached were the moneys of the state, in the state treasury, impressed with no trusts, and the relation existing between the state and the bondholder was merely that of debtor and creditor. Accordingly it was held that such an action was essentially one against the state itself and, therefore, could not be maintained. The same principle governs the case now before us. The title now sought to be adjudged void is the title of the people of the state, the defense of which has not been committed to any officer by whose appearance the state could be concluded. Nor is the decision in *Louisiana v. Jumel*, 107 U. S. 711, 2 Sup. Ct. Rep. 128, 27 L. ed. 448, limited or qualified by the subsequent decision in *Rolston v. Missouri Fund Commrs.*, 120 U. S. 390, 7 Sup. Ct. Rep. 599, 30 L. ed.

721. The distinction between the two ⁴⁸³ cases is stated in a few sentences in the opinion in the later case: "But this case is entirely different from that (Jumel case). There the effort was to compel a state officer to do what a state prohibited him from doing. Here the suit is to get a state officer to do what the state requires of him." The property rights of the plaintiff are not infringed by this decision. He is in possession of the land. If anyone should assume to enter upon it by ousting him from possession he might defend that possession not only physically but by actions in the courts, and if the title of the state is invalid, successfully in the courts. Even in the case of a deed to an individual purchaser on a tax sale, we have held that the legislature may restrict or abolish the right of the owner of the land to relief in equity against the deed as a cloud on his title, since such owner, if in possession, may maintain his possession and if out of possession may recover it by ejectment: *Loomis v. City of Little Falls*, 176 N. Y. 31, 68 N. E. 105. As we have not been referred to any statute authorizing a suit against the state for the matter set forth in the complaint, we are of opinion that the action cannot be maintained.

The judgment of the appellate division and that of the special term should be reversed and the complaint dismissed, with costs in all the courts.

Gray, O'Brien, Bartlett, Haight, Vann and Werner, JJ., concur.

Judgment reversed, etc.

**WHEN PUBLIC OFFICERS ARE SUBJECT TO SUIT ALTHOUGH
THEY ASSUME TO BE ACTING FOR A STATE OR THE
UNITED STATES.**

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I. Immunity of Sovereign from Suit.

a. **Waiver and Evasion of Immunity.**—The general rule is well understood that neither the United States nor any state of the Union can be sued without its consent given by legislative authority: *Hunsaker v. Borden*, 5 Cal. 288, 63 Am. Dec. 130; *Divine v. Harvie*, 7 T. B. Mon. 439, 18 Am. Dec. 194; *Orleans Nav. Co. v. Schooner Amelia*, 7 Mart. 570, 12 Am. Dec. 516; *United States v. Murdock*, 18 La. Ann. 305, 89 Am. Dec. 651; *Overholser v. National Home*, 68 Ohio St. 236, 96 Am. St. Rep. 658, 67 N. E. 487, 62 L. B. A. 936; *Lowry v. Thompson*, 25 S. C. 416, 1 S. E. 141; *Moore v. Tate*, 87 Tenn. 725, 10 Am. St. Rep. 712, 11 S. W. 935; *Cornwall v. Commonwealth*, 82 Va. 644, 3 Am. St. Rep. 121. This immunity cannot be waived by an officer of the government (*People v. Sanitary District*, 210 Ill. 171, 71 N. E. 334; *Carr v. United States*, 98 U. S. 433, 25 L. ed. 209; *Stanley v. Schwalby*, 162 U. S. 255, 16 Sup. Ct. Rep. 754, 40 L. ed. 960; *Bowker v. United States*, 105 Fed. 398), nor can it be evaded by making him a party defendant: *Printup v. Cherokee R. R. Co.*, 45 Ga. 365; *Tate v. Salmon*, 79 Ky. 540; *League v. De Young*, 2 Tex. 497.

b. **Whether Immunity Extends to Officers.**—It does not follow, however, that an officer of a state or of the United States can claim the same immunity from suit that his principal may. If the right asserted and the relief asked by a complainant is against the defendants as individuals, they cannot protect themselves from liability by their official character as representatives of the sovereign, when the authority under which they profess to act is void. Said Justice Matthews in *Ex parte Ayers*, 123 U. S. 443, 8 Sup. Ct. Rep. 164, 31 L. ed. 216: "The very ground on which it [*Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204] was adjudged not to be a suit against the state, and not to be one in which the state was a necessary party, was that the defendants personally and individually were wrongdoers, against whom the complainants had a clear right of action for the recovery of the property taken, or its value, and that, therefore, it was a case in which no other parties were necessary. The right asserted and the relief asked were against the defendants as individuals. They sought to protect themselves against personal liability by their official character as representatives of the state. This they were not permitted to do, because the authority under which they professed to act was void." Then, after discussing the immunity of the several states from suit, Justice Matthews added: "But this is not in any way intended to impinge upon the principle which justifies suits against individual defendants who, under color of the authority of unconstitutional legislation by the

state, are guilty of personal trespasses and wrongs, nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest." See, also, *Fitts v. McGhee*, 172 U. S. 516, 19 Sup. Ct. Rep. 269, 43 L. ed. 535.

"The suability of a state, without its consent, was a thing unknown to the law. This has so often been laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. It was fully shown by an exhaustive examination of the old law by Justice Iredell in his opinion in *Chisholm v. Georgia*, 2 U. S. (2 Dall.) 419, 1 L. ed. 440; and it has been conceded in every case since, where the question has in any way been presented, even in the cases which have gone furthest in sustaining suits against the officers or agents of states: *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Davis v. Gray*, 16 Wall. 203, 21 L. ed. 447; *United States v. Lee*, 106 U. S. 196, 1 Sup. Ct. Rep. 240, 27 L. ed. 171; *Poindexter v. Greenhow*, 109 U. S. 63, 3 Sup. Ct. Rep. 8, 27 L. ed. 860; *Virginia Coupon Cases*, 114 U. S. 269, 5 Sup. Ct. Rep. 903, 29 L. ed. 185. In all these cases the effort was made to show, and the court held that the suit was not against the state or the United States, but against the individuals, conceding that if they had been either against the state or the United States, they could not have been maintained": *Hans v. Louisiana*, 134 U. S. 1, 10 Sup. Ct. Rep. 504, 33 L. ed. 842, per Justice Bradley.

c. **Whether Suit is in Fact Against State or Officer.**—Obviously, therefore, it becomes important to determine, in any given case, whether the action, irrespective of the nominal parties, is really one against the state and to which it is an indispensable party to enable the court to grant relief. In *Tuchman v. Welch*, 42 Fed. 548, Justice Philips discusses this question as follows: "In *Cunningham v. Macon R. R. Co.*, 109 U. S. 446, 3 Sup. Ct. Rep. 292, 27 L. ed. 992, it was held that, in those cases where it is manifest from the record that the state is an indispensable party to enable the court to grant any relief, it would refuse jurisdiction. In other words, when it is clear that the party proceeded against has no individual interest in the controversy, and the state alone is to be affected by the judgment, and the decree would be inoperative unless against the state, it may be deemed as a proceeding against the state. This question underwent thorough discussion in *Re Ayers*, 123 U. S. 443, 8 Sup. Ct. Rep. 164, 31 L. ed. 216, where it was held that, although the matter out of which the controversy arose was against Ayers as attorney general and other officers of the state in their official capacity, yet, as the real purpose was to enforce a right founded in contract to which the state was a party alone, and any

judgment the court might render could be effectual only as against the state, the state was a necessary party, and in the case under review was constructively present by its officers. 'In such a case,' says Mr. Justice Matthews, 'though the state be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still in substance, though not in form against the state. . . . It may be asked, What is the true ground of distinction, so far as the protection of the constitution of the United States is invoked, between the contract rights of the complainant in such a suit and other rights of person and of property? In these latter cases it is said that jurisdiction may be exercised against individual defendants, notwithstanding the official character of their acts, while in cases of the former description the jurisdiction is denied.'

"He then proceeds to show that the acts alleged to be threatened by Ayers and others are in violation of the contract made by the state of Virginia, which it alone could perform, and the acts of the defendants are but the acts of the state, and nothing said or done by them constituted a breach of the contract, the breach of which constitutes the whole gravamen of the action; and as the judgment sought would bind the state, if effective, and not any individual act of the defendants, it should be deemed the act of the state. The opinion then pertinently proceeds as follows: 'But this is not in any way intended to impinge upon the principle which justifies suits against individual defendants who, under color of the authority of unconstitutional legislation by the state, are guilty of personal trespasses and wrongs, nor to forbid suits against officers in their official capacity, either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest. . . . If an individual acting under the assumed authority of a state, as one of its officers, and under color of its laws, comes into conflict with the superior authority of a valid law of the United States, he is stripped of his representative character, and subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.' "

In *Carolina Nat. Bank v. State*, 60 S. C. 465, 85 Am. St. Rep. 864, 38 S. E. 629, Justice Jones made this observation: "Whenever the United States supreme court, notwithstanding the inhibition of suits against the state without its consent, rightfully assumes jurisdiction of a suit against a state officer, it is upon the ground that the officer's act is not state action, but the individual act of the person holding the office in cases where the officer's act is not authorized

by a valid and constitutional statute. If authorized by a valid law, the officer's act is the state's act; if not so authorized, the officer's act is his own."

It seems to have been thought at one time that in determining whether or not an action was against a state, the fact that the state was not named as a party to the record was conclusive of the inquiry: *Osborn v. Bank of United States*, 22 U. S. (9 Wheat.) 738, 6 L. ed. 204. But it has now become the settled doctrine that a court, when its jurisdiction is questioned because the action is really against the state, will look behind the nominal parties to the record to ascertain who are the real parties to the controversy; so that an action, though in form against an officer of a state, if in fact against the state itself, cannot be maintained, even when the state is not made a party on the record: *McWhorter v. Pensacola etc. R. R. Co.*, 24 Fla. 417, 12 Am. St. Rep. 220, 5 South. 129, 2 L. R. A. 504; *Salem Mills Co. v. Lord*, 42 Or. 82, 69 Pac. 1033, 70 Pac. 832; *Lowry v. Thompson*, 25 S. C. 416, 1 S. E. 141. In *Hagood v. Southern*, 117 U. S. 52, 6 Sup. Ct. Rep. 608, 29 L. ed. 805, where the state of South Carolina, though the party in interest, was not nominally a defendant, it was said in the course of the opinion: "These suits are accurately described as bills for the specific performance of a contract between the complainants and the state of South Carolina, who are the only parties to it. But to these bills the state is not in name made a party defendant, though leave is given to it to become such if it chooses and except with that consent it could not be brought before the court, and be made to appear and defend. And yet it is the actual party to the alleged contract, the performance of which is decreed, the one required to perform the decree, and the only party by whom it can be performed. Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and agents of the state, having no personal interest in the subject matter of the suit, and defending only as representing the state. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the state. The state is not only the real party to the controversy, but the real party against which relief is sought by the suit, and the suit is therefore substantially within the prohibition of the eleventh amendment to the constitution."

If whether a suit is one against a state is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party to the record, but by the effect of the judgment which can

be entered: *Minnesota v. Hitchcock*, 185 U. S. 373, 22 Sup. Ct. Rep. 650, 46 L. ed. 954.

The fact that a state has an interest in the result of a suit brought against one of its officers does not necessarily render the action one against the state itself and bar the court of jurisdiction: *Board of Public Works v. Gaunt*, 76 Va. 455; *Virginia Coupon Cases*, 25 Fed. 654.

II. Actions Involving Torts.

a. *In General.*—There is a class of cases in which an individual is sued in tort for some act injurious to another in regard to person or property, his defense being that he has acted under the orders of the government. In these cases he is not sued as or because he is an officer of the government, but as an individual. And the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense, he must show that his authority was sufficient in law to protect him. The vital principle in all such cases is, that the defendant, though professing to act as an officer of the government, is violating or threatening to violate the rights of the plaintiff, for which he is personally and individually liable. One sued as a wrongdoer, who seeks to substitute the state in his place, or to justify himself by the authority of the state, or to defend on the ground that the state has adopted his act and exonerated him, cannot rest on the bare assertion of this defense. He must establish it. It is necessary, therefore, for him, in order to complete his defense, to produce a law of the state which constitutes his commission as its agent and warrant for his act: *Regan v. Farmers' Loan etc. Co.*, 154 U. S. 362, 14 Sup. Ct. Rep. 1047, 38 L. ed. 1014; *Belknap v. Schied*, 161 U. S. 10, 16 Sup. Ct. Rep. 443, 40 L. ed. 599; *Metropolitan Life Ins. Co. v. McNall*, 81 Fed. 888; *Union Pac. R. R. Co. v. Alexander*, 113 Fed. 347.

Belonging to this class of cases is a trespass upon real estate, giving rise to an action of trespass or ejectment: *United States v. Lee*, 106 U. S. 196, 1 Sup. Ct. Rep. 240, 27 L. ed. 171. It has been held that officers or agents of a state in charge of its insane asylum may be enjoined from interfering with the flow of a natural stream, and from throwing offal therein, whereby its waters become unfit for any purpose, and the air is rendered noxious and offensive: *Herr v. Central Ky. Lunatic Asylum*, 97 Ky. 458, 53 Am. St. Rep. 414, 30 S. W. 921, 28 L. B. A. 394.

"In a suit to which the state is neither formally nor really a party, its officers, although acting by its order and for its benefit, may be restrained by injunction, when the remedy at law is inadequate, from doing positive acts, for which they are personally and individually liable, taking or injuring the plaintiff's property, contrary to a plain official duty requiring no exercise of discretion,

and in violation of the constitution of the United States": *Belknap v. Schied*, 161 U. S. 10, 16 Sup. Ct. Rep. 443, 40 L. ed. 599.

b. **Enforcement of Unconstitutional Statute.**—A suit may be maintained to enjoin individuals, acting as officers of a state, from enforcing an unconstitutional statute to the injury of the rights of the complainant: *Blue Jacket etc. Copper Co. v. Scherr*, 50 W. Va. 533, 40 S. E. 514; *Claybrook v. City of Owensboro*, 16 Fed. 297; *Mills v. Green*, 67 Fed. 818; *Western Union Tel. Co. v. Henderson*, 68 Fed. 588; *Starr v. Chicago etc. Ry. Co.*, 110 Fed. 3; *Pennoyer v. McConnaughy*, 140 U. S. 1, 11 Sup. Ct. Rep. 699, 35 L. ed. 363. Such a suit, however, cannot be maintained merely to test the constitutionality of a statute. "There is a wide difference between a suit against individuals holding official positions under a statute, to prevent them, under sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state": *Fitts v. McGhee*, 172 U. S. 516, 19 Sup. Ct. Rep. 269, 43 L. ed. 535; *Coulter v. Weir*, 127 Fed. 897, 62 C. C. A. 429.

The fact that a statute under which state officers are proceeding is constitutional will not necessarily bar the federal courts of jurisdiction, for a valid law may be wrongfully administered to the injury of an individual. State officers may go beyond the powers conferred by statute, and, when they do so, the fact that they assume to act under a valid law will not oust the courts of jurisdiction to restrain their illegal acts: *Reagan v. Farmers' Loan etc. Co.*, 154 U. S. 362, 14 Sup. Ct. Rep. 1047, 38 L. ed. 1014; *Metropolitan Life Ins. Co. v. McNall*, 81 Fed. 888.

c. **Infringement of Patents.**—State or United States officers are personally liable to suit for their own infringement of a patent or copyright, although acting under orders from their principal: *Cammer v. Newton*, 94 U. S. 225, 24 L. ed. 72; *Howell v. Miller*, 91 Fed. 129, 33 C. C. A. 407. An injunction will not lie, however, to restrain employes or officers of the United States from using an article in infringement of a patent, when the United States is in possession of the article as owner or lessee: *Belknap v. Schied*, 161 U. S. 10, 16 Sup. Ct. Rep. 443, 40 L. ed. 599; *International Postal Supply Co. v. Bruce*, 194 U. S. 601, 24 Sup. Ct. Rep. 820, 48 L. ed. 1134. See, too, *Daskiell v. Grosvenor*, 66 Fed. 334, 13 C. C. A. 593, 27 L. ed. 67. The members of a state capitol commission, who let a contract for the construction of a capitol building, wherein the use of a patented article is specified, are not answerable for an infringement of the patent by the contractor: *Standard Fireproofing Co. v. Toole*, 122 Fed. 649.

III. Actions Involving Contract.

There is a very clear distinction between those cases wherein actions at law or suits in equity are maintainable against individuals who, while claiming to act as officers of a state, violate and invade the personal or property rights of the complainants, under color of authority unconstitutional and void, and those cases in which the decree require, by affirmative official action on the part of the defendants, the performance of an obligation that belongs to the state in its political capacity: *Hagood v. Southern*, 117 U. S. 52, 6 Sup. Ct. Rep. 608, 29 L. ed. 805. An action cannot be maintained against the officers of a state to compel them to perform a contract between the state and an individual, or to compel them to do acts which would impose a contractual pecuniary liability upon the state, or to issue any evidence of debt which would have that result, for such an action is in effect against the state itself: *Mills Pub. Co. v. Larrabee*, 78 Iowa, 97, 42 N. W. 593; *State v. Mortensen* (Neb.), 95 N. W. 831; *Miller v. State Board*, 46 W. Va. 192, 76 Am. St. Rep. 811, 32 S. E. 1007; *State v. Lanier*, 47 La. Ann. 110, 16 South. 647; *McCauley v. Kellogg*, 2 Woods, 13, Fed. Cas. No. 8688; *Farmers' Nat. Bank v. Jones*, 105 Fed. 459.

"A suit against the officers of a state," said Justice Lamar in *Pennoyer v. McConnaughy*, 140 U. S. 1, 11 Sup. Ct. Rep. 699, 35 L. ed. 363, "to compel them to do the acts which constitute a performance by it of its contracts, is, in effect, a suit against the state itself. In the application of this latter principle, two classes of cases have arisen in the decisions of this court, and it is in determining to which class a particular case belongs that differing views have been presented. The first class is where the suit is brought against the officers of the state, as representing the state's action and liability, thus making it, though not a party to the record, the real party, against whom the judgment will so operate as to compel it to specifically perform its contracts: *In re Ayers*, 123 U. S. 443, 8 Sup. Ct. Rep. 164, 31 L. ed. 216; *Louisiana v. Jumel*, 107 U. S. 711, 2 Sup. Ct. Rep. 128, 27 L. ed. 448; *Antoni v. Greenhow*, 107 U. S. 769, 2 Sup. Ct. Rep. 91, 27 L. ed. 468; *Cunningham v. Macon E. R. Co.*, 109 U. S. 446, 3 Sup. Ct. Rep. 292, 609, 27 L. ed. 992; *Hagood v. Southern*, 117 U. S. 52, 6 Sup. Ct. Rep. 608, 29 L. ed. 805. The other class is where a suit is brought against defendants who, claiming to act as officers of the state, and under color of an unconstitutional statute commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the state, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant

the performance of a plain legal duty, purely ministerial, is not, within the meaning of the eleventh amendment, an action against the state: *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Davis v. Gray*, 16 Wall. 203, 21 L. ed. 447; *Board of Liquidation v. McConib*, 92 U. S. 531, 23 L. ed. 623; *Allen v. Baltimore etc. R. R. Co.*, 114 U. S. 311, 5 Sup. Ct. Rep. 925, 962, 29 L. ed. 200, 207; *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. Rep. 903, 962, 29 L. ed. 185." "The supreme court has been scrupulous not to permit suits against state officers to compel or coerce states to perform their obligations or abide by their contracts, when the officer has neither committed, nor threatened to commit, an injury to the property of the complainant, and has been willing to permit suits against officers who, under the authority of unconstitutional statutes, have attacked, or threatened to attack and injure, the vested pecuniary rights of the complainant in his property": *Yale College v. Sanger*, 62 Fed. 177.

If a bill in equity for the specific performance of a contract cannot be maintained against the officers or agents of a state when in effect it is against the state, conversely a bill the object of which is by injunction indirectly to compel the specific performance of the contract, by forbidding all acts which constitute breaches of the contract, cannot be maintained. In such a case, although the state is not nominally a party on the record, if the defendants are its officers or agents through whom it alone can act in doing or omitting to do the things that constitute a breach of its contract, the suit is still in substance against the state: *In re Ayers*, 123 U. S. 443, 8 Sup. Ct. Rep. 164, 31 L. ed. 216.

Notwithstanding a statute enacted by a state which withdraws from its officers the power to carry out the contract embodied in its bonds and coupons or certificates of indebtedness, is unconstitutional, because impairing the obligation thereof, an action cannot be maintained in the federal courts to compel such officers by mandamus to perform the acts constituting a performance of the contract: *Louisiana v. Jumel*, 107 U. S. 711, 2 Sup. Ct. Rep. 128, 27 L. ed. 448.

In *Salem Mills Co. v. Lord*, 42 Or. 82, 69 Pac. 1033, 70 Pac. 832, it is held that when a suit is brought to enjoin public officers from using more water from a stream than the state is entitled to under a contract providing that it should not use more than a specified quantity, the court will not be ousted of jurisdiction on the ground that the action is against the state for a specific performance of the contract.

IV. Actions Concerning Tangible Property.

a. **Possession and Title to Real Estate.**—The owner of real estate may maintain an action to recover the possession thereof against an officer of a state holding it in his official capacity. Such an action is not against the state itself: *Whatley v. Patten*, 10 Tex. Civ. App. 77, 31 S. W. 60; *Tindall v. Wesley*, 65 Fed. 731, 13 C. C. A. 160; *Saranac Land etc. Co. v. Roberts*, 68 Fed. 521. Moreover, one may recover real

property belonging to him by an appropriate action against an officer, civil or military, of the United States who claims possession thereof for and in behalf of the national government. The action in such a case is not regarded as against the United States, nor is the judgment therein rendered binding on the federal government: *King v. Lagrange*, 61 Cal. 221; *McConnell v. Willcox*, 2 Ill. (1 Scam.) 344; *Droux v. Kennedy*, 12 Rob. (La.) 489; *Stanley v. Schwalby*, 85 Tex. 348, 19 S. W. 264; *Grisar v. McDowell*, 73 U. S. (6 Wall.) 363, 18 L. ed. 863; *United States v. Lee*, 106 U. S. 196, 1 Sup. Ct. Rep. 240, 27 L. ed. 171.

An action of ejectment may be brought against an officer of the army of the United States who is in possession of the demanded premises for the purpose of a military camp or fortification under the direction of the Secretary of War or of the President of the United States: *Polack v. Mansfield*, 44 Cal. 36, 13 Am. Rep. 151. And ejectment in a federal court may be brought against an agent of the United States in charge of a public improvement which the plaintiff alleges is on his land. The court will determine whether he has the superior title, though its judgment will not conclude the United States: *Scranton v. Wheeler*, 57 Fed. 803, 6 C. C. A. 585.

In *Tindal v. Wesley*, 167 U. S. 204, 17 Sup. Ct. Rep. 770, 42 L. ed. 137, it was decided that a suit against an individual to recover possession of real property was not against the state, although he was in possession as an officer of the state, not asserting any interest for himself in the property. Said Justice Harlan: "The settled doctrine of this court wholly precludes the idea that a suit against individuals to recover possession of real property is a suit against the state simply because the defendant holding possession happens to be an officer of the state, and asserts that he is lawfully in possession on its behalf. . . . And when such officers assert that they are rightfully in possession, they must make good that assertion when it is made to appear in a suit against them as individuals that the legal title and right of possession is in the plaintiff. . . . If a suit against officers of a state, to enjoin them from enforcing an unconstitutional statute, whereby the plaintiff's property will be injured, or to recover damages for taking, under a void statute, the property of the citizen, be not against the state, it is impossible to see how a suit against the same individuals to recover the possession of property belonging to the plaintiff and illegally withheld by the defendants, can be deemed a suit against the state."

In *Davis v. Gray*, 83 U. S. (16 Wall.) 203, 21 L. ed. 447, a suit was brought by the receiver of a railroad company to which a grant of land had been made by the state of Texas, to enjoin the commissioner of the state land office and the governor, who had declared the land forfeited, from granting it to other persons. The jurisdiction of the court was questioned, because the suit was in effect against the state, but it was nevertheless sustained: See the com-

ment on this decision in *Cunningham v. Macon R. R. Co.*, 109 U. S. 446, 3 Sup. Ct. Rep. 292, 27 L. ed. 992. In the subsequent case of *Pennoyer v. McConnanghy*, 140 U. S. 1, 11 Sup. Ct. Rep. 699, 35 L. ed. 363, it was decided that a citizen of one state may maintain a suit against the land commissioners of another state to restrain them from reselling swamp lands claimed by the complainant, on the ground that the statute under which they intend to act is invalid as impairing his contract of purchase from the state under a prior act, such a suit not being against the state.

An action against the auditor of a state to enjoin him from certifying and transmitting to the county auditors valuations of the property of the plaintiff, for purposes of taxation, pursuant to a statute claimed to be unconstitutional, on the ground that the acts complained of would create a cloud on the plaintiff's title, was held not to be a suit against the state in *Western Union Tel. Co. v. Henderson*, 68 Fed. 588. So, a suit against a state land commission to enjoin him from allowing locations of land within the limits of a grant made to a person under whom the plaintiff claimed, was held not to be a suit against the state in *Hancock v. Walsh*, 3 Woods, 351, Fed. Cas. No. 6012.

But the owner of land cannot maintain an action of ejectment against the commissioner of the state land office and the comptroller of the state, they not having committed or threatened to commit any illegal acts jeopardizing the plaintiff's rights, to cancel and remove tax deeds executed by the comptroller to the state on sales of the land for unpaid taxes, for the state is a necessary party to the action: See the principal case, ante, p. 826.

b. *Possession and Right to Personal Property.*—In the case of *Lowry v. Thompson*, 25 S. C. 416, 1 S. E. 141, an action against the commissioners of the sinking fund of a state to recover deeds in the possession of the Secretary of the State, who held and claimed them as the property of the state, subject to the control of the sinking fund commissioners, was held to be in effect an action against the state and not maintainable. But in *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. Rep. 903, 29 L. ed. 185, where a collector of taxes due to a state refused to receive coupons of the state tendered in payment of such a tax, because forbidden to do so by a statute of the state, which was unconstitutional as impairing the obligation of the contract made by the state with the holders of the coupons in the statute under which they were issued, the court declared that the collector was liable to an action of detinue or of trespass for distraining personal property for the payment of the tax, or, if the remedy at law was inadequate, that he might be restrained by an injunction from making the distrain. "The case of the plaintiff below," observed the court, "is reduced to this: He had paid the tax demanded of him by a lawful tender. The defendant had no authority of law thereafter to enforce other payment by seizing his

property. In doing so, he ceased to be an officer of the law, and became a private wrongdoer. It is the simple case in which the defendant, a natural private person, has unlawfully, and with force and arms, seized, taken, and detained the personal property of another."

V. Actions Respecting Fiscal Affairs.

a. **Control of Public Funds.**—A suit by a taxpayer to restrain public officers from misappropriating money in the state treasury is not regarded as against the state and can be maintained in a proper case: *Burke v. Snively*, 208 Ill. 328, 70 N. E. 327; *Butler v. Ellerbe*, 44 S. C. 256, 22 S. E. 425; *Chaffrix v. Board of Liquidation*, 11 Fed. 638; *Yale College v. Sanger*, 62 Fed. 177. An action to coerce money out of a state treasury, however, has a different standing: *Ottawa County v. Alpin*, 69 Mich. 1, 36 N. W. 702; *Hagood v. Southern*, 117 U. S. 52, 6 Sup. Ct. Rep. 608, 29 L. ed. 805; *Smith v. Reeves*, 178 U. S. 430, 20 Sup. Ct. Rep. 919, 44 L. ed. 1140.

b. **Recovery Back of Taxes.**—Actions having for their object the reaching of funds in a state treasury have been instituted in a number of cases to recover back taxes alleged to have been illegally exacted. The case of *Smith v. Reeves*, 178 U. S. 436, 20 Sup. Ct. Rep. 919, 44 L. ed. 1140, wherein suit was brought against the state treasurer of California in his official capacity, was an action of this kind, and in holding such an action to be in reality against the state and therefore not maintainable in the federal courts, Justice Harlan said: "Although the state, as such, is not made a party defendant, the suit is against one of its officers as treasurer; the relief sought is a judgment against that officer in his official capacity; and that judgment would compel him to pay out of the public funds in the treasury of the state a certain sum of money. Such a judgment would have the same effect as if it were rendered directly against the state for the amount specified in the complaint. This case is unlike those in which we have held that a suit would lie by one person against another person to recover possession of specific property, although the latter claimed that he was in possession as an officer of the state and not otherwise. In such a case the settled doctrine of this court is, that the question of possession does not cease to be a judicial question—as between the parties actually before the court—because the defendant asserts or suggests that the right of possession is in the state of which he is an officer or agent: *Tindal v. Wesley*, 167 U. S. 204, 17 Sup. Ct. Rep. 770, 42 L. ed. 137, and authorities there cited. In the present case the action is not to recover specific moneys in the hands of the state treasurer, nor to compel him to perform a plain ministerial duty. It is to enforce the liability of the state to pay a certain amount of money on account of the payment of taxes alleged to have been wrongfully exacted by the state from the plaintiffs. Nor is it a suit to enjoin the defendant from doing some positive or affirmative act to the in-

jury of the plaintiffs in their persons or property, but one in effect to compel the state, through its officer, to perform its promise to return to taxpayers such amount as may be adjudged to have been taken from them under an illegal assessment." It appears that the state of California, by section 3669 of the Political Code, has given its consent to be sued, in its own courts, on account of taxes alleged to have been exacted illegally, but this statute was held, in the above case, not to authorize such a suit in a federal court.

A board of agriculture, which is a department of the state government, cannot be sued to recover back a license tax that has been paid into the state treasury, for the sale of fertilizers, for the suit is in effect against the state: *Lord etc. Chemical Co. v. State Board of Agriculture*, 111 N. C. 135, 15 S. E. 1032.

The supreme court of Iowa, however, has decided that where a state officer, acting under authority of a void statute, receives taxes paid to him under duress and protest, an action may be maintained against him to recover the amount so paid, although he has placed the money to the credit of the state: *Scottish etc. Ins. Co. v. Herriott*, 109 Iowa, 606, 77 Am. St. Rep. 548, 80 N. W. 665.

Where a state insurance superintendent, occupying the position of a tax collector, has collected taxes of a foreign insurance corporation, but has not paid them over to the state treasurer, an action to compel the refunding of the taxes is not against the state, they not having become the property of the state: *German Alliance Ins. Co. v. Van Cleave*, 191 Ill. 410, 61 N. E. 94.

c. **Enforcement of Taxes.**—A suit to enjoin a state officer from assessing or enforcing a tax, when there is no valid law authorizing such tax, is not ordinarily a suit against the state: *Secor v. Singleton*, 35 Fed. 376; *Sanford v. Gregg*, 58 Fed. 620; *Gregg v. Sanford*, 65 Fed. 151, 12 C. C. A. 525. So, an action to enjoin state officers from certifying a tax, which the complainant alleges is without lawful authority, is not an action against the state: *Taylor v. Louisville etc. R. R. Co.*, 88 Fed. 350, 31 C. C. A. 537. Said Justice Taft: "This is not a suit against the state. It is a suit against individuals, seeking to enjoin them from doing certain acts which they assert to be by authority of the state, but which the complainants aver to be without lawful authority." See *Coulter v. Weir*, 127 Fed. 897, 62 C. C. A. 429, where a franchise tax is involved, and also *Blue Jacket etc. Copper Co. v. Scherr*, 50 W. Va. 533, 40 S. E. 514. A national court has jurisdiction to enjoin the enforcement of an unconstitutional state statute under which the authorities threatened to seize the plaintiff's property and destroy his business, unless he pays a license tax thereby imposed: *Minneapolis Brewing Co. v. McGilivray*, 104 Fed. 258.

An action by a foreign insurance company against state officers to enjoin the enforcement of a statute which requires it to pay a

percentage of premiums received from business done in the state, if the relief really sought and the only relief grantable is to compel the state to allow the plaintiff to continue in business in the state without paying the tax, is an action in effect against the state, and not maintainable in a federal court: *Manchester Fire Ins. Co. v. Herriott*, 91 Fed. 711.

An action against a state and its auditor to compel the levy of taxes and the application by the auditor of the money raised to the payment of bonds which the state has issued, is an action against the state; and as it cannot be maintained against the state, it cannot be maintained against the auditor: *North Carolina v. Temple*, 134 U. S. 22, 10 Sup. Ct. Rep. 509, 33 L. ed. 849.

d. **Revocation of Charter or License of Corporation.**—A suit by a foreign insurance corporation, it has been held, may be maintained to enjoin a state commissioner of insurance from revoking the company's license to do business in the state, such a suit not being regarded as against the state itself: *North British etc. Co. v. Craig*, 106 Tenn. 621, 62 S. W. 155; *Metropolitan Life Ins. Co. v. McNall*, 81 Fed. 888. But a suit by a domestic corporation to enjoin the attorney general of the state from bringing an action in the name of the state to forfeit the charter of the corporation is held to be in effect a suit against the state, and hence not maintainable in a federal court: *Morenci Copper Co. v. Freer*, 127 Fed. 199.

e. **Regulation of Charges of Public Service Corporations.**—Actions to restrain state officers from enforcing statutes of the state regulating freight rates, alleged to be unconstitutional, have been held not to be actions against the state, and have therefore been sustained in the federal courts: *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. Rep. 418, 42 L. ed. 819; *Prout v. Starr*, 188 U. S. 537, 23 Sup. Ct. Rep. 398, 47 L. ed. 584; *Chicago etc. Ry. Co. v. Dey*, 35 Fed. 656, 1 L. R. A. 744; *Chicago etc. Ry. Co. v. Becker*, 35 Fed. 883; *Clyde v. Richmond etc. R. R. Co.*, 57 Fed. 436; *Starr v. Chicago etc. Ry. Co.*, 110 Fed. 3. The same holdings have been made in the case of telegraph rates (*Western Union Tel. Co. v. Myatt*, 98 Fed. 335), and in the case of gas rates: *Haverhill Gas Co. v. Barker*, 109 Fed. 694.

However, in *Fitts v. McGhee*, 172 U. S. 516, 19 Sup. Ct. Rep. 269, 43 L. ed. 535, a suit to prevent the enforcement of a statute of Alabama prescribing maximum toll rates on a certain bridge was held in effect to be against the state and therefore not maintainable. But the principle governing this case seems to be that the defendants were not charged by the statute with any specific duty in the matter, were not committing any act of trespass, and could act only by formal proceedings in the courts of the state. Said Justice Harlan: "There is a wide difference between a suit against individuals holding official positions under a state, to prevent them, under the sanction of an unconstitutional statute from committing by some posi-

tive act a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state. In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement."

VI. Actions Enjoining Criminal Prosecutions.

The principle thus announced by Justice Harlan is recognized and applied in *Union Trust Co. v. Stearns*, 119 Fed. 790, where it is held that a suit to enjoin the attorney general of a state from instituting criminal proceedings in the name of the commonwealth under a statute by which they are charged with no special duty, and to which they bear no different relation than to other penal statutes, is virtually a suit against the state. This principle is again applied in *Ball v. Rutland R. R. Co.*, 93 Fed. 513, where a railroad company seeks to enjoin the state's attorneys of the counties through which the road is laid from proceeding under a statute which imposes a fine on railroad companies for a failure to sell mileage books. See, further, *McWhorter v. Pensacola etc. R. R. Co.*, 24 Fla. 417, 12 Am. St. Rep. 220, 5 South. 129, 2 L. R. A. 504; *Louisiana v. Lagarde*, 60 Fed. 186.

An action against a state officer to enjoin him from instituting prosecutions under a pure food statute which is conceded to be valid if properly construed and with which he is charged with the enforcement of, on the ground that he is proceeding under an erroneous interpretation of the law which renders it in violation of the federal constitution, is really an action against the state of which the national courts are without jurisdiction: *Arbuckle v. Blackburn*, 113 Fed. 616, 51 C. C. A. 122.

A circuit court of the United States cannot lawfully enjoin the attorney general of a state from suing to recover money claimed to be due as penalties under a maximum freight law of the state: *State v. Chicago etc. R. R. Co.*, 61 Neb. 545, 85 N. W. 556.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

SCHMOELE v. BETZ.

[212 Pa. St. 32, 61 Atl. 525.]

EASEMENT of Right of Way Over Another's Property is appurtenant to the particular piece or lot of ground of the dominant owner with which it is granted, and is not personal to the owner authorizing him to use it in connection with other real estate he may own abutting on the right of way. (p. 848.)

EASEMENT of Right of Way—Interference with.—If the owners of lots abutting on an alley have a right to use it for a passageway and watercourse, the owner of one of such lots, who also owns a theater located on the opposite side of the alley, has no right, against the objection of a lot owner having such easement in the alley, to erect a fire-escape on the wall of his theater overhanging the alley, and such erection may be enjoined. (p. 848.)

EASEMENTS—Obstruction.—A tenant of land for nine hundred and ninety-nine years, while in possession of the premises, has a right to protect his possession and any easement which he may have in the premises, against third persons by an action at law or a suit in equity. (p. 850.)

EASEMENTS—Injunction—Immaterial Damage.—The owner of an easement may enjoin a trespass thereon by one not entitled to the use thereof, although the owner's use is not materially impaired. (p. 851.)

EASEMENTS—Injunction—Trespass.—Equity will direct a removal of an obstruction to an easement and enjoin a continuance of a trespass thereon without proof of actual damages. (p. 852.)

F. P. Pritchard and T. S. Gates, for the appellants.

S. G. Thompson and W. Willard, for the appellee.

³³ **MESTREZAT, J.** This bill was filed to restrain the defendants from maintaining a fire-escape over and across an alley in the rear of the plaintiff's premises. The facts which

we deem material and were found by the trial judge and not excepted to are the following:

1. The plaintiffs are the owners of a leasehold estate for nine hundred and ninety-nine years in the lot of ground No. 246 N. Franklin street, Philadelphia, containing in front on Franklin street twenty feet and extending of that width westward between parallel lines at right angles with Franklin street one hundred and twenty-two feet eight inches to a three feet four inches wide alley leading northward into Vine street, together with the free and uninterrupted use, right and privilege of the said alley as and for a passageway and watercourse in common with the owners and occupiers of the other ground abutting thereon.

2. The defendant, John F. Betz, is the owner of No. 248 N. Franklin street, and adjoining the plaintiff's lot, with the same right as the plaintiffs to the use of the alley.

3. The defendant, John F. Betz, is the owner, and the defendant, John G. Jermon, is the lessee of a lot of ground with ³⁴ a theater building thereon, situated on the south side of Vine street one hundred and twenty-six feet west of Franklin street, containing in front on Vine street eighty-one feet and extending of that width in length or depth one hundred feet. The east wall of the theater forms the western boundary of the alley, but in the deeds conveying the theater lot no privilege of the alley is granted.

4. The defendants have erected on the east wall of the theater a fire-escape, consisting of two balconies constructed of iron slats, which overhang the alley opposite the rear of lots Nos. 246 and 248 N. Franklin street, and have also constructed a permanent stairway from the lower balcony over No. 248 N. Franklin street, which is owned by the defendant, John F. Betz; the rear fence of this property has been moved forward, and the open space abutting on the alley is utilized for the foot of the stairway. The lower balcony is about sixteen feet above the pavement of the alley.

5. The titles of the plaintiffs and defendants came originally from a corporation, the common grantor. The corporation first conveyed the theater property, now owned by defendant Betz, and in the description of the lot in the deed no alley is mentioned, and the lot is described as bounded eastward by other ground of the parties of the first part. At the date of this conveyance the alley had not been dedicated

as a passage and no privilege of the alley is granted nor is it referred to in the conveyance. In the subsequent deeds in the line of title down to the defendant Betz, the alley is not described as a boundary nor is any privilege of the alley granted. The plaintiff's lot was conveyed, "together with the free use, right, liberty and privilege of the said three feet four inches wide alley as and for a passageway and watercourse in common with the parties of the first part hereto, their successors and assigns, owners and occupiers of the other ground bounding thereon, and the laying and repairing therein pipes of conduit, for the purpose of introducing Schuylkill and other water from the said Vine street into the thereby granted premises, or any part thereof."

In addition to the above, the learned trial judge found that the plaintiffs have not been obstructed in their right to the use of the alley as a passageway and watercourse, that the fire-escape ³⁵ does not in any material respect impair the use of the plaintiff's easement, and in no way interferes with their use of the alley. These findings of fact are excepted to and assigned for error. The court held as conclusions of law that the plaintiffs "have simply a right to use the alley as a passageway and watercourse"; that at the rear of No. 248 N. Franklin street, the defendant Betz being the owner of both sides of the alley "may at that point erect such structures as he chooses so long as he does not interfere with the easement in the alley"; and "that the defendants have a right to maintain the stairway and that part of the fire-escape which is opposite the rear of No. 248 N. Franklin street." The learned judge accordingly refused the injunction prayed for in the bill, and the plaintiffs have appealed.

We think that on the uncontroverted facts in this case it was clear error to refuse the relief prayed for in the bill. It is manifest from the cases he cites that the learned trial judge was led into error by a misapprehension of the facts of this case. The authorities he cites have no application here. In both cases, the owner of the fee had granted a right of way over the premises, retaining the ownership of the soil, and it was held that the grantee could not enjoin him from building over the alley if it did not interfere with the use of the way. But those are not the facts in this case. The parties to this suit hold under a common grantor, who first conveyed the theater property by metes and bounds before the dedication

of the alley in question and with no reference to an alley or to a right of way over an alley. The eastern boundary of the property is described in all the deeds of the defendants' chain of title as "ground now or late of," etc. Hence it is clear that the defendants, as the owners of the theater premises, have neither ownership nor easement in the soil of the alley, and, therefore, have no right to utilize or obstruct the alley for any purpose.

The defendant Betz is the owner of the lot at No. 248 N. Franklin street, which adjoins the plaintiff's lot and at the rear abuts on the alley with the same rights over it as the plaintiffs have. Prior to the sale of any of the lots abutting on the alley, it was dedicated as a passageway by the owner of all the ground to the use of the lots on the eastern side of the ^{3d} alley. It is appurtenant alike to all of them, and the owners of the several lots have the same easement in and over the alley. The easement thus acquired by Betz when he purchased the premises at 248 N. Franklin street was appurtenant solely to those premises, and did not extend to the theater property nor to any other property which he possessed. The purchase of that property, therefore, invested him with no authority to erect or maintain a fire-escape on the east side of his theater over and across the alley, and in maintaining such a structure he is invading the property rights of the plaintiffs and other lot owners who have a like easement in the alley. It is settled that an easement of a right of way over another's property is appurtenant to the particular piece or lot of land of the dominant owner with which it is granted, and is not personal to the owner authorizing him to use it in connection with other real estate he may own abutting on the right of way. In *Kirkham v. Sharp*, 1 Whart. 323, 29 Am. Dec. 57, the owner of a large lot of ground conveyed to another a small part of it fronting on a street, together with the use of an alley extending a certain depth from the street alongside of the lot granted. Subsequently, the owner of the large lot sought to extend the depth of the alley beyond the smaller lot so as to connect it with another alley leading from the rear of the large lot. It was held that this could not be done against the objection of the grantee of the smaller lot. Chief Justice Gibson, in discussing the rights of the parties says (1 Whart. 334): "It is certain that the ungranted residue of a right of way may be annexed

to a particular messuage or close, either by express stipulation or necessary implication, according to the occasion of the grant. An instance of this might be found in the disposal of houses surrounding a court, originally destined to be a common avenue to them, in which it would be sufficiently obvious from the disposition of the property that the right of way had been appended to the houses and not to the owner of them. By the act of laying out the ground as a court, it would be allotted to the houses intended to adjoin it, so as to pass with them as an appurtenance; and the right of the owner would be correspondingly qualified by the nature of the use to which it was dedicated. Sales of the houses would successively abridge it, till it was ultimately extinguished along with his property in ³⁷ the last of them, when the purchasers might, by common consent, bar the entrance against his person, notwithstanding his legal title, just as they might bar it against a stranger. During his ownership of but a part of the property, he would be entitled to no privilege that he had not originally annexed to it, nor could his right to use the court as a thoroughfare to a messuage or close adjoining him on the farther side be greater than that of any of his grantees. Is not that the case before us? . . . It is plain, therefore, that to make the alley an appurtenance to what it was not at the time of the purchase, would be a fraud upon the contract." In *Lewis v. Carstairs*, 6 Whart. 193, Burd conveyed a lot to Sims together with the use of an alley as a passage in common with Burd "and his heirs and those to whom he may likewise grant the same" privilege. Subsequently, Burd conveyed the residue of his property to Murray, who was also owner of other lots adjoining the alley. This court held that Murray could not use the alley for his other lots. In delivering the opinion Chief Justice Gibson says (page 206): "The easement passed from Burd to Murray as appurtenant to the residue of Burd's ground; and it could pass in no other way, for the conveyance contained no power in gross to grant it without stint. On that state of the case, then, Murray could not append it to ground to which it was not appendant before." In *Shroder v. Brenneeman*, 23 Pa. St. 348, both parties owned the property adjoining an alley and with a right of way over the alley as appurtenant. The defendant also owned another property on the alley to which the alley was not appurtenant. It was held that the

defendant could not erect a hydrant in the alley for the use of the lot to which the alley was not appurtenant. Woodward, J., delivering the opinion, says (page 350): "It is a well-settled rule of law that if a man have a right of way over another's land to a particular close, he cannot enlarge it and extend it to other closes, and this whether his right be by user or by deed. . . . The reason of the rule is stated in *Howell v. King*, 1 Mod. 190, and runs through the subsequent cases, that if the law were not so, the owner of the close to which the right is appurtenant might purchase an indefinite number of adjoining acres, and annex the right to them, by which the grantor of the way might be entirely deprived of the benefit of his land; a reason which ³⁸ applies with all its force to a private alley like that in respect to which this suit was brought. Entitled to the use of this alley for the purposes of the lot purchased of Metzgar, if Shroder can use it also for the convenience of the lot he purchased from Withers, there is nothing to prevent his use of it in connection with any other lots he may purchase along the alley, and thus Brenneman may be annoyed with the general use of a right granted only for a special purpose. The right is not personal to Shroder, but appurtenant to his one specific lot, and the necessary limitation of its extent is found in the terms of the grant." The principle of these cases is recognized and approved in *Coleman's Appeal*, 62 Pa. St. 252; *Greenmount Cemetery Co.'s Appeal*, 1 Sadler's Reps. 371, 4 Atl. 528; *Greene v. Canny*, 137 Mass. 64; *Howe v. Bell*, 143 N. Y. 190, 38 N. E. 200.

We infer from the language used in the opinion that the learned trial judge thought the right of the plaintiffs to the relief sought in this suit was in some way affected unfavorably by the fact that they are tenants for nine hundred and ninety-nine years, and not the owners in fee of the Franklin street property. We regard this position as untenable. The tenant while in possession of the premises has a right to protect his possession against third persons by an action at law or a suit in equity. This proposition is self-evident and is well stated with a citation of numerous cases of the state and federal courts to sustain it in 18 *American and English Encyclopedia of Law*, second edition, 453, as follows: "After he (the tenant) has entered into possession he is, as to third persons, to be regarded as the owner, and may maintain, to

the same extent as any other owner in possession, trespass *quare clausum fregit* for any unlawful interference with his right of possession, or trespass on the case for indirect or negligent injuries to his possessory right, and may also seek protection of his rights in a court of equity." In *Hamilton v. Dennison*, 56 Conn. 359, 15 Atl. 748, 1 L. R. A. 287, it was held that a tenant at will under a parol lease could maintain an action for damages for obstructing a passageway appurtenant to his premises. Park, chief justice, delivering the opinion, says: "The defendant claims that the plaintiff, being only a tenant at will of the premises under a parol lease, had not sufficient interest in the way to enable him to maintain this suit. We think this claim is unfounded. The plaintiff was in possession of the premises, and ³⁹ in possession of the way, and this was sufficient to enable him to maintain a suit against the wrongdoer who disturbed his possession." In *Gale on Easements*, 571, it is said that "an injunction to restrain an obstruction to light has been granted at the suit of a yearly tenant, and of a tenant, whose time had expired after the obstruction, and he had agreed to renew."

We do not agree with the trial court that the plaintiffs cannot restrain the defendants from maintaining a fire-escape unless they show that it in some material respects impairs the use of the easement. The erection of the fire-escape by the defendants was a trespass and an infringement of the rights of the plaintiffs in the alley, and the right of the latter to the easement being conceded, equity will direct a removal of the obstruction and enjoin a continuance of the trespass without proof of actual damages. Such is the doctrine of all our cases. *Hacke's Appeal*, 101 Pa. St. 245, was a bill by a lessee of property with the use of an alley appurtenant, and the court entered a decree directing the defendants to remove an obstruction from the alley. In delivering the opinion Mr. Justice Trunkey says (page 249): "It has long been settled that nuisances to rights of way are one of the classes of cases in which the equitable remedy by injunction may be sought. . . . This right of way is founded upon contract, the grant being shown by the respective deeds under which Brown and Hacke hold their lots. The owner has a right to its enjoyment in the mode and form stipulated for in the deeds. The mere fact that the appellants prevent such enjoyment is sufficient ground for interference of the court by injunction.

It is not necessary that the owner should prove damage to entitle him to his property. Like rule applies as if the right existed by covenant directly between Brown and Hacke, and in such case when the covenant is of such nature that it can, consistently with the principles of equity, be specifically enforced, the court will not, unless under very exceptional circumstances, take into consideration the comparative injury to the parties from granting or withholding the injunction." *Ellis v. Academy of Music*, 120 Pa. St. 608, 6 Am. St. Rep. 739, 15 Atl. 494, was a case for the erection of a bridge over an alley which the plaintiff had the right to use as a passageway and watercourse. The trial court charged in part as follows, which was the subject of one of the unsustained assignments of ⁴⁰ error (120 Pa. St. 611): "Parties having the use of an alley which is free and unobstructed, are entitled to the same use of it that the public is entitled to on its highways. If it is wrong for a private owner, owning on both sides of the street, to shed over the street, it is wrong for a private owner to shed over an alley if the owners object. No matter if they are not injured to any considerable extent, still if their legal right is invaded, they are entitled to have that right vindicated by verdict and judgment in their favor establishing the right and its invasion." This court in affirming the judgment for the plaintiff said (120 Pa. St. 623): "The right, whether in the fee or only in the way, was common to both parties, so that neither, without the assent of the other, had the right to alter the character of the alley in any particular. Nor did the court err in charging that parties who are entitled to a free use of an alley, have the same right in it that the public has in its highways, and that if the way in this case were vacated, the soil would belong to the plaintiff and defendant as tenants in common. By the several grants to these parties, their properties were not only bounded on the alley in controversy, but it was made appurtenant to those properties. Nothing, therefore, was left in the owner, and if the fee did not vest in these grantees it is hard to tell where it is."

Nor can we assent to the finding of the trial judge that "the plaintiffs have not been obstructed in their right to the use of the alley as a passageway and watercourse," and that the fire-escape "does not in any material respect impair the use of the easement" of the plaintiffs in the alley. The fire-

escape had two balconies overhanging the alley and extending longitudinally over the greater part of it. Its purpose was to afford an exit from the theater in case of an emergency, and the evidence shows that it had been used for that purpose. This imposed an additional servitude on the alley and interfered with the use of it by the plaintiffs and others having an easement in it. Doors of the theater opened on the fire-escape and persons were thus enabled to use it at any time for either a proper or an improper purpose. It appeared that on some occasions boys had gone on the fire-escape from the theater and annoyed the occupants of the property on the east side of the alley. Parties using the alley take the risk of things placed on the fire-escape ⁴¹ falling on them, as well as the structure itself falling. Rain and snow impregnated with accumulations of dirt and rust would fall from it on persons passing through the alley. It is manifest, we think, from the evidence that the fire-escape was an obstruction to, and an interference with, the use of the alley, and that it was clear error for the court to find to the contrary.

The decree is reversed at the costs of the appellees, and it is now ordered, adjudged and decreed that the bill be reinstated and that the defendants remove the fire-escape from the alley, and that an injunction issue restraining them perpetually from maintaining a fire-escape over and across said alley.

The Rights and Obligations of parties to private ways are discussed in the monographic notes to *Dudgeon v. Bronson*, 95 Am. St. Rep. 318-330; *Bakeman v. Talbot*, 83 Am. Dec. 279-282. The rights and remedies of the parties to ways are further discussed in the monographic note to *Welch v. Wilcox*, 100 Am. Dec. 114-119.

COOK v. CARPENTER.

[212 Pa. St. 165, 61 Atl. 799.]

EQUITY JURISDICTION—Corporations—Unpaid Stock Subscriptions.—The assignee of an insolvent corporation may maintain a bill in equity against a large number of its stockholders to recover their unpaid stock subscriptions, although all of the unpaid capital stock is insufficient to pay the corporate debts, and no accounting is asked for or involved. (pp. 856, 857.)

LIMITATION OF ACTIONS—Demand.—On an obligation for the payment of money on demand, the statute begins to run at once and suit is a sufficient demand and must be brought within six years; but if the contract is to pay on the future performance of a condition, or the happening of an event, or at a certain time after demand, then a demand is necessary to a right of action and the statute does not begin to run until demand is made. (p. 857.)

LIMITATION OF ACTIONS—Corporate Stock Subscriptions. If a subscription to corporate stock is not presently payable in full, but by its terms is to be payable from time to time as called for by the corporation, the statute of limitations does not begin to run until a call is made, and such call need not be made within the statutory period of limitation from the date of the stock subscription. (p. 864.)

E. A. Ballard, R. E. Shapley and J. Weaver, for the appellants.

J. G. Johnson and P. F. Rothermel, for the appellees.

¹⁰⁶ MITCHELL, C. J. The preliminary question is the jurisdiction in equity. Appellants insist that there is a plain, full and adequate remedy at law, by suits against the several stockholders defendant, ¹⁰⁷ where each can defend upon his own case untrammelled by differences of fact in the others. That there is a remedy at law by separate actions against the respondents is undeniable, but is it a full and adequate remedy in the sense that it bars the jurisdiction of equity?

The subject of the controversy is the collection and administration of corporate assets as a trust fund for the benefit of corporate creditors. Both the control of corporate matters and trust funds are in general the subject of equitable jurisdiction. As was said in Lane's Appeal, 105 Pa. St. 49 (65). 51 Am. Rep. 166, "when insolvency and exhaustion of assets [of corporations] exist, the unpaid capital is not available to any one creditor in satisfaction of his debt, because then the whole amount of the unpaid capital is a trust fund which does

not belong to the corporation but to the whole body of its creditors. Hence whether the proceeding originates in the name of one or of several or of all the creditors the result is the same in each. The capital when recovered inures to the benefit of all, and must be distributed among all ratably." This result, as to collection, and still more forcibly as to distribution, is not reasonably practicable except in equity.

A bill may be filed, as in this case, by assignees representing the corporation for the benefit of creditors, or, as in Lane's Appeal, 105 Pa. St. 49 (65), 51 Am. Rep. 166, by creditors in their own names in behalf of themselves and others. In the latter case an action at law would present insuperable difficulties, and yet the substantial controversy is the same, and the mere difference in the nominal complainant should notoust in one case the jurisdiction that must be sustained in the other.

It is earnestly argued by appellants that in all the cases where a bill has been sustained, an accounting was part of the relief sought, and that equitable jurisdiction attached on this ground alone, while in the present case no accounting is asked, as the bill avers that the whole unpaid subscription will be insufficient to pay the debts. It is true that the necessity for an account is a large and influential element in equitable relief, but we do not find it said in any of the cases, that its presence or absence is the conclusive jurisdictional fact. In the present case the bill sets up facts that avoid the necessity for an accounting and an assessment. But suppose the answer had denied the ¹⁶⁸ averments and thus made the necessity of an accounting and assessment an issue. That would at once have made the case one cognizable in equity. Citizens' Bank v. Gillespie, 115 Pa. St. 564, 9 Atl. 73, was an action at law in which such necessity was part of the issue, and the case had to be sent to a new trial for the reception of incompetent evidence on that point. Whether all the unpaid capital is required for payment of debts, or only part, and if so how much, are matters of judgment on the evidence, and different juries are likely to differ in their conclusions. The result would be that in numerous suits by the assignees some stockholders defendant might have to pay their subscriptions in full while some paid only part and others perhaps nothing at all. This would be incurring certain inconvenience and quite probable injustice, where the relief should

not only be certain but uniform. As was well said by the learned judge below, "there are more than forty defendants. Most of them live within the jurisdiction, some do not, and it is quite conceivable that there might be hundreds living without the jurisdiction not reachable by our process at law. The question involved in all the cases is substantially the same, namely, Ought the corporation to collect in its unpaid capital? It is a pure question of law, and may be decided once for all in one suit as well as in a thousand. If the balance should not be collected from all, then it ought not to be collected from any. If, on the other hand, it should be collected, then none should escape."

In the absence of chancery powers in our courts, equitable relief was afforded wherever practicable, in common-law forms. When later the legislature granted equitable powers it was held that if the subject of a bill was one within the proper and established jurisdiction of chancery the invention of a new remedy in common-law form, or the extension of an old one, would not necessarily oust the equitable jurisdiction: *Wesley Church v. Moore*, 10 Pa. St. 273. The question in such cases turns on the completeness, adequacy and convenience of the remedy at law, and our decisions have been liberal in the consideration of all these elements: *Kirkpatrick v. McDonald*, 11 Pa. St. 387; *Bierbower's Appeal*, 107 Pa. St. 14; *Brush Electric Co.'s Appeal*, 114 Pa. St. 574. 7 Atl. 794; *Johnston v. Price*, 172 Pa. St. 427, 33 Atl. 688; *Gray v. Citizens' Gas Co.*, 206 Pa. St. 303, 55 Atl. 988. In the last case it was said by our ¹⁰⁹ Brother Dean: "The question raised in this case is not alone whether plaintiff has a remedy at law, for that remedy it clearly has, but whether in view of the facts it is an adequate one. It may be conceded that the time is not very remote in our judicial history when a wronged party sought the intervention of equity and he could be truthfully met by the reply, you have a remedy at law in an action for damages, such reply would have been the end of his bill; he would have been turned out of court for want of jurisdiction. But this answer is no longer conclusive as to the jurisdiction; courts now go further and inquire whether under the facts the remedy at law is not vexatiously inconvenient, and whether it is so proximately certain as to be adequate to right the wrong complained of."

Testing by this standard the numerous actions that would

be required at law, and comparing that remedy with the superior certainty, uniformity and convenience of the present bill, we have no hesitation in holding that it is a proper case for equitable jurisdiction.

The remaining question, the substantial issue in the case, concerns the statute of limitations. Stated generally, it is whether, when demand is necessary to start the running of the statute, it must be made within six years of the contract. Stated in detail with reference to the particular facts of the case it is well expressed in the twelfth assignment of error, thus, "the stock subscription having been made in 1888, and all the calls made in 1888 having been paid, and no further call for the unpaid portion of the stock having been made by the directors, and the insolvency of the company having occurred more than six years from the date of the last call and the payment thereof, this action for the unpaid portion of the stock subscription, begun more than ten years thereafter, is barred by the statute of limitations."

In *Swearingen v. Sewickley Dairy Co.*, 198 Pa. St. 68, 47 Atl. 941, 53 L. R. A. 471, the law was thus stated: "The general rules are, first, that on an obligation for the payment of money on demand the statute begins to run at once. Suit is a sufficient demand and must be brought within six years: *Andress' Appeal*, 99 Pa. St. 421; *Milne's Appeal*, 99 Pa. St. 483; *Boustead v. Cuyler*, 116 Pa. St. 551. Secondly, where the contract is to pay on the future performance of a condition, or happening of an event, or at a certain ¹⁷⁰ time after demand, there a demand is necessary to a right of action, and the statute does not begin to run until demand is made: *Smith v. Bell*, 107 Pa. St. 352; *Eichman v. Hersker*, 170 Pa. St. 402, 33 Atl. 233; *Taylor v. Witman*, 3 Grant, 138. Whether there is a third rule that if demand is necessary it must be made within six years from the contract, has been both affirmed and denied in our cases, which are much at variance on the question. It was asserted in *Laforge v. Jayne*, 9 Pa. St. 410, and expressly held in *Pittsburg etc. R. R. Co. v. Byers*, 32 Pa. St. 22, 72 Am. Dec. 770, *McCully v. Pittsburg etc. R. R. Co.*, 32 Pa. St. 25, *Pittsburg etc. R. R. Co. v. Graham*, 36 Pa. St. 77, and *Franklin Savings Bank v. Bridges*, 20 Week. Not. Cas. 43, 8 Atl. 611. On the other hand, it was denied generally in *Taylor v. Witman*, 3 Grant, 138, and expressly rejected in *Girard Bank v. Bank of Penn*

Twp., 39 Pa. St. 92, 80 Am. Dec. 507, *Smith v. Bell*, 107 Pa. St. 352, and other cases."

The case then before us did not call for a decision on the last question, and it was accordingly passed with only the foregoing incidental reference. In the present case, however, the same point is squarely presented and is now to be met.

The cases as already said are much at variance, and require critical examination. In favor of the rule, and as contended for by appellants, are *Laforge v. Jayne*, 9 Pa. St. 410, *Pittsburg etc. R. R. Co. v. Byers*, 32 Pa. St. 22, 72 Am. Dec. 770; *McCully v. Pittsburg etc. R. R. Co.*, 32 Pa. St. 25, *Pittsburg etc. R. R. Co. v. Graham*, 36 Pa. St. 77, and *Franklin Savings Bank v. Bridges*, 20 Week. Not. Cas. 43, 8 Atl. 611, and some other cases, such as *McKelvey's Appeal*, 72 Pa. St. 409, in which the foregoing have been cited, though generally arguing and obiter.

Laforge v. Jayne, 9 Pa. St. 410, was an action of assumpsit on a duebill for "one hundred and seventy-two dollars in Pike county checks, which I promise to return on demand." Suit being brought after six years was supported by the plaintiff on the ground that "Pike county checks" were a specific kind of personal property and therefore demand for their return was a necessary preliminary to suit. But this court held that the obligation was to pay money on demand and therefore the statute began to run from the date. In the opinion Coulter, J., refers to *Codman v. Rogers*, 27 Mass. 112, the leading case on the view that where demand is necessary it must be made in ¹⁷¹ a reasonable time and where no cause for delay is shown such time is measured by the period of the statute. But the case was decided on the other ground, and therefore is not really in point in the present discussion.

In *Franklin Savings Bank v. Bridges*, 20 Week. Not. Cas. 43, 8 Atl. 611, the syllabus is that six years is a bar to an action by a corporation on a subscription when no call or assessment has been made in that time, but there the corporation had been insolvent for more than six years and the decision was put explicitly on that ground which is now well settled. The case, therefore, is not in point.

Pittsburg etc. R. R. Co. v. Byers, 32 Pa. St. 22, 72 Am. Dec. 770, and *McCully v. Pittsburg etc. R. R. Co.*, 32 Pa. St. 25, are the main authorities in appellant's favor. Both were actions by the corporation to recover the amount of subscrip-

tions to the stock, and in each, the call on which the action was based was made more than six years after the subscription. This court citing *Codman v. Rogers*, 27 Mass. 112, held that the statute of limitations was a bar. But it is notable that the defense was not rested on the mere lapse of time, but also on the abandonment of the corporate enterprise. In the *Byers* case, Woodward, J., says the act "contemplated an early commencement and completion of the road. . . . It is not reasonable to suppose the legislature meant that subscribers to such a stock should be indefinitely bound. The road was to be promptly commenced and vigorously maintained." And in the *McCully* case the same judge still more explicitly said we have held in the case against *Byers* that "the company were bound from analogy to the statute of limitations to call in payments on stock subscriptions within six years after their date; or if the delay was not satisfactorily accounted for subscribers would be at liberty, after that lapse of time, to consider the enterprise abandoned and their subscriptions canceled. The presumptions of abandonment in such cases are very reasonable and necessary. . . . But this case is not left to stand on presumptions of abandonment. We have direct and conclusive evidence of it in the testimony of Addison, Kelly and Robinson. Not only was the project abandoned, but the money of many subscribers was refunded to them and they released from all further obligations to the company." ¹⁷² Special attention was called to this feature in *Hanover Junction etc. R. R. Co. v. Haldeman*, 82 Pa. St. 36 (46), and some other cases which will be referred to later on.

It must be conceded, however, that notwithstanding the references to the peculiar facts the court put the cases fairly on the principle that the action for subscriptions to stock must be brought within reasonable time, and unless cause for delay be shown, such time is measured by the statute of limitations.

Morrison's Admr. v. Mullin, 34 Pa. St. 12, was an action by the sheriff on a refunding receipt stipulating to repay "if on settlement of the liens, it should [appear] that I am not entitled to this money." Suit was brought twenty-three years after the date of the receipt, and the point made by the plaintiff that until a settlement of the liens was shown the statute did not begin to run. But the court on the authority of

Pittsburg etc. R. R. Co. v. Byers, 32 Pa. St. 22, 72 Am. Dec. 770, held that the plaintiff not having shown a settlement within a reasonable time, the statute was a bar. It is notable that two of the five justices dissented on this point, one of them being Woodward, J., who wrote the opinions in the Byers and McCully cases. And in Girard Bank v. Bank of Penn Township, 39 Pa. St. 92 (102), 80 Am. Dec. 507, the suggestion is made that this case can be sustained on the presumption of payment after twenty years.

Pittsburg etc. R. R. Co. v. Graham, 36 Pa. St. 77, was an action by the same railroad under substantially the same facts as Pittsburg etc. R. R. Co. v. Byers, 32 Pa. St. 22, 72 Am. Dec. 770, and McCully v. Pittsburg etc. R. R. Co., 32 Pa. St. 25, except that the subscription was conditional "that the construction of said road is prosecuted." This element gave additional force to the defense of abandonment, and the previous cases were naturally followed.

The cases holding the other view may be said to begin with Sinkler v. Turnpike Co., 3 Penr. & W. 149, where it was held that on a subscription to stock payable at such times as the managers may determine, the statute of limitations does not begin to run until a call is made. The defense was that the action was brought more than six years after the subscription, though within six years from the call. The call, however, was within six years from the subscription and this fact is referred to in the Byers case (32 Pa. St. 22, 72 Am. Dec. 770) as sustaining a distinction.¹⁷³ But the court in Sinkler v. Turnpike Co., 3 Penr. & W. 149, puts its decision plainly on the other ground. "No action," said Kennedy, J., "could have been maintained for defendant's subscription, or any part of it until the managers had fixed a time for the payment of it. . . . The statute of limitations does not begin to run before the plaintiff has a right to bring his suit." The decision was cited as authority for this principle in McCarty v. Selinsgrove etc. R. R. Co., 87 Pa. St. 332; and again in Smith v. Bell, 107 Pa. St. 352.

Sinkler v. Turnpike Co., 3 Penr. & W. 149, was decided before the Byers and McCully cases, and though antagonistic in principle, did not expressly pass upon the distinction set up in those cases. With the next case in order of time, however, Girard Bank v. Bank of Penn Township, 39 Pa. St. 92, 80 Am. Dec. 507, the conflict really began. That was an action by the

holder of a certified check, against the certifying bank, more than six years after the date of the check, the date of the certification not appearing. The court held that the holder of such check stood upon the same footing as a depositor, and as the contract of the bank with its depositor was not to pay absolutely and immediately, but when payment should be required, a demand was necessary and the statute did not begin to run until it was made. The Byers and McCully cases were cited, but the court, per Strong, J., distinguished them on the ground of their special facts, saying "the contract of subscription was a peculiar contract; the legislature had fixed five years as the limit within which the construction of the road should be commenced. It was the duty of the company to commence it and to prosecute it vigorously, and of course to make the calls without delay." He then cited *Morrison v. Mullin*, 34 Pa. St. 12, and after suggesting that in that case "the twenty years' presumption stood in the way of recovery," said: "In delivering the opinion of the court Mr. Justice Thompson referred to the rulings in *Codman v. Rogers*, 27 Mass. 112, and *Pittsburg etc. R. R. Co. v. Byers*, 32 Pa. St. 22, 72 Am. Dec. 570, but without laying down or intending to assert a general doctrine that where demand is necessary under a simple contract before bringing an action it must in all cases be made within six years from the date of the contract." This case is a clear adjudication that though the Byers case and those which follow it may be sustained on their peculiar facts,¹⁷⁴ they are not authorities for a general principle. No case has since questioned the soundness and authority of this decision. On the contrary, in *Finkbone's Appeal*, 86 Pa. St. 368, the court, after speaking of *Laforge v. Jayne* as countenancing a different principle (although as shown *supra* there is no real conflict in that decision), say: "We feel warranted in adopting the later case not only because it was the more carefully considered, but also because it accords better with the general rule that the statute cannot begin to run until the cause of action has accrued." And *Finkbone's Appeal* itself is cited approvingly in *Humphrey v. County Nat. Bank*, 113 Pa. St. 417, 6 Atl. 155, and *Hartmanft's Estate*, 153 Pa. St. 530, 34 Am. St. Rep. 717, 26 Atl. 104.

In *Taylor v. Witman*, 3 Grant, 138, the exact tenor of the note in suit does not appear in the report, but the principle

that, "where an actual demand or other act of the promisee is necessary before suit, such demand must be made or that act done within six years from the date of the promise or the statute will begin to run from the date," was clearly stated and distinctly repudiated, Strong, J., referring to *Girard Bank v. Bank of Penn Township*, 39 Pa. St. 92, 80 Am. Dec. 507, as having settled the law to the contrary.

Allibone v. Hager, 46 Pa. St. 48, was a suit by a creditor against subscribers to the stock of a manufacturing company under the act of April 7, 1849 (Pub. Laws, 563), for unpaid subscriptions, and it was held that though no call had been made for eleven years the statute of limitations were not a defense, the court saying that the *Ryers*, *McCully* and *Graham* cases, where the work had not been prosecuted as required by the act of incorporation, did not apply.

The next case, *Smith v. Bell*, 107 Pa. St. 352, was an action against a former policy-holder in the mutual insurance company, more than six years after his policy had expired and he had ceased to be a member. His contract, however, was to pay his share of losses when an assessment should be levied by the directors. It was held that the right of action did not accrue, nor the statute begin to run until such assessment, and he was, therefore, liable, although the loss occurred more than six years before he ceased to be a member. *Pittsburg etc. R. R. Co. v. Byers*, 32 Pa. St. 22, 72 Am. Dec. 770, and *Morrison v. Mullen*, 34 Pa. St. 12, were referred to by the court but set aside with a citation ¹⁷⁵ of *Girard Bank v. Bank of Penn Township*, 39 Pa. St. 92, 80 Am. Dec. 507, as governing the case.

Smith v. Bell, 107 Pa. St. 352, was reaffirmed and followed in the latest case on the subject, *Eichman v. Hersker*, 170 Pa. St. 402, 33 Atl. 233, although as our Brother Dean called attention to in the opinion, "the assessment was not made within six years from the date of the policies and the premium note, nor within six years from the date of the losses, the payment of which had created the debt now sought to be satisfied by assessment." Distinctions based on the wording of the charters or the statutes under which they were conferred were repudiated and the decision put explicitly on the general principle that the obligation was not to pay at once but upon a future event, the levying of an assessment by

the directors, and the statute did not begin to run until such assessment.

This detailed review of the cases shows clearly that while they are in some apparent conflict yet there has been a uniform trend in the later ones to rest on the correct application of a general principle admittedly sound. The rules, as stated in *Swearingen v. Sewickley Dairy Co.*, 198 Pa. St. 68, 47 Atl. 941, 53 L. R. A. 471, already quoted, are, first, that on an obligation for the payment of money on demand the statute begins to run at once. Suit is a sufficient demand and must be brought within six years. Secondly, where the contract is to pay on the future performance of a condition, or happening of an event, or at a certain time after demand, there a demand is necessary to a right of action, and the statute does not begin to run until demand is made.

The question is then suggested whether there is a third rule that if demand is necessary it must be made within six years from the contract. On this our cases were said to be much at variance, and the review of them has to some extent confirmed the statement. It will not be amiss at this point to consider on principle the foundations of rules first and second.

Negotiable instruments payable on demand were originally classed together, and held like checks and bills of exchange necessary to be presented with due diligence according to the residence of the parties: *Byles on Bills*, *213. "But a common promissory note payable on demand is very often originally ¹⁷⁶ intended as a continuing security . . . and is not necessarily to be presented the next day after it has been received in order to charge the indorser." But the terms payable on demand import that the debt is already due, and, therefore, the statute of limitations begins to run from the date: *Byles on Bills*, *347. The obligation to pay in such case is absolute and present; the only element not fixed with certainty is the time of payment, and as that is at the option of the creditor, and the debtor must be prepared *eo instanti*, the time of payment, and with it the statute, begins to run at once.

If, however, the debt is not absolutely or presently due, but either the obligation to pay or the time of payment is contingent on the performance of some act, the happening of some event or the lapse of a specified period of time, then the hap-

pening of the event is a condition precedent to the present obligation to pay and the debtor is not in default, nor the creditor entitled to call for performance until the condition is fulfilled and the statute cannot begin to run until that time.

These principles are of uniform application and lie at the foundation of all our cases. Applying them to the present case it is plain that where a subscription to stock is not presently payable in full, but by its terms is to be payable from time to time as called for by the company, there is no substantial basis for the existence of a third rule, as queried in *Swearingen v. Sewickley Dairy Co.*, 198 Pa. St. 68, 47 Atl. 941, 53 L. R. A. 471. Until such call, there is no obligation on the stockholder to pay. It may never be made. If the enterprise is successful and profitable from the start, or the provision for capital has been larger than actual needs require, the duty of payment is only a reserve duty for possible contingencies, and until they happen, either by calls by the corporation on the subscriptions, or by the rights of creditors, there is no duty of the subscriber to pay, no right of action against him for nonpayment, and no starting point for the statute of limitations.

As already said, the principles at the basis of the decisions are clear and undisputed, and the later and more authoritative cases have tended distinctly to rest upon them. We conclude, therefore, that *Pittsburg etc. R. R. Co. v. Byers*, 32 Pa. St. 22, 72 Am. Dec. 770; *McCully v. Pittsburg etc. R. R. Co.*, 32 Pa. St. 25; *Pittsburg etc. R. R. Co. v. Graham*, 36 Pa. St. 77, and the cases which have followed them, are not authorities for a general ¹⁷⁷ rule in cases of subscriptions to corporate stock, but must be sustained, if at all, as exceptions resting on their own peculiar facts of abandonment of the corporate enterprise, which released the subscriber's contract to pay further. The court below was right in applying the general rule to this case.

Decree affirmed.

The Liability to Corporations of subscribers to their capital stock is discussed at length in the monographic note to *Gettysburg Nat. Bank v. Brown*, 93 Am. St. Rep. 349-394. The defense of the statute of limitations in actions to enforce the liability is discussed at pages 390-393 of this note; and it is further considered in the monographic note to *Boyd v. Mutual Fire Assn.*, 96 Am. St. Rep. 983-989, and in the subsequent case of *West v. Topeka Sav. Bank*, 66 Kan. 524, 97 Am. St. Rep. 385.

HYDE v. BAKER.

[212 Pa. St. 224, 61 Atl. 823.]

EQUITY JURISDICTION—Remedy at Law—Fraud.—Equity jurisdiction will not attach where there is a full, complete, and adequate remedy at law, even when fraud is alleged. (p. 863.)

• **CREDITORS' BILLS—Equity Jurisdiction—Remedy at Law.** A creditor's bill cannot be maintained to declare fraudulent deeds of property by the debtor to a third person, for a reconveyance of the property to the debtor, for an injunction to restrain him from executing conveyances of such property or in any manner encumbering it, until the claims of the creditor are established. In such case there is a full, complete and adequate remedy at law by sheriff's sale under execution, and purchase of the title, followed by an action of ejectment. (p. 866.)

FRAUDULENT CONVEYANCES—Remedy of Creditor.—If it is alleged that the debtor has sold and conveyed his real estate for the purpose of delaying, hindering, or defrauding his creditors, the proper manner in which to test the validity of the transaction is by a sheriff's sale on execution, and a purchase of the title followed by an action of ejectment. (pp. 866, 867.)

G. W. Gise and W. F. Shepherd, for the appellants.

J. F. Whalen and W. K. Woodbury, for the appellees.

226 ELKIN, J. Did the court below have jurisdiction in equity to entertain this bill? The answer to this question will dispose of this appeal. We do not dispute the general principle relied upon by the appellee that where fraud is alleged equity has concurrent jurisdiction with law. In our state, however, the settled rule has never been departed from that equity jurisdiction will not attach where there is a full, complete and adequate remedy at law. Our reports are full of cases in which this principle is involved, but in no instance has it been decided that equity had jurisdiction where all the above specified requirements of a remedy at law exist. In a very large and increasing number of cases equity jurisdiction has been sustained where under the peculiar facts thereof it was held that the remedy at law was inadequate or ineffectual. In some of the cases it was not full, in others not complete, in others not adequate, and in still others it was neither complete nor adequate. Under such circumstances equity has concurrent jurisdiction. In the case at bar the remedy at law is full, complete and adequate, and our courts have frequently so held.

The appellee is a creditor. The principal appellant is a debtor. The bill asks that certain deeds of conveyance executed by the debtor to third parties be declared fraudulent, void and of no effect, and that a reconveyance of the properties therein described be directed to be made to the debtor. It also asks for an order restraining the debtor from executing any conveyance of said properties to third parties, or in any manner encumbering the same until the claims of the creditor have been satisfied. It is therefore a creditor's bill. In such cases this court has frequently pointed out the proper legal remedy to pursue. It has always been the practice in this state for a judgment creditor to seize and sell in satisfaction ²²⁷ of his debt any real estate in which his debtor has, or is believed to have, an interest. When it is alleged, as it is here, that the debtor has sold and conveyed his real estate for the purpose of delaying, hindering or defrauding his creditors, the proper manner in which to test the validity of the transaction is by a sheriff's sale on an execution, a purchase of the title, followed by an action of ejectment: *Stewart v. Coder*, 11 Pa. St. 90; *Appeal of Girard National Bank*, 13 Week. Not. Cas. 101; *Taylor's Appeal*, 93 Pa. St. 21, 24; *People's Nat. Bank v. Kern*, 193 Pa. St. 59, 44 Atl. 331. The cases relied upon by the court below and cited by the appellee here are not applicable to the present case. *Fowler's Appeal*, 87 Pa. St. 449, *Houseman v. Grossman*, 177 Pa. St. 453, 35 Atl. 736, *People's Nat. Bank of Pittsburg v. Loeffert*, 184 Pa. St. 164, 38 Atl. 996, and *Orr v. Peters*, 197 Pa. St. 606, 47 Atl. 849, are cases in which the ordinary remedy at law would have been ineffectual, and under the peculiar facts thereof it was held to be inadequate. None of these cases go so far as we are asked to go here in sustaining this bill. How can it seriously be contended that equity jurisdiction attaches in this case, when, as the testimony shows, the appellee did pursue his remedy at law in the court of common pleas, obtained two judgments against his debtor, one of the appellants, caused execution to be issued thereon, sold all the real estate described in the bill at sheriff's sale, became the purchaser thereof, and now holds a sheriff's deed for the same. He has pursued his remedy at law until he has secured whatever title the debtor had to the real estate involved in this controversy. By taking one step more, an action of ejectment, he can have the question determined whether there was a fraudulent conveyance to delay, hinder

and defraud creditors. He must pursue that remedy if he desires to test the validity of the transactions about which he complains.

What we have said is fatal to this proceeding and makes it unnecessary to discuss the other questions raised by the assignments of error.

Decree reversed and bill dismissed, costs to be paid by the appellee.

Demands Which will Support a Creditor's Bill are discussed in the monographic note to Ladd v. Judson, 66 Am. St. Rep. 271-290. That fraudulent transfers of property may, in a proper case, be reached by a creditor's suit, see *Blanc v. Paymaster Min. Co.*, 95 Cal. 524, 29 Am. St. Rep. 149; *Davidson v. Burke*, 143 Ill. 139, 36 Am. St. Rep. 367; *Pierstoff v. Jorge*, 86 Wis. 128, 39 Am. St. Rep. 881; *O'Brien v. Stambach*, 101 Iowa, 40, 63 Am. St. Rep. 368; *Falkenburg v. Johnson*, 102 Ky. 543, 80 Am. St. Rep. 369; *Boutwell v. Vandiver*, 123 Ala. 634, 82 Am. St. Rep. 149. As to whether it is necessary, in such cases, to first reduce the creditor's claim to judgment, see *Ageltinger v. Einstein*, 143 Cal. 609, 101 Am. St. Rep. 131; *First Nat. Bank v. Eastman*, 144 Cal. 487, 103 Am. St. Rep. 95; and as to the necessity of the issue of an execution and the return thereof nulla bona, see *Scott v. Aultman*, 211 Pa. St. 612, 103 Am. St. Rep. 215. The general rule as laid down by some authorities is to the effect that a creditor must first exhaust his legal remedies before invoking the aid of a court of equity: *Reyburn v. Mitchell*, 106 Mo. 365, 27 Am. St. Rep. 350; *First Nat. Bank v. Randall*, 20 R. I. 319, 78 Am. St. Rep. 867.

McCLOSKEY v. SNOWDEN.

[212 Pa. St. 249, 61 Atl. 796.]

CORPORATIONS—Internal Management—Stockholders' Bill.

The right of an individual stockholder to act for the corporation is exceptional, and arises only on a clear showing of special circumstances, among which inability or unwillingness of the corporation itself, demand upon the regular corporate management and refusal to act are imperative requisites, and the refusal by the corporate management must appear affirmatively to be a disregard of duty and not an error of judgment, a nonperformance of a manifest official obligation amounting to a breach of trust. A bill by an individual stockholder acting for the corporation will be dismissed when the charges of fraud and collusion against the officials and former officials of the corporation are merely inferences from insufficient averments of facts. (p. 868.)

CORPORATIONS—Internal Management—Stockholder's Bill.—

If the act complained of in a stockholder's bill against a corporation affects the complainant solely in his capacity as a member of the corporation, whether it be as a stockholder, director, president or other officer, and is the act of the corporation, whether acting in

stockholder's meeting or through its agents, the board of directors, such action is the management of the internal affairs of the corporation, and in case of a foreign corporation, the courts of the state will not take jurisdiction, and it is immaterial that the visible, tangible property of the foreign corporation is situate within the state. (pp. 869, 870.)

S. E. Smith, J. D. Brown and T. O. Pierce, for the appellants.

J. G. Johnson, A. S. L. Shields, H. L. Carson, A. Simpson, Jr., and F. S. Brown, for the appellees.

253 MITCHELL, C. J. This bill is clearly one of interference in the internal management of a foreign corporation, and as such is not distinguishable from *Madden v. Electric Light Co.*, 181 Pa. St. 617, 37 Atl. 817, 38 L. R. A. 638.

The bill sets up a case of fraud against the company which affects the plaintiffs solely in their capacity as stockholders in common with the others. *Prima facie*, the proper party to seek redress for such a wrong is the corporation itself through its governing body, the board of directors. "The right of an individual stockholder to act for the corporation is exceptional, and only arises on a clear showing of special circumstances, among which inability or unwillingness of the corporation itself, demand upon the regular corporate management, and refusal to act are imperative requisites. And the refusal by the corporate management must appear affirmatively to be a disregard of duty and not an error of judgment; a nonperformance of a manifest official obligation amounting to a breach of trust": *Wolf v. Pennsylvania R. R. Co.*, 195 Pa. St. 91, 45 Atl. 936.

The present bill charges that "your orators did make demand upon the present officers and board of directors of the said Danville Bessemer Company, who are, to wit, . . . to cause an action to be brought in the name of the said Danville Bessemer Company against the defendants hereinbefore named to compel an accounting by said defendants of the profits made by them in the transaction hereinbefore recited or to authorize your orators to bring such action in the name and on behalf of the said Danville Bessemer Company, but notwithstanding the demand thus made by your orators said board of directors have declined so to do." But there is nothing in the bill to show breach of trust by the directors, or any acquiescence in fraud on their part. For all that appears it is merely a difference of views and judgment be-

tween the complainants as individual or minority stockholders and the constituted board of management of the corporate affairs. Of the nine officials named as the board of directors at the present time, only one is a defendant in the bill, charged as having taken part in the transaction complained of, and the charge against the others is sought to be inferred from the fact that three of them are related or in business connection with some of the promoters; the averment that the first officers who made the purchase complained of ²⁵⁴ were "none of them persons of independent or substantial interest in the business of the corporation," but were placed there "simply to do the bidding of said promoters without the exercise of any independent judgment in the matters which should be presented for official and corporate action"; and finally that both the first and the present were mere "dummy boards" under the control of the promoters defendants. Such averments are wholly insufficient. What is said in *Wolf v. Pennsylvania R. R. Co.*, 195 Pa. St. 91, 45 Atl. 936, is very applicable here. "Passing by the subordinate questions . . . the bill has no substantial foundation of fact to rest upon. It is filled with charges of fraud and collusion, but they are charges as inferences from very insufficient averments of facts. If we take out what Chief Justice Gibson called the vituperative epithets there is nothing left but the inference of fraud drawn from the general averment that the officers of the lessor company being elected by the vote of the stock held by the lessee are under the latter's influence." And again in the same case: "The defect of this charge is that it does not rest on any acts averred, but on an inference that by reason of the circumstances of their election, the directors will violate their duty and commit a breach of trust. There is no presumption that officers will commit a breach of trust; the charge should rest on some act, affirmative or permissive, manifestly in violation of duty, and manifestly the result of fraud and not of erroneous judgment."

In *Madden v. Electric Light Co.*, 181 Pa. St. 617, 37 Atl. 817, 38 L. R. A. 638, it was held that "where the act complained of in a stockholder's bill against a corporation affects the complainant solely in his capacity as a member of the corporation, whether it be as a stockholder, director, president or other officer, and is the act of the corporation, whether acting in stockholders' meeting or through its agents, the

board of directors, such action is the management of the internal affairs of the corporation; and in case of a foreign corporation the courts of Pennsylvania will not take jurisdiction; and it is immaterial that the visible, tangible property of the foreign corporation is situate within the state." The present bill comes fully within this prescription.

Decree affirmed.

Actions by Stockholders on behalf of their corporation are discussed in the monographic note to *Johns v. McLester*, 97 Am. St. Rep. 29-52. As a rule, minority stockholders cannot maintain an action to redress corporate wrongs, without first having made a demand on the managing officers or governing board of the corporation to correct the wrong of which complaint is made: See *McCampbell v. Fountain Head R. R. Co.*, 111 Tenn. 55, 102 Am. St. Rep. 731; *Johns v. McLester*, 137 Ala. 283, 97 Am. St. Rep. 27, and note.

BRYAN v. CITY OF CHESTER.

[212 Pa. St. 259, 61 Atl. 894.]

MUNICIPAL CORPORATIONS—Ordinances Forbidding Billboards.—Under the police power of a municipality it may prohibit the erection of insecure billboards within its limits, prevent the exhibition from secure ones of immoral or indecent advertisements or pictures, and protect the community from any actual nuisance resulting from the use of them. (pp. 870, 871.)

MUNICIPAL CORPORATIONS—Ordinances—Billboards on Private Property.—A municipal corporation has no right, in the exercise of its police power or otherwise, to enact an ordinance forbidding citizens within its limits from erecting secure billboards on their own property, merely because such boards are unsightly or may constitute a nuisance. (p. 871.)

POLICE POWER.—All Statutory Restrictions of the use of property are imposed upon the theory that they are necessary for the safety, health, or comfort of the public, but a limitation without reason or necessity cannot be enforced. (p. 871.)

A. A. Cochran, for the appellants.

J. E. McDonough, for the appellee.

²⁶¹ **BROWN, J.** Under the police powers of a municipality it may prohibit the erection of insecure billboards within its limits, prevent the exhibition from secure ones of immoral or indecent advertisements or pictures and protect the community from any actual nuisance resulting from the use of

them. But this is not what the city of Chester attempted to do by its ordinance of December 1, 1903.

²⁶² There is a recital in the preamble of the ordinance that, in the sense of councils, showbills and advertising boards are unsightly, and very often are either a nuisance or create one; and thereupon those bodies ordained that in the future no additional boards shall be erected or constructed within the city limits, but permitting those already constructed and used to continue for the purpose of advertising. To say nothing of this inconsistent discrimination, the ordinance means that though, as a matter of fact, a billboard may not be unsightly to the eyes of any other person than those of the members of councils, and may not be a nuisance nor create one, and the advertisements on it may neither shock nor offend public decency, an owner of private property cannot erect one on his land. This is a gross attempt at interference with the lawful use of private property, and the learned judge below properly declared the ordinance void in concisely saying: "I know of no principle upon which it can be sustained. It is not a police regulation, nor for the preservation of health or the abatement or prevention of a nuisance, nor is it a fence or fire regulation." To this we do not feel called upon to add anything, contenting ourselves with quoting the following from *Crawford v. City of Topeka*, 51 Kan. 756, 37 Am. St. Rep. 323, 33 Pac. 476, 20 L. R. A. 692: "All statutory restrictions of the use of property are imposed upon the theory that they are necessary for the safety, health or comfort of the public; but a limitation without reason or necessity cannot be enforced. In what way can the erection of a safe structure for advertising purposes, near the front of a lot, endanger public safety any more than a like structure for some other lawful purpose? Although the police power is a broad one, it is not without limitation, and a secure structure which is not an infringement upon the public safety, and is not a nuisance, cannot be made one by legislative fiat, and then prohibited: *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984; 1 *Dillon on Municipal Corporations*, sec. 374. It is doubtless within the power of the city to prohibit the erection of insecure billboards or other structures, require the owners to maintain them in a secure condition, and to provide for their removal at the expense of the owners in case they become dangerous. Perhaps regulations may be made with reference to the man-

ner of construction so as to insure safety, but the prohibition of the erection of structures upon the lot line, however ²⁰³ safe they might be, would be an unwarranted invasion of private right."

Under the facts set forth in the bill there can be no doubt that this proceeding was properly instituted by the appellee. The decree of the court overruling the demurrer and directing the injunction to issue, is affirmed at appellants' costs.

A Municipal Ordinance prohibiting the erection of billboards exceeding six feet in height within the city limits, without the consent of the common council, is upheld in Rochester v. West, 164 N. Y. 510, 79 Am. St. Rep. 659. But in Crawford v. Topeka, 51 Kan. 756, 37 Am. St. Rep. 323, an ordinance providing that no person shall erect any structure for advertising purposes, unless it is placed at a distance from the line of any street or sidewalk exceeding at least five times the height of the structure, is held unreasonable and void.

KEISER v. LEHIGH VALLEY RAILROAD COMPANY.

[212 Pa. St. 409, 61 Atl. 903.]

RAILROADS—Negligence—Speed—Schedule Time.—It is not negligence to run a fast passenger train at the rate of thirty-five miles an hour, past midnight and twenty-five minutes behind schedule time. (p. 873.)

RAILROADS—Excessive Speed—Evidence.—If the exact rate of speed of a fast passenger train, as shown by its schedule and fixed by the train record made by the conductor on the train at the time, was thirty-five miles an hour, which is not excessive, the testimony of a witness, who states that the train was running very fast, but not stating how fast, and fixing no standard by which the speed of the train can be ascertained, is of no value as showing an excessive rate of speed. (p. 873.)

RAILROADS—Negligence at Crossings—Evidence.—If it is sought to charge a railroad company with negligence at a crossing in failing to give due warning of the approach of the train, evidence negative in character of witnesses who did not hear the bell ring nor the whistle blow, and amounting to only a scintilla, cannot prevail against positive evidence conclusively establishing that such warning signals were given. (pp. 873, 874.)

EVIDENCE.—If Negative Evidence amounts to only a scintilla, the jury cannot be allowed to disregard the positive and conclusive evidence which establishes the controverted fact. (p. 874.)

P. J. Sherwood, for the appellant.

J. B. Woodward, for the appellee.

⁴¹⁰ ELKIN, J. The plaintiff in her statement of claim charged the defendant company with negligence in running the train which caused the accident at an unusual time and excessive rate of speed, and without giving due warning of its approach to the crossing. The appellee cannot be held liable in damages unless it affirmatively appears from the evidence that there was negligence in some or all of these respects. What does the evidence disclose?

⁴¹¹ The train was running after midnight about twenty-five minutes behind its schedule time. This is neither unusual nor exceptional, and is not negligence within the meaning of the law so as to make the defendant liable in damages. Nor does the testimony show that the train was running at an excessive rate of speed. The witnesses of the appellant did not fix the rate of speed. It is true one witness testified that the train was running very fast, but inasmuch as he did not say how fast, nor fix any standard by which the speed of the train could be ascertained, his testimony is without value in this respect. The exact rate of speed shown by the schedule and fixed by the train record made by the conductor at the time showed the rate of speed to be a little over thirty-five miles an hour. It was a fast passenger train with two locomotives, and this rate of speed is not excessive for such a train. It is clear, therefore, that the appellant failed to establish her allegations of negligence that the train was running at an unusual time or at an excessive rate of speed.

The only question left for us to consider in reference to the alleged negligence of the defendant is whether through its employes it failed to give due warning of the approach of the train to the crossing. The appellee contends that it performed its duty in this respect by providing headlights for its engines, by ringing the bell and blowing the whistle at the proper places before reaching the crossing where the accident occurred. The appellant contends that these signals were not given. There is no serious dispute about the headlights. The evidence shows that they were lighted and in their proper places. The appellant undertook to show that the whistle was not blown nor the bell rung. Nine witnesses testified that they did not hear the bell ring nor the whistle blow. The testimony of all of these witnesses was negative in character, and cannot prevail against the positive and conclusive testimony of the appellee, which clearly showed

these duties to have been performed. This case comes under the rule stated by Mr. Justice Paxson in *Urias v. Pennsylvania R. R. Co.*, 152 Pa. St. 326, 25 Atl. 566, wherein it is said: "One witness who hears the ringing of a bell is worth more than the testimony of a dozen witnesses who did not hear it, unless in some manner their attention had been especially called to it. The witness who heard the ⁴¹² bell either tells the truth, or he tells a deliberate and willful falsehood, while the witness who did not hear the bell may be, and is probably truthful. The bell may be rung or the whistle blown without attracting the attention of persons who are familiar with such sounds." In *Culhane v. New York Central etc. R. R. Co.*, 60 N. Y. 133, the following rule is stated: "A mere 'I did not hear' is entitled to no weight in the presence of affirmative evidence that the signal was given, and does not create a conflict of evidence justifying a submission of the question to the jury as one of fact."

While our cases have not stated the rule so broadly as the New York case cited, yet this court has frequently said that where the negative testimony amounts only to a scintilla, a jury cannot be allowed to disregard the positive and conclusive testimony which establishes the controverted fact. The presumption is that the trainmen of a railroad company perform their duty in these respects when a train approaches a crossing: *Pittsburg etc. Ry. Co. v. Dunn*, 56 Pa. St. 280. In the case at bar, in addition to the presumption that the trainmen performed their duty, the defendant produced fourteen witnesses who testified in the most positive terms that the signals were given at the proper places before the train reached the crossing. The engineer who blew the whistle and started the automatic ringer, the engineer of the second engine whose duty it was to listen for the signal so that if the first engineer failed or neglected to blow the whistle it was his duty to do so, the man who was pulling the rope that rang the bell, the man sitting in the cab and on whose shoulder the bell rope rubbed every time it was pulled, and ten other witnesses whose duty it was to watch for these signals, all testified in positive terms that these signals were given. Of the nine witnesses produced by the plaintiff and who testified that they did not hear the signals, one was shut up in a water-tank, another in a boiler-house, another in a dwelling-house near the switch about two thousand two hundred feet from the whistling-post shut off by an inter-

vening hill, another was in an engine-house, another in a caboose of the freight train nearly half a mile away, another stood near the water-tank close to the passing freight train, and none of them had any duty to perform which called their attention to the signals. The night ⁴¹³ was stormy, high winds were blowing, and the weather conditions such as to make it difficult for these witnesses to hear the signals. Under such circumstances, the negative testimony of these witnesses amounted only to a scintilla, and must give way to the overwhelming weight of the positive testimony produced by the defendant.

In *Lonzer v. Lehigh Valley R. R. Co.*, 196 Pa. St. 610, 46 Atl. 937, this court said: "The verdict should have been set aside as in direct disregard of the evidence, and where that is the case, the court may refuse to submit it at all and direct a verdict accordingly." Under these circumstances the learned court below was justified in refusing to submit the question to the jury and in saying that the plaintiff had failed to establish the negligence complained of. This view of the case being conclusive of the questions involved in this controversy, it is unnecessary to discuss the alleged contributory negligence of the appellant.

Judgment affirmed.

The Speed at Which a Railway Company may operate its cars without being chargeable with negligence is governed largely by circumstances and surrounding conditions: See Butler v. Rockland etc. St. Ry. Co., 99 Me. 149, 105 Am. St. Rep. 267; *Chicago etc. R. R. Co. v. Crose*, 214 Ill. 602, 105 Am. St. Rep. 135; *Hicks v. New York etc. R. R. Co.*, 164 Mass. 424, 49 Am. St. Rep. 471. As to the negligence of a railway company in running its cars at an excessive rate of speed in the night-time, see *Anniston Elec. etc. Co. v. Hewitt*, 139 Ala. 442, 101 Am. St. Rep. 42; *Alabama Midland Ry. Co. v. McGill*, 121 Ala. 230, 77 Am. St. Rep. 52; *Gilmore v. Federal St. etc. Ry. Co.*, 153 Pa. St. 31, 34 Am. St. Rep. 682.

Negative Testimony is not entitled to the same weight as affirmative testimony: See *West Chicago St. Ry. Co. v. Mueller*, 165 Ill. 499, 56 Am. St. Rep. 263, and cases cited in the cross-reference note thereto.

**SHELLENBERGER v. ALTOONA AND PHILIPSBURG
CONNECTING RAILROAD COMPANY.**

[212 Pa. St. 413, 61 Atl. 1000.]

RAILWAY BONDS—Bona Fide Holders—Presumption—Fraud.

It is presumed that holders of negotiable railway bonds are bona fide holders for value, but if fraud in the inception of the bonds is shown, the holder, to be entitled to protection as a bona fide holder, must show that he is such and his mere possession of the bonds is insufficient. (p. 878.)

RAILWAY BONDS—Holder with Knowledge of Infirmary.—

A person who takes a negotiable railway bond with knowledge that the conditions on which alone the bond was authorized were not fulfilled is not protected, and in his hands the bond is invalid, although the imperfection is in some matter relating to the internal affairs of the company which would be unavailable against a bona fide holder. (p. 879.)

RAILWAY BONDS—Purchasers with Notice of Illegality.—If

railway bonds have been illegally issued and pledged for a debt the amount of which is less than the face value of the bonds, stockholders in the railway company having notice of all the facts, after having purchased the bonds from the pledgee for substantially the amount required for their redemption, cannot recover from such company more than they have paid. (p. 879.)

S. V. Wilson, T. H. Greevy and H. Boulton, for the appellant.

D. L. Kebs, W. S. Hammond, J. B. McEnally and A. L. Cole, for the appellee.

⁴²¹ POTTER, J. On June 1, 1893, the Altoona and Philipsburg Connecting Railroad Company executed and delivered to the Union Trust Company of Philadelphia, trustee, a mortgage upon all of its property and franchises to secure bonds of the company in the ⁴²² sum of four hundred thousand dollars, said bonds being of the par value of one thousand dollars each. The trustee certified three hundred and thirty of the bonds of which two hundred and ninety-nine were delivered to the president of the railroad company, Samuel P. Langdon. One of these bonds was sold to W. L. Shellenberger, four to W. S. Lee, two to S. J. Westley, one to W. J. Heinsling, five to John Loudon and two to William Loudon, in all fifteen. Two hundred and seven of the bonds were pledged as collateral for a loan to George Philler of Philadelphia and were sold by him, after due notice, to O. L. Schoonover, Charles S. Avery, John G. Platt, James A. Passmore, and C. H. Rowland. Thirty-four bonds were pledged to Levis & Company and sold by them at public sale, when

they were purchased by the same parties, making their total holding two hundred and forty-one bonds. The trustee held thirty-one bonds as security for certain advances and liability incurred on account of the railroad company, and the balance of the bonds apparently were not negotiated.

On August 20, 1903, the holders of the fifteen bonds filed a bill in equity against the railroad company, the Union Trust Company, the Pittsburg, Johnstown, Ebensburg and Eastern Railroad Company, the New York and Pittsburg Central Railroad, lessees of the Altoona etc. Company, and Samuel P. Langdon, alleging default in the payment of interest on the bonds and the insolvency of the company, and praying for a decree of foreclosure and the appointment of a receiver for the railroad. On September 13, 1903, the court appointed a receiver, but this decree was appealed from and superseded. On December 17, 1903, upon its own petition, the Union Trust Company, trustee, was permitted to withdraw the answer it had filed and to intervene as a party plaintiff.

Defense to the bill was made in behalf of the railroad company upon three grounds: 1. That the bill was multifarious; 2. That under the act of May 7, 1887 (Pub. Laws, 94, sec. 3), the issue of bonds was void and of no effect and therefore neither the bondholders nor the trustee had any standing to maintain this action; and 3. That the holders of these bonds had purchased them with full knowledge of the fact that they had been illegally issued and were only pledged as collateral and had paid for them a sum much less than the face value.

The court below held that the bill was not multifarious and ⁴²³ even if it had been, the objection should have been raised by demurrer before answer filed, citing *Persch v. Quiggle*, 57 Pa. St. 247. This forms the subject of the first assignment of error, but appellants do not press it in their argument.

Many of the assignments of error are not in accordance with our rules, and are open to the objection suggested by the appellees. But the appellants have met these objections in part at least by filing additional assignments, and among these are a sufficient number to properly raise the questions of importance in this appeal.

Upon the second ground of defense it was contended that under section 3 of the act of 1887, the bonds were void be-

cause at the time of their issue the amount subscribed for capital stock had not been fully paid. The fact of the non-payment of the stock was conceded, but the court held that the railroad company, having received the benefit of the sale of the bonds, could not defend against its contract on the ground of *ultra vires*: Citing *Reed's Appeal*, 122 Pa. St. 565, 16 Atl. 100, and *Fidelity Ins. etc. Co. v. West Pennsylvania etc. R. R. Co.*, 138 Pa. St. 494, 21 Am. St. Rep. 911, 21 Atl. 21. This was undoubtedly true to the extent to which the railroad company actually received the proceeds of the bonds. But it was shown that two hundred and seven bonds held by O. L. Schoonover et al. were purchased from George Philler for sixty-two thousand two hundred and fifty dollars, and the thirty-four from *Levis & Company* for ten thousand three hundred dollars. Defendant offered to show that at the time of the purchase of these bonds the purchasers were stockholders of the railroad company and had full knowledge of the fact that the bonds were illegally issued and also that the parties from whom they purchased were not absolute owners of the bonds, but that the company held an equity of redemption in them. The court excluded the testimony, which is the subject of a number of the assignments of error. In the final decree of the court below, the purchasers named above were adjudged to be *bona fide* holders of the bonds for their face value, two hundred and fifty-six thousand dollars, with accrued interest, one hundred and sixteen thousand eight hundred and fifty dollars, making a total of three hundred and seventy-two thousand eight hundred and fifty dollars due upon the mortgage.

We think the trial court was mistaken in the position it took in this respect. If the defendant could show that these bondholders were not *bona fide* holders for value, it was entitled to do so. "The presumption is, that holders of negotiable railway bonds are *bona fide* holders for value, but if fraud in the ⁴²⁴ inception of the bonds is shown, the holder, to be entitled to protection as a *bona fide* holder, must show that he is such; his mere possession of the bonds is insufficient": 23 Am. & Eng. Ency. of Law, 838.

"The doctrine which validates securities within the apparent powers of the corporation, but improperly and therefore illegally issued, applies only in favor of *bona fide* holders for value. A person who takes such a security with knowledge that the conditions on which alone the security was author-

ized were not fulfilled, is not protected, and in his hands the security is invalid; though the imperfection is in some matter relating to the internal affairs of the corporation, which would be unavailable against a bona fide holder of the same security": *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548, where an elaborate discussion of the authorities is to be found.

In the present case, the court below quotes from the syllabus in *Gibson v. Lenhart*, 101 Pa. St. 522, that "the transferee of a coupon bond is presumed to be a bona fide holder for value." But the language of Justice Sterrett in the opinion in that case is (pages 527, 528): "The last taker is presumed to be a bona fide holder for value and may maintain his possession against everybody until the contrary be successfully established by those who undertake to assail his possession."

The rule to be applied in such cases has been thus stated in the federal courts. The question of the validity of railroad bonds is to be determined by the well-established rule that "if fraud or illegality in the inception of negotiable paper is shown, an indorsee, before he can recover, must prove that he is a holder for value. The mere possession of the paper under such circumstances is not enough": *Simmons v. Taylor*, 38 Fed. 682.

We are of opinion that the testimony tending to show that the present holders were not bona fide holders for value without notice, should have been admitted; and if it be established that they were not such, then the amount of the recovery should be limited to the actual amount expended in the purchase of the bonds, with interest thereon. The equity of this course will be especially manifest, if the proof sustains the averments of the answer, that the holders of these bonds purchased them with knowledge of the irregularity of the issue, and that they ⁴²⁵ had only been pledged as collateral, and that the sum paid for them was substantially the amount required for their redemption.

The assignments of error numbered 114, 115, 118, 119, 120 and 121 are sustained.

The decree of the court below is reversed, and the costs of this appeal are to be paid by the appellees. And it is ordered that the record be remitted to the court below for further proceedings in accordance with this opinion.

A Mortgage Given by a Railroad Company to aid in constructing and equipping its road, and for a greater sum than twice the amount of its paid-up capital stock, is invalid as between it and its stockholders; but as between bona fide holders of the mortgage bonds and the corporation or its subsequent creditors with notice of the mortgage, the latter is a first lien on the mortgaged property, and such creditors cannot set up the fraud of the corporation as a defense against such bondholders: *Fidelity Ins. etc. Co. v. Western etc. R. R. Co.*, 138 Pa. St. 494, 21 Am. St. Rep. 911. See, too, *Guilford v. Minneapolis etc. Ry. Co.*, 48 Minn. 560, 31 Am. St. Rep. 694.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

**LOUISVILLE AND NASHVILLE RAILROAD COM-
PANY v. SAWYER.**

[114 Tenn. 84, 86 S. W. 386.]

RAILROADS—Signals at Overhead Crossings.—The law imposes no absolute duty upon a railway company to warn travelers of the approach of trains at a place where its road crosses a highway on an overhead bridge. If the place is dangerous, the company must give such warning to travelers in the highway; but whether, as a matter of fact, the place is dangerous, is a question for the jury. (p. 890.)

John Bell Kuhle, C. R. Berry and Henderson & Henderson,
for the appellant.

Hern, McCorkle & Lane, for the appellee.

⁸⁵ **MCALISTER, J.** The defendant in error, Sawyer, recovered a verdict and judgment against the company for the sum of thirteen hundred dollars damages for personal injuries. The company appealed, and has assigned errors.

The gravamen of the action, as alleged in the declaration, is that Sawyer was driving in a buggy along a turnpike road, and, when about to pass under the overhead trestle of the company, a train of cars rapidly came upon the tracks, frightening plaintiff's horse, overturning the buggy, and throwing plaintiff to the ground, as the result of which he sustained serious personal injuries. The theory of the plaintiff below was that this was a dangerous crossing, and the company was guilty of negligence in not warning the public of an approaching train.

The declaration comprises five counts, but the substance of the complaint, as alleged in the first count, is: "Said de-

fendant, Louisville and Nashville Railroad Company, through and by its agents and servants, did carelessly, wantonly, negligently and wrongfully, and without notice or warning to plaintiff, run, drive, and propel one of its said engines and trains of cars up to, ⁸⁶ upon, over and across said overhead bridge, directly over and above said line of pike road upon which plaintiff was traveling in the way and manner aforesaid, on account of which careless, wanton, negligent and wrongful act of defendant railroad company, the horse which plaintiff was driving became frightened," etc.

There is no complaint, either in the declaration or proof, that the horse was frightened in consequence of any excessive or unusual whistling or ringing of the bell or escaping of steam, which is usually the foundation of such actions, as illustrated by the case of *Mitchell v. Nashville etc. Ry. Co.*, 100 Tenn. 329, 45 S. W. 337, 40 L. R. A. 426. But it is conceded that the train approached this overhead bridge under which the plaintiff was about to pass almost noiselessly.

The complaint in this declaration is that it was the legal duty of the railroad company to warn travelers upon the highways about to pass under the railroad track of the approach of the train, and the failure of the company to perform this duty was the proximate cause of the accident.

There is proof tending to show that at the locus in quo of the accident the Louisville and Nashville Railroad crosses the Franklin and Nolensville Turnpike by means of an overhead trestle, resting upon massive rock walls, which project out on either side of the railroad, forming a narrow and restricted passageway under the railroad. The view of the approaching train was to some ⁸⁷ extent obstructed by houses, walls, hedges, etc.; and, though plaintiff was looking and listening for any train that might be coming from either direction, he neither saw nor heard the approaching train until about to start under the overhead bridge, when this train, running at the rate of about forty miles an hour, suddenly appeared and passed over said trestle while plaintiff was passing under it, or just as he emerged from it on the eastern side. As a result thereof, plaintiff's horse became frightened, throwing plaintiff from the buggy to the ground, breaking his collar bone and inflicting other serious personal injuries.

There is proof tending to show that, as a consequence of the fracture of plaintiff's collar bone, a knot or malformation

had appeared on that part of his breast and shoulder where said collar bone was broken. According to the proof, the whistle was not sounded nor the bell rung as the train approached this overhead crossing. It is insisted that the company was under no obligation to ring the bell or sound the whistle at this point in obedience to the requirements of the statute, since the obstruction was not upon the track of the company, but beneath it.

The theory of the plaintiff is that the company was under a common-law duty to sound the whistle on approaching a public highway extending under the railroad trestle, and which crossing, by reason of the topography of the country and the surrounding environment, ^{ss} was dangerous to the public traveling along the highway.

On the other hand, it is insisted on behalf of the company there is no common-law obligation on a railroad company to sound signals at an underpass, and no liability for any injury resulting from the frightening of a horse by the lawful and reasonable operation of a train over an underpass. The company therefore assigns as error the following instruction of the trial judge on this subject, viz.: "It was the duty of the defendant company to give plaintiff reasonable warning of the approach of its trains by the usual signals, so as to put plaintiff upon his guard on his approaching or passing under the track. If you believe from the evidence in this case that the plaintiff, on approaching the overhead bridge, was in the exercise of due care and caution, as defined to you above, and while passing under the overhead bridge the defendant's train ran over the bridge, having given plaintiff no reasonable warning of the approach in the usual way, by ringing the bell or blowing the whistle, and if the noise of the sudden approaching train passing over the road scared the plaintiff's horse and caused him to run away, throwing the plaintiff out of his buggy, and if the negligence of the defendant, through its servants or agents, by failing to give such warning, was the proximate cause (that is, the direct and efficient cause) of his injuries, without which his injuries would not have occurred, then the defendant ^{ss} company is liable, and your verdict should be for the plaintiff."

It is conceded by counsel on both sides that the question thus presented by the charge of the trial judge is one of first impression in this state. It is conceded by counsel for the company that, under the authorities, if this were a grade

crossing, the company would be operated with some common-law duty to warn travelers of its approach, but it is contended that no such duty applies when the traveler is not compelled to pass over the railroad track, but beneath it.

As illustrating the position of counsel for the company, the case of *Favor v. Boston etc. R. Co.*, 114 Mass. 350, 19 Am. Rep. 364, is cited, in which the court used this language, viz.: "Where a railroad crosses a highway at grade, the law imposes upon it the duty of giving notice to travelers of the approach of its trains. This rule applies because at grade crossings the traveler on the highway and the railroad enjoy a common privilege on the highway itself, and each must use such privilege with due regard to the safety and rights of the other. And as a train of cars is a dangerous power when in motion, and capable of doing great injury, a high degree of care is demanded of the railroad in controlling it, and some notice of its approach to the highway is required both by the rules of the common law and by statute. But where a railroad crosses a highway by a bridge, it does not, in common with the traveler, have any privilege in ⁸⁰ or use of the highway itself. Though the track and the highway are near and adjacent to each other, they are entirely distinct and separate. The railroad has no rights in the highway, and consequently the same duties are not imposed upon it that are imposed when it passes over the highway itself in common with the traveler. It has the right to use its roadbed and bridge as a railroad may use them—by running its trains at the common rate of speed, accompanied by the usual noises attendant upon such exercise of its rights. It is not bound by law to notify the traveler of its intention to use its bridge in the ordinary and usual manner."

In *Ryan v. Pennsylvania R. Co.*, 132 Pa. St. 304, 19 Atl. 81, it appeared that plaintiffs were driving under defendant's railroad upon a public street, when a train crossing overhead frightened their horse so that it became unmanageable and ran away, inflicting serious personal injuries, and resulting in the death of one of the children. The court said: "The defendant company was operating its road in a lawful manner. No defect was shown in the construction of the road. On the contrary, it was the work of competent engineers, approved by the chief engineer and surveyor of the city, and in pursuance of an ordinance of councils expressly authorizing it. The sight and sound of a moving train always

have a tendency to frighten horses. In this case the fright was occasioned by sound. We cannot measure, nor can a jury be properly allowed to measure, the amount of sound which ⁹¹ may be made by a railroad train, either in crossing bridges at overhead crossings or at other places. The defendant company has, under all the authorities, the right to operate its road in a lawful manner; and, when it does so without negligence and without malice, is not responsible for injuries occasioned thereby."

In *Ransom v. Chicago Ry. Co.*, 62 Wis. 178, 51 Am. Rep. 718, 22 N. W. 147, liability was adjudged against the company for breach of a statute of that state requiring certain precautions to be observed by railroad companies before crossing any highway, causing a horse to run away near a crossing, and inflicting personal injuries on plaintiff's wife. The court said: "There is no statute, and we are aware of no common-law rule, which, under such circumstances, requires railroad companies to observe these precautions to avoid accident. If, therefore, the defendant is liable in this action, it is so because it failed to comply with the requirements of the statute prescribing its duty when its train approached the crossing of the highway."

In *Jenson v. Chicago etc. R. R. Co.*, 57 N. W. 359, 22 L. R. A. 680, the court said as follows: "It is certainly no wrong for the train to be run over such bridges in the usual and ordinary way, and even in this way some horses going under the bridge, or being near it at the same time, might be frightened by it. The trains must necessarily make considerable noise going over the bridge. They cannot be run without it. It is not by any means certain that a train would make ⁹² less noise going over slowly than faster. What degree of noise must it make to frighten horses? As to ringing the bell and blowing the whistle, they are only required, if at all, in order to avoid frightening horses, and, with that view, to warn the traveler on the highway to stop. Where should he stop, and how near the bridge? If near the bridge, and his horse is liable to be frightened and run away, he will be in a much more dangerous condition than if he should drive on and take his chances, for the horse, facing the train rushing over the bridge, would turn suddenly around to escape danger, and upset the carriage."

The cases just mentioned comprise all those cited by counsel for the company in support of their contention that the

charge of the circuit judge was erroneous. The authorities holding the contrary doctrine will now be considered. Rapalje & Mack, in their Digest of Railway Law, volume 3, section 92, state the law thus: "Independently of the statute, it is the duty of those in charge of a train to give notice of their approach at all points of known or reasonably apprehended danger": Citing *Chicago etc. Ry. Co. v. Dillon*, 123 Ill. 750, 5 Am. St. Rep. 559, 15 N. E. 181; *Pennsylvania Co. v. Krick*, 47 Ind. 368; *Winstanley v. Chicago etc. Ry. Co.*, 72 Wis. 375, 39 N. W. 856.

"The absence of a statute requiring the ringing of a bell or the sounding of a whistle in approaching highway crossings will not excuse the company for a failure to do so under all circumstances. Where a view of approaching ⁹³ trains is obstructed, or it is impossible or very difficult to hear them, and in similar cases, it is clearly the duty of the company to give such signals, although not required by the statute": Citing authorities.

"Whether in a given case, ordinary care requires the giving of such signals, is a question for the jury": Citing *Indianapolis Ry. Co. v. Hamilton*, 44 Ind. 76.

Again, the same author, at section 97, volume 3, says: "Where the view of an approaching train is obstructed, though the company is not required by the statute to sound a whistle or ring a bell when its train approaches a highway, yet, where such appliances are available, the failure to use them is negligence": Citing cases.

"Where an approaching engine is concealed from the view of persons approaching a highway crossing at a place of much travel, regardless of the statute, the duty of the company to operate its train at a moderate rate of speed, and to give the usual signals of its approach, is more imperative than at a place of less danger": Citing authorities.

Again, the same author, at section 97, volume 3, says: "The provision of the New York act of 1850, section 39 (page 232, chapter 140), prescribing a penalty for running a locomotive past highway crossings without giving signals, applies to a crossing where the track is carried ⁹⁴ over the highway on a bridge": Citing *People v. New York Cent. R. R. Co.*, 13 N. Y. 78, affirming 25 Barb. 199.

"It is as much the duty of a company to give notice of the approach of trains where highways pass under or over the track as where they cross at grade, if danger is likely to result to persons or property from a failure to do so": Citing

Pennsylvania R. R. Co. v. Barnett, 59 Pa. St. 259, 98 Am. Dec. 346.

This latter case seems to be the leading authority relied on by counsel for the plaintiff below, and we shall therefore proceed to notice it in extenso.

The facts of that case are that the public road crossed the railroad by a bridge nineteen feet above the track. The plaintiff was traveling along this road, and while driving over the bridge an express passenger train passed under it, whistling as it passed, at which his horse took fright and ran away, overturning the carriage and throwing plaintiff out, in consequence of which he was seriously and permanently injured. It appeared that a mill on the east side of the public road obstructed the view of the railroad to some extent. About one hundred rods east of the bridge there was a whistling post, and it was usual for trains going west to sound an alarm whistle as they passed, but at the time of the accident the whistle was not sounded until the train was passing under the bridge. The court, in the midst of its opinion, said: "The degree of care demanded of the company in running its train depended on circumstances, and ^{as} whether it observed due care in approaching the bridge, or was guilty of negligence in not sounding an alarm whistle, was a question which properly belonged to the jury to determine. . . . If there was no danger to the persons and property of those who might be traveling along the public road in running its trains without giving any notice of their approach to the bridge, then the company is not chargeable with negligence in not giving it. But if danger might be reasonably apprehended, it was the duty of the company to give some notice or warning in order that it might be avoided. . . . Whether, therefore, the company exercised proper care and diligence in running the train in order to prevent injury to the persons and property of those who were lawfully on the public road and in the vicinity of the crossing, was a question for the jury."

It was further insisted in that case that the company would not be liable for failing to sound the alarm whistle except at points on the road where injury might result to persons on the track at road crossings at grade and stations. The court held that whether it is the duty of the company to give notice of the approach of its trains at any point on the road depends

altogether upon circumstances. Where there is no reasonable apprehension of danger, no such notice is required. But if danger to the person or property of others may be reasonably apprehended or is likely to result from the running of its trains without giving such notice, then it is the duty of the company to give it, and its omission ⁹⁶ is negligence. The court approved the charge of the circuit judge in saying that it was the duty of the company to give notice wherever danger may result to persons rightfully traveling on a public road that crosses the track, whether at grade, or over or under the railroad, where danger would be the consequence of want of notice.

It will be observed that the substance of this opinion is that, whether or not it was negligence on the part of the company to fail to warn travelers of the approach of the train to a public crossing, was a question for the determination of the jury, in view of all the surrounding circumstances, and it was immaterial whether the railroad crossed the public road at a grade, or over or under the public road.

Another case very much relied on by counsel for plaintiff below is *Rupard v. Chesapeake etc. R. R. Co.*, decided in 1889 by the court of appeals of the State of Kentucky, and reported in 88 Ky. 280, 11 S. W. 70, and in 7 L. R. A. 316. In that case it appeared that the wife of plaintiff, while riding horseback on the public road at a point where the railroad crosses said road on a high trestle, was thrown from her horse in consequence of his fright from the noise of the train as it passed over the trestle. The ground of liability asserted in that case was the failure of the company to give notice of the approach of the train to the crossing. The court, in considering the liability of the company, repudiated the doctrine laid down in *Favor v. Boston R. R. Co.*, 114 Mass. 350, 19 Am. Rep. 364, in ⁹⁷ which a distinction was drawn between the duty of the company to warn travelers of the approach of a train to an overhead bridge or to a grade crossing. In the Kentucky case the court held that it is the duty of a railroad company, where a train crosses a public highway on a trestle, and there is danger of catching a traveler thereunder unawares, and frightening the horse that he is riding or driving, to give some timely warning of the approach of the train to the crossing. The court, in its opinion, while disagreeing with the conclusions reached by the court in *Favor v. Boston R. R. Co.*, 114 Mass. 350, 19 Am.

Rep. 364, approved the principles enunciated in *Pennsylvania R. R. Co. v. Barnett*, 59 Pa. St. 263, 98 Am. Dec. 346.

It was further held in that case that the question of negligence in failing to give notice should be left to the determination of the jury. Counsel for plaintiff in error cites the case of *Farley v. Harris*, reported in 186 Pa. St. 440, 40 Atl. 798, and decided by the supreme court of Pennsylvania in 1898, which case it is claimed, is a modification of the rule laid down in *Pennsylvania R. R. Co. v. Barnett*, 59 Pa. St. 259, 98 Am. Dec. 346. In that case it appeared that the plaintiff was crossing an overhead bridge, when his horse became frightened, ran away, and injured the plaintiff. The grounds of recovery alleged in that case were two: 1. That the whistle had been negligently sounded when the locomotive was immediately under the bridge; and 2. That no whistle had been sounded by the locomotive on approaching this overhead bridge. ⁹⁸ The court said that the rule applicable to grade crossings—that it is negligence in railroad companies not to give warning on approaching them—has no application to under and over crossings at every street crossing in a city. The court, in concluding its opinion, says that the cases cited by the appellant (*Pennsylvania R. R. Co. v. Barnett*, 59 Pa. St. 259, 98 Am. Dec. 346, and other cases) are all applicable to a different state of facts than are presented here.

A careful examination of *Farley v. Harris*, 186 Pa. St. 440, 40 Atl. 798, will show that the gravamen of the action was the blowing of the whistle when *Farley* was on the bridge, and the locomotive was directly beneath it. The proof was that the fright of the horses was caused solely by the blasts of the whistle when *Farley* was in the middle of the bridge. It is true that in the midst of the opinion the court said that the rule applicable to grade crossings has no application to under and over crossings at every street crossing in a city. "In fact," continued the court, "such crossings are constructed on the theory that, by adopting them, travel is unobstructed, and danger to travelers on parallel and cross streets is lessened by the absence of the screams of steam whistles necessary to give warning at grade crossings." The court then said that *Pennsylvania R. R. Co. v. Barnett*, 59 Pa. St. 259, 98 Am. Dec. 346, and other cases cited, are all applicable to a different state of facts, and concludes by saying: "Our decision is based solely on the circumstances of an accident at a properly constructed overhead bridge at one

99 of the many street crossings of a steam railroad in a city." After an examination of all the authorities cited, we think the true rule deducible therefrom is that, if the place is dangerous, then the company is onerated with the duty of warning travelers on the highway of the approach of its trains, but whether the place, as a matter of fact, is dangerous, is a question for the determination of the jury. The law imposed no absolute duty upon the company to give notice at this particular crossing. That duty was only required, as matter of law, in the event the jury should find that danger was to be reasonably apprehended at this conjunction of underpass and overhead bridge. The charge of the trial judge in this case made the duty of the company absolute to give warning of the approach of the train to the crossing. Said the court: "It was the duty of the defendant company to give plaintiff reasonable warning of the approach of the train by the usual signals, so as to put plaintiff upon his guard on his approaching or passing under the track." There was no such absolute duty resting upon the company either at common law or by statute, but its duty in this respect was entirely dependent upon the question of fact whether the place was dangerous. The charge of the court should have been so formulated as to leave to the determination of the jury the dangerous character of the place, as the predicate for the application of the principle of law announced. For the error indicated, the judgment is reversed and the cause remanded.

It is the Duty of Railroad Companies to give notice of the approach of their trains at all points of known or reasonably apprehended danger: Chicago etc. R. R. Co. v. Dillon, 123 Ill. 750, 5 Am. St. Rep. 559; Kinyon v. Chicago etc. Ry. Co., 118 Iowa, 349, 96 Am. St. Rep. 382. As to the application of this rule to overhead crossings, see Favor v. Boston etc. R. R. Co., 114 Mass. 350, 19 Am. Rep. 364; Pennsylvania R. R. Co. v. Barnett, 59 Pa. St. 259, 98 Am. Dec. 346.

JOHNSON v. ISS.

[114 Tenn. 114, 35 S. W. 79.]

MARRIAGE CONTRACT with a Person Previously and Still Married.—Where it is provided by statute that one spouse may, after the other has been absent five years, contract a second marriage, a contract to marry a woman whose husband has been absent less than five years is against public policy, and she can maintain no action for its breach, although the marriage is not to take place until the five years prescribed by statute expire or until she procures a divorce. (pp. 891, 892.)

William G. Brien and William S. Noble, for the plaintiff.

W. A. Guild, G. N. Guthrie, T. C. Mulligan, and J. P. Helms, for the defendant.

¹¹⁵ NEIL, J. An action for breach of promise of marriage. The plaintiff in error relies upon the following section of the code (Shannon's Code, sec. 4188): "A second marriage cannot be contracted before the dissolution of the first. But the first shall be regarded as dissolved for this purpose, if either party has been absent five years, and is not known to the other to be living."

A plea was filed making the defense that the plaintiff was a married woman at the time the contract was entered into. To this she filed a replication alleging, among other things, a promise after the five years had expired. In her evidence before the jury, however, she testified that she intermarried with her husband on the 26th of May, 1898, that they lived together three weeks, that at the expiration of that time he disappeared, and that the last promise which the defendant made to her was in January, 1903. This was only four and one-half years after the disappearance of the husband. It thus appeared from the plaintiff's testimony that while she was still, in the eyes of the law, a wife, she engaged herself to be married to the defendant Iss. Such a contract, made under the circumstances stated, is against public policy, and can furnish no standing to a plaintiff ¹¹⁶ in any court. The illegality of the contract was not cured by the fact that the marriage was not to take place until after the five years prescribed by statute had expired, or until plaintiff should procure a divorce from her husband. Such contracts are immoral, and cannot be recognized by the courts of this state; and the circuit judge acted within his powers, and cor-

rectly, when he arrested the further progress of the case, and dismissed it, upon the illegal nature of the demand of the plaintiff thus incontestably appearing. Of course, the case above stated is to be differentiated from one in which an innocent party makes a contract of marriage with another who is married, in ignorance of the fact that such other person is at the time a married man or woman.

Let the judgment of dismissal be affirmed.

Actions for Breach of Promise to Marry, where one of the parties was married at the time the promise was made, are discussed in the monographic note to *Burnham v. Cornwell*, 63 Am. Dec. 535. Ordinarily, a marriage between parties either of whom has a spouse living is void: *Potter v. Clapp*, 203 Ill. 592, 96 Am. St. Rep. 322. See the monographic note to *State v. Lowell*, 79 Am. St. Rep. 361-384, on void marriages. Presumptions in favor of the validity of second marriages are discussed in the extended note to *Pettinger v. Pettinger*, 89 Am. St. Rep. 198-206.

TENNESSEE CHEMICAL COMPANY v. HENRY.

[114 Tenn. 152, 85 S. W. 401.]

DANGEROUS PREMISES—Trespassing Animals.—A manufacturer who keeps his premises inclosed, save for an entrance for railway cars, is not liable for the death of a domestic animal which strays upon the premises and eats deleterious substances stored there for use. (p. 893.)

W. E. Steger and W. C. Cherry, for the appellant.

Alfred T. Levine, for the appellee.

153 SHIELDS, J. This is an action to recover damages for the death of a cow, valued at sixty dollars, caused by alleged wrongful act.

Plaintiff in error, engaged in the manufacture of commercial fertilizers in the suburbs of the city of Nashville, stored sacks which had contained nitrate of soda, used by it in its business, in an open shed upon its premises, which were inclosed, save an opening for the entrance of cars bringing material and carrying out fertilizer. The cow of the defendant in error entered this inclosure, presumably along the railroad track, and, unobserved by the company's employés, ate some of these sacks and the particles of soda left in them, which unusual diet created violent internal disturbances,

causing her death. This suit was brought to recover her value from the plaintiff in error upon the theory that it was guilty of negligence in not fencing its premises, so as to prevent stock running at large from becoming poisoned by eating its property there stored.

The trial judge, disposing of the case without a jury, gave judgment in favor of the plaintiff in the lower court, and the chemical company appeals and assigns error.

The owners of lands are under no obligation to keep ¹⁵⁴ their premises safe for trespassing animals belonging to others, but the owners of animals must at their peril keep them off the lands of others, and whether such lands are inclosed or not is immaterial.

Judge Thompson, in his work on Negligence, 298, says: "A land owner is not liable for failure to keep his premises safe for trespassing animals. If cattle stray upon uninclosed lands and injure themselves by eating deleterious matter, which has been left there by the land owner without any malicious intent, the land owner is not liable to the owner of the cattle."

In the case of *Knight v. Abert*, 6 Pa. St. 472, 47 Am. Dec. 478, it is said: "A man must use his property so as not to incommode his neighbor; but the maxim extends only to neighbors who do not interfere with it or enter upon it. He who suffers his cattle to go at large takes upon himself the risk incident to it." And in *Rust v. Low*, 6 Mass. 94, it is said: "It is a general rule of the common law that the owner of cattle is bound at his peril to keep them off the lands of other persons, and he cannot justify or excuse such an entry by showing that the land was unfenced. Fences were designed to keep one's cattle at home, and not to guard against the intrusion of those belonging to other people." Other cases in accord are *Hess v. Lupton*, 7 Ohio, pt. 1, 216; *Bush v. Brainard*, 1 Cow. 79, 13 Am. Dec. 513; *Hughes v. Hannibal etc. R. R. Co.*, 66 Mo. 325; *McGill v. Compton*, 66 Ill. 327; *Herold v. Meyers*, 20 Iowa, 378; *Walker v. Herron*, 22 Tex. 55.

¹⁵⁵ Nor were the premises of the chemical company in any sense an attractive nuisance, the maintenance of which made it liable for injuries sustained by trespassing animals.

There is no evidence to sustain this judgment, and it is reversed, and the suit dismissed with costs.

A Land Owner is Usually not Liable for injuries sustained by domestic animals while trespassing on his property, whether the injury arises from poisonous substances or from dangerous places: See Beinhorn v. Griswold, 27 Mont. 79, 94 Am. St. Rep. 818; Railway Co. v. Ferguson, 57 Ark. 16, 38 Am. St. Rep. 217. Compare, however, Hurd v. Lacy, 93 Ala. 427, 30 Am. St. Rep. 61, and cases cited in the cross-reference note thereto.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY v. DILLARD.

[114 Tenn. 240, 86 S. W. 313.]

FELLOW-SERVANTS.—A Conductor of a Passenger Train and a brakeman on a freight train are fellow-servants. (pp. 897, 898.)

FELLOW-SERVANTS—Assumption of Risk.—If an employer has exercised due care in the selection of his employes, the danger arising from the negligence of a fellow-servant is a risk which one entering the service voluntarily assumes. (p. 902.)

Seay & Seay, for the plaintiff in error.

B. F. Proctor and J. D. G. Morton, for the defendant in error.

²⁴² NEIL, J. This action was brought in the circuit court of Sumner county to recover damages for an injury inflicted upon the foot of the defendant in error in a collision that occurred in November, 1902, at Hendersonville, on the line of the plaintiff in error, between a freight train and a passenger train. There were verdict and judgment in the court below, and the railway company, after motion for a new trial had been overruled, appealed and assigned errors.

The defendant in error was a brakeman on the freight train. The declaration contained counts on the negligence of the train-dispatcher, the negligence of the conductor of the freight train, and the negligence of the conductor of the passenger train. To the last-mentioned count—the third—there was a demurrer filed, raising the question that the conductor on the passenger train stood in the relation of fellow-servant to the train crew of the freight train, and hence to the defendant in error, the brakeman on that train, and therefore the company would not be liable to him for an injury caused by the negligence of such passenger conductor.

This demurrer was overruled by the circuit court judge, and his action on this matter forms the subject of the first assignment of error, which we shall now proceed to consider.

²⁴³ The first assignment of error raises the question whether the conductor on the passenger train was the fellow-servant of the brakeman on the freight train or whether such conductor stood in the relation of vice-principal to the brakeman.

In our latest case upon the subject (*Railroad Co. v. Edwards*, 111 Tenn. 31, 76 S. W. 897, it is said: "The mere superiority in dignity, grade, or compensation, in favor of one servant of a common principal over other servants is not a mark by which to distinguish whether or not the former is a vice-principal. . . . The most general test is that, in order to be a vice-principal, a servant must so far stand in the place of his master as to be charged in the particular matter with the performance of a duty toward the inferior, which, under the law, the master owes to such servant, as furnishing tools (*Guthrie v. Louisville etc. R. R. Co.*, 11 Lea, 372, 47 Am. Rep. 286), or machinery and appliances (*Louisville etc. R. R. Co. v. Lahr*, 86 Tenn. 335, 341, 6 S. W. 663), or giving orders with respect to work to be done by the subordinate (*Nashville etc. Ry. Co. v. Handman*, 13 Lea, 423, 429).

"A test frequently stated in our cases is the authority to give orders, as a vice-principal, to the subordinate servant, in directing him when, where, and how to work. . . . Some illustrations of the foregoing are seen in the following cases: *Louisville etc. R. R. Co. v. Bowler*, 9 Heisk. 866; *Railroad Co. v. Northington*, 91 Tenn. 56, 17 S. W. 880, 16 L. R. A. 268; *Electric Ry. Co. v. Lawson*, 101 Tenn. 408, 409, ²⁴⁴ 47 S. W. 489. In these cases a section boss was held to stand as a vice-principal to the section-hands under him because he had power to order them with respect to their work and also because it was his duty to see that they had proper tools with which to work. In *East Tennessee etc. R. R. Co. v. Collins*, 85 Tenn. 227, 1 S. W. 883, and *Louisville etc. R. R. Co. v. Martin*, 87 Tenn. 398, 10 S. W. 772, 3 L. R. A. 282, it was held that the engineer was the vice-principal of the brakeman on a train, when, in the absence of the conductor, he had power to give the brakeman orders in respect to his work, but otherwise not; and in *Railroad v. Wright*, 100 Tenn. 56, 42 S. W. 1065, it was held that the conductor

stands as vice-principal to all of the train force, because they are all under his orders." To same effect, *Railroad v. Spence*, 93 Tenn. 173, 42 Am. St. Rep. 907, 23 S. W. 211.

The conductor of the passenger train in question, however, had no power to give orders to the brakeman on the freight train. This ground for adjudging the relation of vice-principal and of servant thereunder did not, therefore, exist.

Was the conductor of the passenger train charged with any of the personal duties of the master toward the brakeman on the freight train? Was he charged with the duty of furnishing tools and appliances or a safe place to work? There is nothing to show that he was charged with such duties.

Was the passenger conductor in charge of, or engaged in, a separate department of the master's business?

²⁴⁵ In this state the departmental doctrine is recognized in railway cases. The grounds on which it rests are thus stated in *Coal Creek Min. Co. v. Davis*, 90 Tenn. 711, 719, 720, 18 S. W. 387, 389: "The doctrine rests upon the theory that the vast extent of the business of railway companies has led to the division of their business into separate and distinct departments; that by reason of this division a servant in one branch or department has no sort of association or connection with one in another department; that this absence of association gives the servant no opportunity of observing the character of a servant in another department of labor, and no opportunity to guard against the negligence of such servant. The want of consociation is the idea underlying this limitation. This rule has not been extended by us beyond railroad corporations, and we are not disposed to extend it further than to the class of employments to which it has been heretofore limited."

Under this doctrine it has been held that a track repairer was in a different department from, and hence not the fellow-servant of, the crew of a train running upon the track (*Haynes v. East Tennessee etc. R. R. Co.*, 3 Cold. 222); for the same reason, that a section foreman was not the fellow-servant of the train crew (*Nashville etc. R. R. Co. v. Carroll*, 6 Heisk. 347, 361); that a watchman was not the fellow-servant of an engineer (*Louisville etc. R. R. Co. v. Robertson*, 9 Heisk. 276); a telegraph operator at a way station, not the fellow-servant of the conductor of a train (*East*

Tennessee etc. R. R. Co. v. De Armond, 86 Tenn. 73, 6 Am. St. Rep. 246 816, 5 S. W. 600); a car inspector, not the fellow-servant of the crew of a switch engine (Taylor v. Railroad Co., 93 Tenn. 307, 27 S. W. 663); a depot agent, not the fellow-servant of the conductor of a train (Louisville etc. R. R. Co. v. Jackson, 106 Tenn. 438, 61 S. W. 771); a bridge crew, not the fellow-servant of the crew of a freight train (Freeman v. Illinois Cent. R. R. Co., 107 Tenn. 340, 64 S. W. 1); and an engineer, not the fellow-servant of a telegraph operator (Illinois Cent. R. R. Co. v. Bentz, 108 Tenn. 670, 91 Am. St. Rep. 763, 69 S. W. 317, 58 L. R. A. 690).

We have no case holding that separate trains constitute separate and distinct departments of railway service, nor do we think they can be so treated on principle. The reason underlying the departmental doctrine resides in, as already stated, the need of consociation to enable coemployés to judge of the caution, diligence, and efficiency of each other, in order that they may properly protect themselves against negligence. In distinct departments of the service they are regarded as constantly working apart from each other, without the opportunity of mutual observation and criticism. This reason, however, cannot be held to apply to the crews of different trains running upon the tracks of the same company. It does not appear that such crews are permanently attached to any special trains. Moreover, even if not associated upon the same train, the crews of each train, in passing and re-passing and in mingling with each other in the handling of traffic in the course of their work, necessarily have an opportunity of judging to some extent ²⁴⁷ how the various trains are managed by the people who man them. At best, the amelioration of the dangers incident to a hazardous business cannot be very great for the servants of a common master, even when they work in the same department, where the number of such coemployés is great, as very often happens in the railway business, and in other kinds of business.

If the conductor of the passenger train in question had no control over the brakeman on the freight train, or was not charged with any duty of the master toward him, as in the furnishing of tools and appliances or a safe place to work, or was not in a different department of the master's service (and we have seen that he had no such powers and bore no such relation), which are the only exceptions our cases recognize as taking coemployés out of the class of fellow-servants,

then the said conductor and brakeman were fellow-servants, and the master was not liable for the injuries inflicted upon one by the negligence of the other. This conclusion seems inevitable, on principle.

The weight of authority likewise supports this conclusion. Baltimore etc. R. R. Co. v. Andrews, 50 Fed. 728, 1 C. C. A. 636, 17 L. R. A. 191; Kerlin v. Chicago etc. R. Co. (C. C.), 50 Fed. 186-188; St. Louis etc. Ry. Co. v. Needham, 63 Fed. 107, 112, 11 C. C. A. 56, 25 L. R. A. 837; Northern Pac. R. R. Co. v. Mase, 63 Fed. 114, 11 C. C. A. 63; McMaster v. Illinois Cent. R. R. Co., 65 Miss. 264, 268, 7 Am. St. Rep. 654, 657, 4 South. 59; Pittsburg etc. R. R. Co. v. Devinney, 17 Ohio St. 197. There are ²⁴⁸ other cases holding a contrary view: Madden's Admr. v. Chesapeake etc. Ry. Co., 23 W. Va. 617, 618, 57 Am. Rep. 695, 696, 697; Daniel's Admr. v. Chesapeake etc. Ry. Co., 36 W. Va. 397, 411, 414, 417, 419, 32 Am. St. Rep. 870, 882, 885, 888, 889, 15 S. E. 162, 16 L. R. A. 383, 387, 389, 390; Louisville R. Co. v. Edmonds' Admx., 23 Ky. Law Rep. 1049, 64 S. W. 727. The Kentucky case is based, in substance, on the ground that separate trains constitute separate departments, or that they are equivalent thereto because the crews of such separate trains are "so disconnected as to not give the one a right or opportunity for controlling, admonishing, or even observing the manner of the colaborer doing his work." We have already held this distinction inadmissible, in a former part of this opinion. The substance of the West Virginia cases (both collision cases), as we understand them, is that it is the personal duty of the master to keep the way clear, and that each conductor in charge of a train should be regarded as representing the master for that purpose. We think this view is fully met by the reasoning of Sanborn, J., in St. Louis etc. Ry. Co. v. Needham, 63 Fed. 107, 112, 11 C. C. A. 56, 25 L. R. A. 837.

In that case it appeared there was a rule of the company which provided: "That conductors of all trains, when approaching meeting points where they are to take the siding, must go to the forward part of trains and attend to the switch in person. On train leaving the siding they must set up switch for the main track in person. Conductors must not assign this duty to anyone, but must attend to it in person in every instance."

²⁴⁹ The decedent was a fireman on a passenger train running south from Little Rock, Arkansas, December 16, 1889.

About two hours before this passenger train arrived at Alexander, a station ten miles south of Little Rock, the conductor of a construction train of the railroad company caused the switch of the spur track at that place to be opened, ran his train upon that track and then ran it north to Little Rock, and left the switch open, when it was his duty to close it. The passenger train ran into the open switch, and Mr. Needham was killed.

In answer to the contention that it was the personal duty of the master to make and keep the way safe, the court, among other things, said: "The line of demarkation between the absolute duty of the master and the duty of the servants is the line that separates the work of construction, preparation and preservation from the work of operation. Is the act in question work required to construct, to prepare, to place in a safe location, or to keep in repair the machinery furnished by the employer? If so, it is his personal duty to exercise ordinary care to perform it. Is the act in question required to properly and safely operate the machinery furnished, or to prevent the safe place in which it was furnished from becoming dangerous through its negligent operation? If so, it is the duty of the servants to perform that act, and they, and not the master, assume the risk of negligence in its performance.

"The roadbed, ties, tracks, stations, rolling stock, and all the appurtenances of a well-equipped railroad together ²⁵⁰ constitute a great machine for transportation. It is the duty of the railroad company to use ordinary care to furnish a sound and reasonably safe machine, to use due diligence to keep it in proper repair, and to use ordinary care to employ reasonably competent servants to operate it; but when this duty is performed, the duty rests upon the servant to operate it carefully. In the case before us there is no evidence that the conductor who negligently left the switch open was not selected with reasonable care. There is no claim that there was any defect in the switch that hindered or prevented the conductor from closing it. The company furnished a switch sufficient to move the rails, and used due care in selecting the servant to operate it. Before this servant commenced to operate it, the switch was closed, so that the passenger train on which the decedent was killed might have passed in safety. It became the duty of the conductor, in the operation of the railroad, to open this switch, and to run his train through it upon the spur track. He did so.

It then became his duty to take his train off the spur track and to close the switch. He took his train off and proceeded south, but carelessly left the switch open. His negligence was not in the construction, preparation or repair of the railroad, but in its operation. The railroad was safe before he made it unsafe by his negligence in operating it, and he was discharging none of the personal duties of the master, but one of the duties of the servant, when he became guilty of the fatal negligence. Any other holding would annihilate²⁵¹ the now settled rule of liability for the negligence of fellow-servants. It will not do to say that the timely movement and fastening of a switch in the ordinary operation of a railroad is requisite to provide a safe place for the next train to be operated in, and hence is one of the personal duties of the master. Under such a rule, it would become the absolute duty of the master to so operate all switches, all turntables, the levers of all engines, all brakes, all cars and every appurtenance of the railroad, that every place upon it should at all times be safe, and no negligence of any employé could ever cause an injury to another servant for which the master might not be held liable. At the instant of the injury every place in which an injury is inflicted is unsafe. The test of liability is not the safety of the place nor of the machinery at the instant of injury, but the character of the duty, the negligent performance of which caused the injury. Was it a duty of construction, preparation, or repair, or was it a duty of operation of the machine?

"In our opinion, the duty of opening and closing a switch in the ordinary operation of a railroad is not one of the personal duties of the master, but a duty of operation—a duty of the servant—for negligence in the discharge of which another servant of the same master, engaged in operating a train over the same railroad, cannot recover."

And it is well said by Brewer, J., in *Howard v. Denver etc. Ry. Co.* (C. C.), 26 Fed. 837, 842—a collision case:²⁵² "It will not do to say that, because Ryan's engine was in the way and collided with decedent's train, the track was not clear, and therefore the master had failed in his duty of providing a safe place for the employé to work in and upon. The negligent use by one employé of perfectly safe machinery will seldom be adjudged a breach of the master's duty of providing a safe place for other employés. Such a construction would make any negligent misplacement of a

switch, any negligent collision of trains, even any negligent dropping of tools about a factory, a breach of the duty of providing a safe place. The true idea is that the place and the instruments must in themselves be safe, for this is what the master's duty fairly compels, and not that the master must see that no negligent handling by an employé of the machinery shall create danger. Neither can it be said that Ryan and decedent were engaged in a different class of work. Both were employed in the movements of the trains—the same kind of service. True, they were on different trains, and at the time of the accident had no opportunity of noticing the conduct of each other until too late to prevent the collision. But being engaged in the same kind of service, and on the same division, they must naturally have often been thrown into contact and had ample opportunities for mutual supervision. To subdivide beyond the class of the service, into the place of work, would carry the exception beyond well-recognized limits. It would make the trainmen on one train not fellow-servants with those on another; the carpenters and machinists ²⁵³ in one room strangers in service to those of another; one gang of section-men not coemployés with another—and all because at the time their places of work happened to be different.”

To admit the qualification into the law of master and servant sought to be introduced in this case, making the conductor of one train the vice-principal of employés upon another train, thereby declaring each train to constitute a separate department of the service, would practically break down the whole law of fellow-servants as previously understood in this state. The law as it exists in this state is not unfair either to the master or the servant. While on the one hand, it seems, on a casual view, that it is a hardship upon the servant to deny him relief for an injury inflicted upon him by the negligence of a fellow-servant in whose selection he had no voice, yet it seems equally hard to make the master liable to one of his servants for the negligence of another servant when he (the master) has exercised due care in selecting such servant. What more could he do? It is impossible that he should supervise and control every act of his servants. Yet if he is made liable to each of his servants for every act of all his servants in the course of the employment—and there may be and there often are thousands of them—the law then places upon him a duty which everyone

knows that no one can discharge. The true and just view is that expressed in our cases—that, after the master has exercised due care in the selection of his servants, the danger arising from the negligence ²⁵⁴ of a fellow-servant is a danger which one going into the service voluntarily assumes, and it is a risk for which it is presumed he is satisfactorily compensated by the larger wages he can earn in the service than in other employments. In this state we have already narrowed the field covered by the law of fellow-servants by withdrawing from it cases wherein one servant of the master is set over other servants, with power to command them in their work, and by the introduction of the departmental doctrine as construed and applied in our previous cases, and have added cases arising under these to the master's generally recognized duty of furnishing safe tools and appliances, a safe place to work, and the selection of reasonably competent servants. We deem it inexpedient to make any further extension than may follow from a natural and reasonable development of the principles already adjudged. We do not think the case now put before us lies within the path of that development.

We are of opinion, therefore, that the circuit judge committed error in not sustaining the demurrer to the third count of the declaration, and the first assignment is sustained.

Other assignments of error are disposed of in a memorandum opinion filed with the record, and need not be further referred to here.

Reverse and remand.

The Question Whether a Conductor on one train is a fellow-servant with a brakeman on another train, is considered in the monographic note to Mast v. Kern, 75 Am. St. Rep. 610. It has been held that employes on one train of a cable street railway are fellow-servants with the employes on the train next preceding: Chicago City Ry. Co. v. Leach, 208 Ill. 198, 100 Am. St. Rep. 216. A car inspector and a conductor are held not fellow-servants in McDonald v. Michigan Central R. R. Co., 132 Mich. 372, 102 Am. St. Rep. 426.

UNION BANK AND TRUST COMPANY v. FRED W.
WOLF COMPANY.

[114 Tenn. 255, 86 S. W. 310.]

FIXTURES—Priority Between Seller of Chattel and Mortgagee of Realty.—Where machinery has been so placed in a factory as to become *prima facie* a part of the realty, a secret condition in the contract under which the machinery was purchased that the title should remain in the seller until the payment of the purchase price, is inoperative as against a subsequent mortgagee of the realty without notice. (p. 909.)

W. H. Williamson, for the appellant.

Norman Farrell, Jr., for the appellee.

²⁵⁶ NEIL, J. Contest for priority between the seller of machinery, under a conditional sale, for an ice plant, and subsequent mortgagees of the same property, without notice, after it was attached to the plant.

²⁵⁷ The facts, so far as necessary to be stated, are as follows: On the 24th of January, 1899, the Fred W. Wolf Company entered into a contract with 'the Consumers' Ice, Coal and Cold Storage Company, whereby the former sold to the latter machinery to the value of fourteen thousand six hundred dollars, payable in installments, evidenced by sundry promissory notes. By the terms of the contract the machinery was to remain the property of the selling company until paid for. There still remains unpaid a balance of about eighteen hundred dollars.

The machinery consisted of a condenser, an engine, oil trap, all very heavy articles, and sundry pipes, necessary for the operation of an ice factory. The condenser and engine were placed upon brick foundations and bolted thereto. The oil trap was likewise bolted to the floor. The pipes were connected with the condenser, and thence, through the building, with other parts of the machinery of the plant which was already in place at the time the contract was made, the latter being a part of the old equipment of the factory. All of this machinery was connected together in such a way as to form a complete and homogeneous system. The condenser, the engine, and the oil trap could be taken out of the building, without serious injury thereto, by taking off the taps and

withdrawing the bolts. The other connections could then be taken out, also without serious injury thereto.

²⁵⁸ At the time, however, that this machinery was put in place, it was intended by the parties that it should be permanently attached to the freehold, subject only to the failure to comply with the condition of payment. None of the machinery furnished under the contract and so placed in the building could be withdrawn without seriously impairing the efficiency of the plant. The machinery was sold by the Fred W. Wolf Company to the ice company for the purpose of being attached to the freehold in the manner in which it was attached, and it was so fastened thereto with the knowledge and consent and aid of the said company.

On April 1, 1901, the Consumers' Ice, Coal and Cold Storage Company executed a mortgage on the whole plant to the Union Bank and Trust Company, to secure an issue of fifteen thousand dollars of bonds, and on January 1, 1902, a second mortgage was placed thereon, in favor of the Union Bank and Trust Company, as trustees, to secure thirty-five thousand dollars of bonds. These mortgages were taken upon the property in the belief that the machinery above referred to constituted a part of the plant, and that the whole was subject to mortgage. Neither the trustee nor the bondholders had any knowledge or notice of the fact that the Fred W. Wolf Company had retained title to the machinery.

The ice company having failed, the trustee was proceeding to foreclose the mortgages, whereupon the Fred W. Wolf Company brought its replevin suit to recover the machinery. Then the present bill was filed to enjoin ²⁵⁹ that suit, and to test the question of priority between the parties.

The chancellor rendered a decree in favor of the complainants, upholding the priority of the mortgagees, and thereupon the seller, the Fred W. Wolf Company, appealed to this court, and has assigned errors.

We are referred by counsel for the defendants to *McDavid v. Wood*, 5 Heisk. 95, as authority for the proposition that the intention of the parties in affixing things to land will generally determine whether, on being so attached, they become fixtures, and so part of the realty. In that case the rule contended for is enunciated in the following language: "Look first to the intention with which the thing, which may be a fixture by annexing it to the freehold, was annexed, and if it

is found that it was the intention of the owner of the freehold to make the erection for the permanent use and advantage of the land, and to remain permanently attached to the soil, such erection is to be regarded as part of the realty. But if the erection is not made with the view of a permanent addition to the land, but for purposes of trade or manufacture, the erection will be regarded as a chattel, ²⁶⁰ unless a contrary intention is made to appear." In that case the contest was between the executor and heir, and the property involved a steam sawmill, with its machinery and appendages. The court held that this property was to be treated as personalty, although fixed to the land, because it appeared in the evidence that the mill was erected by four partners on the land of one, under a lease of the land, with the agreement that it was to be removed whenever they thought proper; that it was erected for manufacturing purposes, and not with the view of giving additional value to the land; that the owner of the land did not agree to its erection as a permanent improvement, and did not at any time regard it in any other light than as personal property belonging to the four partners. To the same effect, *Snowden v. Memphis Park Assn.*, 7 Lea, 225, 229; *Saunders v. Stallings*, 5 Heisk. 65, 70-73; *Memphis Gaslight Co. v. State*, 6 Cold. 310, 98 Am. Dec. 452. The relations of the parties have much to do with the matter also; likewise the use to which the property is put. The general rule is that everything attached to the freehold becomes land: *Childress v. Wright*, 2 Cold. 350. This rule is relaxed, as between landlord and tenant, in favor of the latter (*Saunders v. Stallings*, 5 Heisk. 65), and as to machinery introduced for manufacturing purposes (*Memphis etc. Co. v. State*, 6 Cold. 319, 98 Am. Dec. 452), also between the tenant for life and the remainderman (*Cannon v. Hare*, 1 Tenn. Ch. 22); but is administered strictly between the owner of the land and a trespasser making erections thereon ²⁶¹ (*Malone v. State*, 11 Lea, 701; *Childress v. Wright*, 2 Cold. 350), and, between vendor and vendee, in favor of the latter: *Degraffenreid v. Scruggs*, 4 Humph. 451, 40 Am. Dec. 658.

In the case last cited, it appeared that one Shelton was the owner of a cotton farm, on which he erected a cotton-gin for the purpose of ginning cotton produced thereon; that the house was built upon blocks, and the gin fastened to the house

by nails and braces. Shelton thereafter conveyed the land by deed in trust to Nelson to secure the payment of certain debts. Subsequently to the making of this deed in trust, Shelton executed a deed in trust to one Scruggs, for the benefit of other creditors, on the cotton-gin alone. Thereafter Nelson enforced his trust deed by a sale of the property therein conveyed, the land, and Degraffenreid became the purchaser. Scruggs, the trustee under the second deed in trust, demanded the cotton-gin from Degraffenreid, but the latter refused to surrender it. Thereupon Scruggs brought suit. The court below charged the jury that, if the gin could be severed and removed without serious injury to the land or gin, it would not pass under the deed, and they must find for the plaintiff. The jury so found, and upon appeal to this court, after stating the strict rule of the common law as above announced, and its relaxation in favor of tenants, and in relation to fixtures erected for purposes of trade, and its rigid maintenance as between executor and heir, and between vendor and ²⁶² vendee, the court proceeded to decide the controversy in favor of the vendee, in the following language: "In this case the gin was erected in the ginhouse, and fastened to the house by nails and braces. It was, therefore, permanently attached and fixed to the freehold, and this is the true and certain criterion to determine whether it passed by the deed with the freehold. . . . Any attempt to carry out the principles stated by his honor to the jury would be attended with endless difficulty and uncertainty. If fixtures attached to the freehold may be removed provided they can be severed without any injury to the land, scarcely a case could occur in which they would pass by the deed."

As said by Cooper, J., in *Cannon v. Hare*, Tenn. Ch. 22: "The finest framed or other buildings . . . are constructed upon foundation walls, and any building can be taken down to the top of the foundation walls, and to the bottom rock of the foundation walls, without injury to the soil. Accordingly, the tendency of modern decisions is to make the rights of the parties to fixtures and buildings depend, not on the manner in which they are attached to the freehold, but upon the character of the parties, the intention in erecting the improvements, and the uses to which they are put.

"Loose machinery in a manufacturing establishment will, as we shall see presently, go to the heir as against the exec-

ntor, while the same machinery firmly attached to the building, and even the building itself, belong to the tenant for years, as between him and the landlord. ²⁶³ So, substantial houses built upon stone foundations with brick chimneys, and indubitably attached to the soil, will, if erected principally for purposes of trade, belong to the outgoing tenant for years; while the same buildings, or even buildings resting upon pillars or trestles, and not let into the soil, if erected and used as dwellings, or for the more convenient enjoyment of the land, or for the purpose of obtaining an income by renting, would go, with the freehold, to the landlord, even as against a tenant for years."

So, in *Cubbins v. Ayres*, 4 Lea, 329, it was held, in favor of a tenant as against his landlord, that a bar-room counter and shelving, and an office counter, and an iron safe, erected on the premises of the landlord by the tenant, should be treated as personal property, under the theory of trade fixtures, although the counter was nailed to the wall and the floor, and the shelving was behind the counter, and was fastened by nails also to the walls and the floor, and the iron safe was well set into an aperture in the wall larger than the safe itself, and surrounded with a structure of wood, fitted and securely fastened to the sides and top of the wall around the opening, and inclosed therein. On the other hand, in *Johnson v. Willingby*, 3 Tenn. Cas. 338, it was held that a dwelling-house, kitchen, stable, corncrib, and other outhouses erected upon land by a tenant, without any contract with the landlord in respect thereto, became the property of the owner of the land at the expiration of the tenancy, on the ground that the erection was ²⁶⁴ made with a view of permanent advantage to the land, and not for the purpose of trade or manufacture. And in *Johnson v. Patterson*, 13 Lea, 626, machinery in a cotton factory was held to be realty, under the following circumstances: When President Andrew Johnson died, he had a debt on one Prather, due by note, for the sum of ten thousand dollars. This debt was secured by deed in trust to Thomas Maloney, conveying a brick cotton factory, with the two acres of land on which it stood, with all the machinery and fixtures of all kinds in the cotton factory, consisting of spinning frames and attachments necessary to operate them, with all appurtenances connected with or belonging to the factory, with power to sell on default, as is usual in

such cases. On default occurring, the trustee advertised and sold the property, and it was bought in by the three children of President Johnson, viz., Andrew, Jr., Mrs. Patterson, and Mrs. Stover, for the debt due on the trust deed. The trustee conveyed the property to these purchasers by deed, and they went into possession. The point was made that much of the property was strictly personal property, and did not come within the definition of real estate. Speaking to this subject, the court said: "As to the point suggested in the bill, that much of the property was strictly personalty and not realty, alluding, as we learn from argument of counsel, to the machinery making up a part of the cotton factory conveyed, we need say but little. The complainant [the widow of Andrew Johnson, Jr., who had died in the meantime] ²⁰⁵ stands in the shoes of her deceased husband in asserting the position that the machinery making part of the cotton factory is personalty. It is beyond question that he and the copurchasers purchased the whole property as one property, and treated it as such. The intent was to either use it permanently as such, and as a whole, or to sell it as a whole. Most certainly the parties did not intend to become owners as tenants in common of the brick house erected for the purpose of the enterprise, and to hold the machinery as personalty, with the right to divide it among them as such. It would probably, if not certainly, have been impossible for them so to divide it without rendering it useless for all practical purposes. Modern authorities all agree that the most controlling test of the question whether property connected with real estate is to be deemed realty or a mere chattel, removable at the pleasure of the owner, is the intention and purpose of the erection. . . . But the intent and the nature of the property, taken as a whole, as the parties purchased it and treated it, concurred in making it a part of the freehold, and stamped it as realty, and it must so be held."

When the facts contained in the statement are viewed in the light of the foregoing decisions, we think it cannot be doubted that the purpose of the ice company in placing the machinery in the building was to permanently enhance the value of the property and to make it a part of the realty. It is equally clear that this purpose was concurred in by the seller of the machinery, ²⁰⁶ subject only to the condition that

such seller should have a right to withdraw it in case the purchase money notes should not be paid.

The question to be determined is whether this secret condition, known only to the seller and buyer, should be held operative against an innocent purchaser of the realty.

We think this question should be decided in the negative, for two reasons. The first of these reasons is based upon the principle that, where one of two innocent persons must suffer, that one should bear the loss whose conduct or act placed it in the power of a third party to impose upon or deceive another. The second reason is to be found in the policy of our law in respect of real estate titles. That policy is opposed to secret liens, and requires that the public records shall contain evidence of all liens and encumbrances. An opposite view would soon involve titles to realty in great confusion, and result in needless depreciation of land values, since a vendee would search the records in vain for a secret agreement between the vendor and some prior owner in respect of the fencing or houses, or mills containing machinery, or other erection upon the land. The purchaser desiring to buy land would justly suffer under the apprehension of some such secret understanding between prior parties, whereby, after paying for the land, he might be deprived, without his consent and without compensation, of a considerable portion of the value of the property that he supposed he was buying.

²⁶⁷ Now, in the present case, it appears that the machinery was so placed in the factory as to be *prima facie* a part of the realty itself, and the whole erection, composed of the building and the machinery, was in the possession of the owner of the land. The trustee and bondholders under the two mortgages or trust deeds were justified from the appearance of things in assuming that the machinery was in truth a part of the land, and in taking such machinery into estimation in determining the amount of money which they would advance upon the entire property. Now, to deprive them of this security in behalf of the seller of the machinery, who retained the title merely as security, and by a secret or unrecorded writing between such vendor and the purchaser of the machinery, would be, in our judgment, to sacrifice the substance of justice to its mere form.

This question has received consideration in other jurisdictions, and the decided weight of authority is in favor of the view here taken. The cases are collected in a note on pages

628 and 629 of 13 American and English Encyclopedia of Law, second edition.

We shall refer specially to a few of the cases cited.

In *Southbridge Sav. Bank v. Exeter Works*, 127 Mass. 542, it appeared that the defendant delivered to one Stevens, to be used on trial at his machine-shop in Brookfield, an Exeter-sectional boiler, which, by agreement between them, was to remain the personal property of the defendant until paid for. Thereafter Stevens made a mortgage to the plaintiff of the machine-shop ²⁶⁸ and land, under which the property was sold; and the plaintiff claimed under that sale. At the time the mortgage was executed, the machinery had been placed in the building, which was a machine-shop, by Stevens, the mortgagor, for the purpose of furnishing the motive power for his machinery. It was firmly attached to the land, was in connection with the steam engine, shafting, and machinery adapted to the machine-shop and business, and was essential to the equipment and use of the building for the purpose for which it was intended. It was therefore *prima facie* a part of the land. In speaking to this subject, and the rights of an innocent purchaser under such state of facts, the court said: "Where, as in this case, personal property is sold for the purpose of being annexed to the realty, and it is so annexed, an agreement between the seller and the buyer that it shall not become a part of the realty, but shall remain the personal property of the seller, will not bind or affect a vendee or mortgagee without notice. Notwithstanding such agreement, the property will pass to such vendee or mortgagee as a part of the realty." To the same effect, see *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Thompson v. Vinton*, 121 Mass. 139; *Prince v. Case*, 10 Conn. 375, 27 Am. Dec. 675; *Landon v. Platt*, 34 Conn. 517; *Powers v. Dennison*, 30 Vt. 752; *Davenport v. Shants*, 43 Vt. 546; *Tibbetts v. Horne*, 65 N. H. 242, 23 Am. St. Rep. 31, 23 Atl. 145, 15 L. R. A. 56; *Bringholff v. Munzenmaier*, 20 Iowa, 513, 518, 519; *Stillman v. Flenniken*, 58 Iowa, 450, 454, 43 Am. Rep. 120, 10 N. W. 842; ²⁶⁹ *Rowand v. Anderson*, 33 Kan. 264, 52 Am. Rep. 529, 6 Pac. 255; *Climer v. Wallace*, 28 Mo. 556, 75 Am. Dec. 135.

In *Prince v. Case*, 10 Conn. 375, 27 Am. Dec. 675, the reason for the rule is thus stated: "The policy of our law is that titles to real estate shall appear upon record, so that all may in this way be informed where the legal estate is. But were

this new mode of conveyance to prevail, encumbrances might frequently be found to exist, against which no vigilance could guard, no diligence protect. Our records would be fallacious guides, and, when we had gained all the information they could give, we should remain in doubt as to the title. It is much better to leave those unaided who had ventured to rely upon the word or honor for their redress, than to suffer a person who had resorted to the official register to be defeated by secret claims of this kind. The law cannot prefer the claims of those who take no care of themselves to those who have faithfully used all legal diligence. If a loss is to be sustained, it is more reasonable that he who neglected the means the law put into his power should suffer, rather than he who has used those means." This case is cited, with approval of the reasoning just set forth, in the cases of *Powers v. Dennison*, 30 Vt. 752, *Tibbetts v. Horne*, 65 N. H. 242, 23 Am. St. Rep. 31, 23 Atl. 145, 15 L. R. A. 56, and *Rowand v. Anderson*, 33 Kan. 264, 52 Am. Rep. 529, 6 Pac. 255.

There are some cases which hold that the rights of the conditional seller are superior even to the rights of a purchaser or mortgagee without notice. We have examined ²⁷⁰ these authorities, but do [not] think they rest upon a sound basis. We are of opinion that the rule which we have announced is the sound view of the matter, and is supported by reason and the weight of authority.

There are cases both ways upon the question whether the rights of such conditional seller would be superior to those of the holder of a mortgage in existence at the time the property was annexed to the land. It is unnecessary to go into this question in the present case, and we express no opinion upon it. Nor are we to be understood as impeaching the validity of conditional sales of personalty in general, or as impairing their efficiency, as previously understood in this state, when the property which is the subject of such sales remains in its original form, not transmuted into realty in such guise, or under such circumstances, as are of character likely to deceive innocent purchasers or mortgagees of the latter class of property.

It results from the views above expressed that we are of opinion the decree of the chancellor and of the court of chancery appeals, in favor of the mortgagees, must be affirmed.

A Subsequent Mortgagee of real estate is generally not bound by an agreement that fixtures shall retain their personal character, if he has no notice of the agreement at the time of taking the mortgage: See the monographic note to *Fuller-Warren Co. v. Harter*, 84 Am. St. Rep. 892. It has recently been held that one who sells machinery to be put into a mill, with a stipulation that it shall remain his until paid for, cannot, after permitting it to be made a part of the building without any inquiry as to ownership, remove it as against one whose rights are substantially those of a mortgagee of the mill: *McCrillis v. Cole*, 25 R. I. 156, 105 Am. St. Rep. 875, and see the cases cited in the cross-reference note thereto.

BLUE v. GUNN.

[114 Tenn. 414, 87 S. W. 408.]

FIXTURES—Building Materials Before Annexation.—Doors, mantels, casings, columns, and the like, deposited in a building for the purpose of annexation, but never physically attached to it, are not fixtures so as to pass to a purchaser under a mortgage sale of the premises. (p. 918.)

Robert B. Williams and L. B. White, for the plaintiff.

W. R. King, for the defendant.

415 *McALISTER, J.* The question to be solved on this record is whether or not certain doors, mantels, casings, columns, etc., deposited in a building for the purpose of annexation, but which, as a matter of fact, were never physically attached to the building passed to the purchaser under a mortgage sale of the premises.

The facts revealed in the record are that plaintiff and wife on the seventeenth day of June, 1901, executed a deed of trust on certain real estate to James T. Dunn, trustee, to secure an indebtedness to one D. E. Rose for the sum of one thousand dollars. There was a foreclosure of this trust deed, and the property was purchased by M. S. McDougal for the sum of two thousand one hundred dollars. The latter sold the property in a short time thereafter to the defendant, L. F. Gunn. It appears that when the property was first mortgaged a **416** house had been erected upon the premises, which was not entirely finished. Prior to the sale by the trustee, the plaintiff mortgagor had bought certain finishing material, and deposited it in a room of the building on the second floor. The material consisted of doors, mantels, casings.

columns, corner beads, etc., which had been ordered with the intention of being used in this house, but none of it was attached in any way to the building.

It further appears that this finishing material was not especially designed for that particular house, but could be utilized in any other residence. The plaintiff lived on the property at the time the trust deed was executed, and continued to occupy it until after the foreclosure sale. It further appears that in the deed from the trustee to the purchaser said material was not mentioned, nor was it mentioned in the trustee's advertisement of the foreclosure sale. There is evidence tending to show that plaintiff at all times claimed this material, and after the first sale gave notice to the purchaser, McDougal, that he claimed it. It is also shown that he notified the trustee before the sale not to sell this material, and claimed it as his property. It further appears that, about a year after L. F. Gunn went into possession of the premises under his purchase from McDougal, he used said material which he found stored in the building for the purpose of completing it. Thereupon the plaintiff, Barney Blue, who was the original mortgagor, and had purchased this material and left it in the building, brought suit to recover the sum of one hundred and forty-eight dollars, the value of ⁴¹⁷ said material. There was a verdict and judgment in the court below in favor of the defendant. The plaintiff appealed, and has assigned errors.

The disputed question of law is whether said material passed, under the mortgage sale, as fixtures, or whether it remained the personal property of the original mortgagor.

As already stated, said material was not mentioned in any of the various conveyances of the property, and there was no physical attachment of said material to the building; and, while this material was originally purchased to be affixed to this building, it was commercial finishing, carried in stock by dealers, and could have been used on other buildings.

While the question thus presented is of first impression in this state, so far as we are advised, it seems to have been settled as a matter of legal controversy in many other states. The question of what constitutes a fixture has usually arisen in cases where the article, appurtenance, or material has been affixed to the freehold, and the question for determination in that class of cases was whether the fixtures could be detached from the freehold, the solution of that question being de-

pendent generally upon the intention of the parties in annexing it, and whether the right of removal had been reserved. This phase of the question was fully considered by this court at the present term in the case of Union Bank etc. Co. v. Wolf Co., 114 Tenn. 255, ante, p. 903, 86 S. W. 310, in an elaborate opinion by Judge Neil.

⁴¹⁸ But as already observed, the question presented by this record is whether an article which has been deposited upon the premises with a view of annexation, and for the purpose of finishing a building, thereby becomes a part of the realty, in such a sense that it passes under the deed to the purchaser.

The definition of a fixture usually given is: "An article which was a chattel, and which, by being physically annexed or affixed to the realty, becomes accessory to it, and a part and parcel of it": 13 Am. & Eng. Ency. of Law, 2d ed., p. 596.

It thus appears that annexation is the controlling element in the very definition of a fixture, and we find on examination that the overwhelming weight of authority in this country is that the physical annexation of a chattel to the realty is necessary, in order to render it a part of the realty: See cases cited in 13 Am. & Eng. Ency. of Law, 600.

But the question as to the necessity of actual attachment has also arisen as to articles which have not been annexed to the land, but have merely been brought on or near to the land with the intention of annexing them. The great weight of authority is that such articles are still to be considered as chattels. Rails lying on the land, and not yet placed in a fence, have been held to be personalty: Thweat v. Stamps, 67 Ala. 96; Robertson v. Phillips, 3 G. Greene (Iowa), 220; Harris v. Scovel, 85 Mich. 32, 48 N. W. 173. ⁴¹⁹ So of lumber intended for a building: Carlin v. Babbett, 58 N. H. 579. So windows and window blinds made to be used in a house but not actually put in place and fastened, nor otherwise annexed to it, are articles held not to be a part of the realty: Peck v. Batchelder, 40 Vt. 233, 94 Am. Dec. 392. So of a stone brought within a dooryard to be placed as a doorstep: Woodman v. Pease 17 N. H. 282. And so of machinery and parts thereof: Miller v. Wason, 71 Iowa, 610, 33 N. W. 128; Burnside v. Twitchell, 43 N. H. 390. So the rolling stock of a railroad is held not to be treated as realty.

In Williamson v. New Jersey Southern Ry. Co., 29 N. J. Eq. 311, it was said: "The criterion above stated, of actual annexation to the freehold as a rule for determining when

chattels become part of the realty, is as well settled in this state as any other rule of property. Exceptions founded on fanciful and groundless definitions only tend to produce uncertainty and confusion in the rules of property, which should be permanent and uniform. . . . Tested by the foregoing criterion, it is manifest that the rolling stock of a railroad must be regarded as chattels which have not lost their definitive character as personalty by being affixed to and incorporated with the realty."

⁴²⁰ There are authorities which hold a contrary doctrine, being based on the theory that material deposited on the land for the purpose of becoming a part thereof, or machinery deposited in a house for the purpose of being attached thereto, is, in the eye of the law, constructively attached thereto. But as said by the author in *American and English Encyclopedia of Law*, supra: "Of the cases treated as illustrations of constructive annexation, some are merely cases of temporary severance, in which the articles, though not at the time actually attached, are treated as still annexed and part of the realty, and the term has at all times been applied to deer in a park, fish in a pond, and doves in a dovecote, which passed to the heir, and not to the executor."

This class of cases was discussed in *Williamson v. New Jersey Southern Ry. Co.*, 29 N. J. Eq. 311, in which it was said: "The illustrations of doves in a cote, deer in a park, and fish in a pond are entirely inapplicable to the present subject. They go with the inheritance, for special and peculiar reasons. In *Amos & Ferrard on Fixtures*, they are classified under the head of heirlooms—a class of property entirely distinct from fixtures": See, also, *Hoyle v. Plattsburg etc. Ry. Co.*, 54 N. Y. 315, 13 Am. Rep. 595.

It remains to notice several cases decided by this court which are supposed to illustrate the policy of our laws upon this subject. They are cases in which furnishers ⁴²¹ of material for a building are allowed a lien on the lot upon which the building is to be erected, whether the material was ever actually used or not.

In *Daniel & Co. v. Weaver*, 5 Lea, 393, this court said it is not the actual use of lumber in repairs to a building by the owner that gives the furnisher a lien, but the furnishing under the contract for that use, and the lien exists whether the lumber was used or not. That case involved a construction of Shannon's Code, section 3531, establishing a mechan-

ic's lien and furnisher's lien on any lot of ground or tract of land upon which a house has been erected, built, or repaired, or fixtures or machinery furnished or erected, or improvements made by special contract with the owner or his agent, in favor of the mechanic or undertaker, founder, or machinist who does the work, or any part of the work, or furnishes the materials, or any part of the materials, or puts therein any fixtures, machinery, or material, either of wood or metal, and in favor of all persons who did any portion of the work or furnished any portion of the material for the building contemplated in this section.

Section 3539 provides: "The lien shall include the building, fixture, or improvement, as well as the lot or land, and continue for one year after the work is finished or materials are furnished."

The court, in dealing with these two sections, held that it is the furnishing of the lumber for repairs, etc., ⁴²² that creates the lien, and that it does not depend upon the use of it by the purchaser whether the seller shall have a lien. Otherwise, by not using it for a year, the owner could entirely defeat the lien of the purchaser. Such is not the proper construction of said acts, and this is made more clear by the provision in section 3539 that the lien shall continue for one year "after the work is finished," in favor of the workman, or "materials are furnished," as to the furnisher. The furnisher may, therefore, within one year after he has delivered the materials contracted for, have his remedy by attachment to enforce his lien.

The case of *Halley v. Alloway*, 10 Lea, 523, was another case involving the furnisher's lien for repairing and furnishing the Grand Opera House in the city of Nashville. The question presented for determination in that case was whether the things claimed to have been furnished entitled the furnisher to a lien on the house and lot. The material furnished consisted of stage machinery, such as pulleys, rollers for cylinders, etc., used for fitting up the stage—some attached and some not—chairs furnished and fitted to the floor, and seats for the accommodation of the audience, painting the scenery, curtains, and the like. The court held the nature of the thing done and the character of the house repaired, and for which the materials were furnished, as well as the intent of the party building, served to guide the correct conclusion as to whether the work done was work on the house and be-

came part of it. ⁴²³ These elements are better guides than the old idea as to fixtures which was whether the thing was permanently attached and fixed in or to the freehold. In getting up a theater, the whole building, considered in reference to its use, makes the house contracted for. All that serves to complete and furnish such house for the purpose designed makes up the house, and is part of it when completed. Scenery, seats, pulleys, etc., and the like, make up a necessary part of a building designed for theatrical exhibitions, as much as do the counters on which goods are exposed for sale in a retail mercantile store. It is probable the scenery and other articles herein mentioned are as permanently attached to and were a part of the building as such counters.

In *Steger v. Arctic Co.*, 89 Tenn. 453, 14 S. W. 1087, 11 L. R. A. 580, it was held that statutes creating liens upon real estate in favor of those who, under contract with the owners, have furnished lumber or materials for erection of buildings, machinery, etc., thereon, are construed liberally in favor of lienholders, as regards the subject matter to which the lien should attach. In that case it appears that the Arctic Refrigerating Company erected a factory on a lot in Nashville for the manufacture of vapor for cold storage. By permission of the city this company laid subterranean pipes in the streets, connecting with its factory, to convey the vapor to its customers. P. supplied labor and materials in the erection of the factory, and also furnished and laid down the pipes in the streets. It was held that the plant, including ⁴²⁴ lot, factory, pipes, etc., is an entirety, and P.'s lien for materials furnished or labor done upon any part of it attached to the whole.

The case last cited, it will be observed, does not even remotely touch the question with which we are dealing in the present case.

In the case of *Grosvenor v. Bethell*, 93 Tenn. 579, 26 S. W. 1096, one of the objects of the bill was to determine whether or not Bethell, the purchaser at first mortgage sale, thereby acquired title to all the theater furniture and fixtures; the same not having been specifically mentioned. It was held that a mortgage by an incorporated opera house company, made after the purchase of lot, and while the theater buildings are in course of erection thereon, conveying the lot and "all the buildings and improvements thereon or to be erected thereon," operates to pass all furniture, fixtures, and

furnishings then or thereafter placed in the theater building, and essential to its successful operation: Citing *Halley v. Alloway*, 10 Lea, 523, as settling this question.

In *Grewar v. Alloway*, 3 Tenn. Ch. 584, it was held that the rollers, pulleys, etc., for shifting scenery, and other stage properties, were fixtures or machinery, within the meaning of the mechanics' and furnishers' lien act. It was further said that the movable machinery and flying stages of a theater, necessary for the purpose of theatrical exhibitions, are trade fixtures, and removable by the tenant, as between him and his landlord, but, as between the owner and mechanic, ⁴²⁵ are subject to the mechanic's lien law. The question whether a thing is a fixture or not, as between owner and mechanic, depends little upon the mode of annexation. Its fitness for the particular place where it is annexed, its being connected with the general business conducted there, and other facts going to show the intent of the owner to make one thing of the land and chattels to carry out a general purpose, would have more effect upon the question than the mode or permanence of the annexation. It appeared in that case that the chairs had been fastened to the floor, and it is to be inferred that the other property was also in some way attached to the building.

It is unnecessary to pursue this line of cases any further, since we deem the question settled by the great weight of authority in favor of the contention that such materials are not fixtures, and are removable by the mortgagor.

It results from this that the judgment of the circuit court must be affirmed.

For a Decision in this Series involving a question similar to the one passed upon in the principal case, see *Peck v. Batchelder*, 40 Vt. 233, 94 Am. Dec. 392. Where a building falls to the ground, the materials of which it was constructed are not thereby reconverted into personality: *Guernsey v. Phinizy*, 113 Ga. 898, 84 Am. St. Rep. 270.

MCGREGOR v. GILL.

[114 Tenn. 524, 86 S. W. 318.]

LIVERY-STABLE KEEPER—Whether Common Carrier.—A livery-stable keeper who lets for hire his conveyances, either with or without drivers, as occasional demands are made upon him by his customers, is not a common carrier of passengers. (p. 920.)

LIVERY-STABLE KEEPER—Liability for Negligent Driving.—Where a livery-stable keeper lets a conveyance for a particular journey, and exercises reasonable prudence in selecting the team, vehicle, and driver, he is not answerable for injuries sustained by a person riding in the vehicle, occasioned by negligent driving. (p. 921.)

Daniel & Daniel and Leech & Ponder, for the plaintiff.

Michael Savage and Dancy Fort, for the defendant.

⁵²³ BEARD, C. J. This is an action to recover damages for personal injuries sustained by Mrs. McGregor. The trial resulted in a verdict and judgment in favor of the defendant in the court below, and the plaintiffs have appealed.

The defendant Gill was a livery-stable keeper in the city of Clarksville. In August, 1902, he was called upon by Mr. Tyler, of that city, who stated to him that his sister in law, Mrs. Draughon and her son, with a young lady companion, were upon a steamboat which was stranded in the river some thirty miles above Clarksville, and he asked the defendant in error to furnish a wagon and a driver to go for them and their baggage, and bring them through the country into the city. Gill consented to do so, and thereupon Mr. Tyler selected the conveyance, and asked that it be sent under the charge of a white driver, as he thought it probable these ladies would desire to come through the country at night, and he thought it would be safer for them to be with a white, than with a negro, driver. To this Gill replied that his drivers were negroes, but that in an emergency he was in the habit of employing one Hatcher, and asked Mr. Tyler whether the employment of Hatcher for this drive would be acceptable to him. Mr. Tyler agreed that it would be. Putting the wagon under the charge of Hatcher, Gill started it to the point on the river opposite to the sandbar on which the boat was lodged, which point was reached about 6 o'clock in the evening. Mrs. ⁵²³ Draughon, at whose instance the conveyance had been sent, invited Mrs. McGregor, who was

one of the passengers on the boat, together with others, to take seats in the conveyance, and go in it to Clarksville. This invitation was accepted. The baggage was loaded into the wagon, and Mrs. McGregor and others took seats in it. Under the direction of these parties Hatcher at once started, during the night, on his return trip to Clarksville. On his way back, at a point where there was considerable depression in the road, by apparently careless driving the wagon was overturned, and Mrs. McGregor was seriously injured. For this injury the present suit was instituted.

The record shows that Hatcher, the driver, was well known and esteemed in the community of Clarksville; but that he was regarded, not only by Gill, but by others who had the best opportunity of being acquainted with his character and habits, as an unusually safe and trusty driver.

Under these facts we know of no principle which would authorize the maintenance of this action. The defendant in error was not in any sense a common carrier. To the contrary, he was clearly a private carrier for hire, and as such the extent of his obligation was to exercise that degree of care and skill in the selection of the vehicle and team which he let, and of the driver he sent in charge which a prudent man, having due regard for his social relations, would bestow in such a matter. This court, in *Nashville etc. R. R. Co. v. Messino*, 1 ⁵²⁴ Sneed, 220, approved as sound the following charge of the circuit judge in that case: "A common carrier of passengers is one who undertakes for hire to carry all persons indifferently who may apply for passage. . . . To constitute one a common carrier it is necessary that he should hold himself out to the community as such."

This definition is in strict accord with the text as found in volume 6, page 534, of *Cyclopedia*, and *Hutchinson on Carriers*, 48, *Story on Bailments*, section 495, *Thompson on Negligence*, volume 3, section 2537, and *Hale on Bailments and Carriers*, 489. And it necessarily excludes a livery-stable keeper, who lets for hire his conveyances, either with or without drivers, as occasional demands are made upon him by his customers. As was said by the circuit judge in the course of his charge in the *Messino* case, above quoted from: "It is not every carrying of passengers for hire that constitutes a party a common carrier. A party having the conveniences for carrying persons may in some, or perhaps in

many, cases carry passengers for hire, when done at the instance of the passengers, and for their accommodation, without incurring the responsibilities of common carriers."

The present case bears no likeness to that of *Lawrence v. Hudson*, 12 Heisk. 671, relied on as authority by the plaintiff in error. In that case the defendant was the owner of a line of omnibuses, running from Nashville to Edgefield, holding himself out to the public as ready and willing to carry for hire all persons who offered themselves as passengers. This owner was, upon all the ⁵²⁵ authorities, a common carrier, and was properly held to the full limit of liability imposed upon one so engaged.

Upon the undisputed fact in the record that Gill exercised reasonable prudence in the selection of the driver of the wagon, he was not liable, even if negligent driving occasioned the injury of which plaintiffs complain.

Judgment is affirmed.

For Authorities bearing upon the decision in the principal case, see Copeland v. Draper, 157 Mass. 558, 34 Am. St. Rep. 314; *Lynch v. Richardson*, 163 Mass. 160, 47 Am. St. Rep. 444; *Hadley v. Cross*, 34 Vt. 586, 80 Am. Dec. 699.

PRESSLY v. STATE.

[114 Tenn. 534, 86 S. W. 378.]

LIQUORS—Sale to Minor—Consent of Parent.—Where a statute makes it unlawful to give or sell liquor to a minor without the consent of a parent, permission given by a mother to a certain person to give to any of her children liquors at any time he may desire, will not avail him as a defense to a prosecution under the statute, for the statute does not contemplate a general consent of that character. (pp. 922, 923.)

FINE AND IMPRISONMENT—Whether Both may be Imposed.—A statute making it a misdemeanor to give or sell liquor to a minor, and imposing a fine as punishment, does not authorize the imposition of imprisonment in addition to a fine. (p. 923.)

ERRONEOUS SENTENCE—Correction on Appeal.—When the trial court imposes a fine in a misdemeanor case, and then erroneously adds thereto imprisonment, the supreme court on appeal may modify the judgment by striking out the imprisonment and then affirming it as modified. (p. 924.)

John Tucker, for the defendant.

Attorney General Cates, for the state.

⁵³⁵ NEIL, J. The plaintiff in error was indicted and convicted in the circuit court of Putnam county on a charge of giving liquors to a minor without the consent of his parents. He was thereupon sentenced to pay a fine of ten dollars and to six months' confinement in the county workhouse. From this judgment he has appealed and assigned errors. The statute under which he was indicted is found in Shannon's Code, section 6786, and reads as follows: "It shall be unlawful for any person or individual, or firm or corporation, whether engaged or not in the manufacture or sale of any spirituous liquors, malt, or mixed liquors, their employes, agents, or servants, or ⁵³⁶ other persons for them, knowingly to sell, give, furnish to, or procure for, any person under the age of twenty-one years, any spirituous, vinous, or malt liquors, or any mixture thereof with other liquors or ingredients, without the consent of the parents, guardian, or person having the care of such person under the age of twenty-one years."

The punishment is fixed by section 6789, which reads as follows: "Any person or persons violating the provisions of sections 6786 or 6787 shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than ten nor more than two hundred dollars."

Two objections are made in this court. The first is that his honor erred in refusing to permit the defendant below to introduce the following paper in evidence, executed by the mother of the minor, viz.:

"Mr. John Pressly:

"You can give any of my children drinks of whiskey or brandy at any time you may desire to do so. This December

her

"ANGELINA X PALMER.

mark

"Attest: J. L. PALMER."

The mother of the boy was a widow. The child to whom the whisky was given was only fifteen years old. The whisky was given to him during the month of July, 1904.

There was no error in the action of the trial judge in rejecting this paper. It was the specific purpose of the

⁵³⁷ statute to restrain the giving, selling, or furnishing intoxicating beverages to minors, or procuring such beverages for them. An exception was permitted in case of the consent of "the parents, guardian or person having the care of such" minor. It was supposed that parents and guardians, and other persons having charge of minors would have concern for and exercise care over the children committed to them in the course of nature or by operation of law, and that they would use discretion in giving or withholding consent in every instance of a proposed gift or sale to such child or children. To admit the validity of such a general consent as the paper above set out purports to give would not only violate the spirit of the act, but would wholly frustrate the purpose which the legislature had in view; since a general consent of this character would be tantamount to a withdrawal of the child or children referred to in such paper from the protection of the act; at least, in favor of the person or persons to whom such writing might be addressed. If such consent should be held good, no sound reason could be offered against the validity of a writing addressed "to whom it may concern," conferring upon all persons who might choose to take advantage of it, the right to give intoxicating liquors to the children of any parent or guardian sufficiently heedless, or reckless, or wicked to consent to the debauching of the youth under their charge. The legislature did not intend to sanction such a course of conduct. Indeed, we believe that the legislature must have intended that a parent, or guardian, ⁵³⁸ or other person having the care of a minor could give consent that another might give, sell to, furnish to, or procure liquors for, such minor only in cases of emergency; as, for instance, for medical purposes. It was never intended that a general permission should be given to enable minors to use intoxicating liquors as a beverage; on the contrary, authority to sell to, give to, furnish to, or procure liquors for them, is limited to such occasions and emergencies.

The second objection raised against the judgment of the court below is that his honor added imprisonment to the fine, and that he had no legal right to do so.

We are of the opinion that this objection is well taken, and must be sustained.

The rule at common law is thus stated by Mr. Bishop: "The ordinary common-law punishment for misdemeanors is fine

and imprisonment, or either, at the discretion of the court. It is imposed whenever the law has not provided some other specific penalty. For example, when a statute forbids or commands an act of a public nature, but is silent as to the punishment, the common law provides fine and imprisonment": 1 Bishop's New Criminal Law, sec. 940.

The foregoing rule is recognized in several of our own cases (*Atchison v. State*, 13 Lea, 275; *Wickham v. State*, 7 Cold. 525; *Durham v. State*, 89 Tenn. 723, 18 S. W. 74; *Kittrell v. State*, 104 Tenn. 522, 58 S. W. 120; *Thompson v. State*, 105 Tenn. 177, 80 Am. St. Rep. 875, 58 S. W. 213, 51 L. R. A. 883); the ⁵³⁹ fine being assessed by the court if fifty dollars or under, and by the jury if over fifty dollars (*Shannon's Code*, sec. 7212); and the imprisonment to be fixed by the court (*Shannon's Code*, sec. 7202). The code further provides that when the performance of any act is prohibited by statute, and no penalty for the violation of such statute is imposed, the doing of such act is a misdemeanor: *Shannon's Code*, sec. 6437. See, also, *Robinson & Walker v. State*, 2 Cold. 181; *State v. Keeton*, 9 Baxt. 559.

It has been held, however, that where the statute which creates an offense does not make it indictable, but prescribes a penalty, the specific remedy given, the penalty, excludes the resort to an indictment: *State v. Maze*, 6 Humph. 17; *State v. Lorry*, 7 Baxt. 95, 32 Am. Rep. 555; *State v. Manz*, 6 Cold. 557. It would seem to be true, also, that where the statute creates an offense, and prescribes a special form of punishment, this would exclude any other different or additional punishment.

Such is the present case. The statute does not impose imprisonment, but declares that the punishment shall be a fine of not less than ten dollars nor more than two hundred dollars.

We are of opinion, therefore, that his honor erred in imposing the imprisonment. This court, however, has power to modify the judgment by striking out the imprisonment and then affirming it as modified: *Griffin v. State*, 109 Tenn. 17, 70 S. W. 61. This course will be pursued, and the judgment will be remanded to be executed as modified.

Unlawful Sales of Intoxicating Liquors are considered in the note to *Snider v. State*, 12 Am. St. Rep. 353. It seems that one who sells liquor to a minor, though innocently ignorant of the fact, incurs the

penalty of the law forbidding such sales: See *People v. Curtis*, 129 Mich. 1, 95 Am. St. Rep. 404.

Under a Penal Statute prescribing punishment for an offense by fine or imprisonment, a prisoner cannot be both fined and imprisoned: *State v. Walters*, 97 N. C. 489, 2 Am. St. Rep. 310.

NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY COMPANY v. FLAKE.

[114 Tenn. 671, 88 S. W. 326.]

CARRIERS—Injury to One Passenger by Another.—Where a party of intoxicated passengers fire pistols and explode dynamite sticks on a train, and the railway employes, though knowing or having an opportunity to know of such misconduct, make no attempt to preserve order until another passenger is accidentally shot, the railway company is liable for the injuries he sustains. (p. 927.)

T. A. Lancaster, for the plaintiff in error.

Barnham & Davis and M. F. Ozier, for the defendant in error.

⁶⁷³ BEARD, C. J. A boy thirteen years of age, while riding on one of the passenger trains of the plaintiff in error on the afternoon of the 24th of December, 1903, while en route from Huron, a small station on the line of the railway, to Lexington, in this state, was shot. He was wounded by a pistol fired by a party whose name was unknown, and this suit was brought to recover damages for the injury thus received, upon the theory that the conditions existing upon that train, which either were known or should have been known to those in charge, were such as to have caused them reasonably to anticipate this result, and, failing to exercise proper diligence, the plaintiff in error was liable. There was a verdict and judgment in favor of the plaintiff, and the case has been brought into ⁶⁷³ this court for review. A number of errors have been assigned, all of which save one are disposed of in a memorandum opinion which is not intended for publication. The one not there embraced is regarded as of sufficient importance for an opinion to be carried into our reports.

The record shows that at Jackson, Tennessee, the train in question was boarded by a number of persons then under

the influence of strong drink. These parties carried upon the cars bottles of liquor, from which they freely drank as the train proceeded. They were boisterous in manner and speech, and by their conduct attracted the attention and gave considerable alarm to other passengers. They had possession of dynamite sticks, on which they placed caps. These, on being struck upon the floor, exploded. These explosions were as loud as pistol shots. While one or more of these explosions took place in the coach in which the defendant in error was riding, the others were produced upon the platform outside. Young Flake entered the coach, in which he was sitting at the time he received his wound, at Huron. He took his seat just back of the water cooler, with his face fronting in the direction the train was moving. This coach was immediately in the rear of the smoking car. In it were crowded many passengers, filling all the seats and occupying the aisle. The parties who have been referred to as boisterous, or at least some of them, came occasionally into this coach, elbowing their way ⁶⁷⁴ down the aisle, and after remaining for a few minutes, would retrace their steps, and on passing out they either stopped upon the platform or else would enter the smoking car. The passengers in this coach observed that they were under the influence of liquor. Loud and boisterous talking in the smoking car was heard. Much firing was done on the platform between the coach and the smoking car. This firing began soon after the train left Jackson, and continued at intervals until this boy was shot. Unquestionably, some of the explosions which occurred on this platform came from the use of dynamite sticks, but some were from the use of pistols in the hands of some of these parties. One of them made an effort to have a witness, whose testimony is in the record, shoot a negro, who, at one of the stations along the line of the road, rode for a short distance upon the steps of this smoking-car while engaged talking to a friend on the platform, offering him a pistol for that purpose. The witness, however, declined the offer. Immediately after the firing of the shot that wounded young Flake, one of these rowdies, with a pistol in his hand, went out of the coach to the platform, and stated that his weapon had accidentally been discharged, and he had wounded a boy.

The employes in charge of the train testify that they saw no one with pistols and heard no firing. They say that there were crowds collected at the stations along the railroad, con-

sisting of whites and negroes, engaged in shooting firecrackers and otherwise making a noise ⁶⁷⁵ as such crowds will do in anticipation of Christmas. They further testify that there was some boisterous conduct in the smoker, which, however, was promptly suppressed by the manager of trains, who happened to be on board at that time. They deny that they knew, save for the single incident just referred to, of any improper conduct committed by anyone, either on the platform or in the coaches making up that train. The jury evidently credited those witnesses who testified so positively with regard to the shooting of pistols and other explosives on the platform, as well as to the boisterous conduct in the coach, and believed, where so many persons were aware of these things, that the railroad employes either knew, or by the slightest diligence might have been informed of them. That the jury imputed the wound of this boy to the failure of those in control of the train to discharge their duty is evident from the verdict which was rendered. While it is true they could not foresee the wounding of the defendant in error, yet they should have anticipated that drunken ruffians armed with pistols, unless suppressed, would either accidentally or intentionally inflict injury upon their fellow-passengers.

We think there is abundant evidence to support the verdict of the jury, and to indicate that they were inexcusably negligent in preserving order. The principle of law controlling in the case is that "wherever a carrier, through its agents or servants, knows, or has opportunity to know, of threatened injury, or might have reasonably anticipated the happening of an injury, and fails ⁶⁷⁶ or neglects to take the proper precaution, or to use proper means, to prevent or mitigate such injury, the carrier is liable": 5 Am. & Eng. Ency. of Law, 553.

This rule was applied in *Ferry Cos. v. White*, 99 Tenn. 256, 41 S. W. 583. In that case the court quoted and approved a clause from the charge of Shipman, J., given to the jury in a suit involving the liability of a steamer and its owners for an injury sustained by one passenger from the violence of a fellow-passenger. This clause was as follows: "The defendants were bound to exercise the utmost vigilance and care in maintaining order and guarding the passengers against violence, from whatever source arising, which might be reasonably anticipated, or naturally be expected to occur,

in view of all the circumstances, and of the number and character of persons on board."

Public policy requires the strict enforcement of this rule. No relaxation of it should be indulged by the courts. The comfort and safety of passengers who commit themselves to a carrier depend upon it. The facts of the present case eminently call for its application.

We are satisfied no error was committed by the trial judge in his charge, embodying as it did this rule of liability, and his judgment is therefore affirmed with costs.

A Common Carrier is under a duty to protect each passenger from insult, indignities, and personal violence, and it is immaterial whether the disturbance of the passenger's peace, comfort, and personal security comes from another passenger, a trespasser, or an employé of the carrier: See Birmingham Ry. etc. Co. v. Baird, 130 Ala. 334, 89 Am. St. Rep. 43, and cases cited in the cross-reference note thereto; Gillespie v. Brooklyn Heights R. R. Co., 178 N. Y. 347, 102 Am. St. Rep. 503; Citizens' St. R. R. Co. v. Clark, 33 Ind. App. 190, 104 Am. St. Rep. 249; Spangler v. St. Joseph etc. Ry. Co., 68 Kan. 46, 104 Am. St. Rep. 391; O'Brien v. St. Louis Transit Co., 185 Mo. 263, 105 Am. St. Rep. 592.

CASES

IN THE

COURT OF CRIMINAL APPEALS

OF

TEXAS.

EX PARTE LEWIS.

[45 Tex. Cr. Rep. 1, 73 S. W. 811.]

CONSTITUTIONAL LAW—Jurisdiction—Collateral Attack.—

If a judgment in either a civil or a criminal proceeding is absolutely void, either because there is no constitutional tribunal, or because such tribunal has no jurisdiction of the subject matter, its action can be questioned whenever and wherever it is invoked, either collaterally or otherwise. (p. 933.)

CONSTITUTIONAL LAW—Quo Warranto.—The proceeding in quo warranto will not lie to determine the constitutionality of a municipal law, but the proper mode to challenge such law is to interpose an objection as a defense to the enforcement of the ordinance. (p. 933.)

CONSTITUTIONAL LAW—Municipal Ordinances—Habeas Corpus.—A person restrained of his liberty by virtue of an unconstitutional ordinance is entitled under the writ of habeas corpus to test the constitutionality of such ordinance, without resort to the writ of quo warranto to test the power of a certain official body to pass such ordinance. (p. 933.)

CONSTITUTIONAL LAW—Municipal Local Self-government. Without express constitutional provision neither the legislature nor the governor has power to appoint the permanent officers of a municipality. The latter is entitled to self-government, and its officers must derive power from it. (p. 936.)

CONSTITUTIONAL LAW—Municipalities—Right to Local Self-government.—The state has no right under the guise of its law-making authority, to overturn the principles of local self-government of municipal corporations, and, while it has an undoubted right to create their offices and prescribe their duties, here the law-making functions cease, and the filling of the offices belongs exclusively to the municipality. (p. 945.)

CONSTITUTIONAL LAW—Municipal Corporations—Local Self-government.—The mayor and board of aldermen of a municipality are elective officers, and if appointed by the governor of the state, any ordinance passed by them is without authority, and void. (p. 947.)

M. Johnson, for the relator.

C. K. Bell, attorney general, and J. Z. H. Scott, for the respondent.

16 HENDERSON, J. Appellant was convicted in the recorder's court of the city of Galveston for violating an ordinance of said city, and fined twenty-five dollars. Said ordinance was of a sanitary character, and prohibited the removal of the contents of any privy or water-closet, etc., except between certain hours, with the permission of the health physician and in accordance with certain prescribed rules. This ordinance was passed by what is termed in the charter the "board of commissioners," who are in fact the board of aldermen of said city. For failing to pay said fine, appellant was committed to jail. He sued out a writ of habeas corpus before the criminal district judge of Galveston county, who, after hearing the evidence in said case, remanded applicant to the custody of the sheriff until said fine and costs should be paid. From this judgment applicant prosecuted an appeal to this court.

No question has been made as to the regularity of the proceedings which led up to and included the conviction; but appellant contends that said conviction was null and void, because the charter of the city of Galveston passed by the twenty-seventh legislature, and approved April 19, 1901, provides that the board of aldermen of the city of Galveston, called "board of commissioners," shall consist of five commissioners, three of whom are required to be appointed by the governor; that, in accordance with said charter provision, the governor did appoint said three officers, one of whom was named as the president of said board of commissioners, and that these three constituted a majority of the board of aldermen of said city; that said board passed the ordinance in question, under which appellant was tried and convicted. The insistence is that the governor has no authority, under the constitution of this state, to appoint the members of said board, and that the charter provision authorizing him to do so is null and void, and that said ordinance, and all proceedings thereunder, are without authority of law. As the case turns upon the provisions of the charter with reference to the selection of the board of commissioners, who stand for the aldermen of said city, the provisions of the charter bearing on the subject will be quoted substantially. Section 5

provides: "There shall be appointed by the governor of the state, as soon as possible after the passage of this act, three commissioners, one of whom he shall select and designate as president of the board of commissioners provided for herein, and within ten days after the passage of this act, it shall be the duty of the commissioners' court of Galveston county to order an election to be held in the city of Galveston, at which election the qualified voters of the city of Galveston shall elect two other commissioners, who, together with the three commissioners appointed by the governor, shall constitute the board of commissioners of the city of Galveston. ¹⁷ In ordering such election, the commissioners' court shall determine the time and the places in the city of Galveston for holding such election; and the manner of holding the same shall be governed by the laws of the state regulating general elections. Each of said five commissioners shall be over the age of twenty-five years, citizens of the United States, and for five years immediately preceding their appointment or election, residents of the city of Galveston. Each of said five commissioners shall hold office for two years from and after the date of his qualification, and until his successor shall have been duly appointed or elected, as the case may be, and duly qualified. Said board of commissioners shall constitute the municipal government of the city of Galveston." Section 9 provides for the removal of appointees; authorizing the governor to remove the commissioners appointed by him, but withholding from him the power to remove others. Section 10 provides for filling vacancies in the board occurring during the term of office, giving the power to the governor to fill vacancies occasioned by the resignation, etc., of his appointees; but others are to be filled in the same manner as state or district offices. Section 25 provides that the tenure of the board of commissioners shall be two years, and until their successors qualify, and that vacancies in said board are to be filled as provided in section 10. Certain sections make the president the executive officer of the city, and give him the right to vote on all questions which may arise. Other sections constitute the president and board of commissioners the successors of the mayor and board of aldermen of the city of Galveston, and fix their salaries; and said board is given plenary powers, such as are usual with reference to the government of said city, authorizing them to pass all ordinances, etc.

We understand the respondent to contend, first, that the matter of the appointment of said members of the board of commissioners by the governor can only be inquired into by quo warranto, and that this question cannot be raised collaterally; second, that the legislature is omnipotent in the creation of municipal corporations, unless restrained by the constitution, and that there is nothing in the constitution prohibiting the legislature from granting to the governor the power to appoint any or all of the members of the board of commissioners; third, that the appointment of the president of the board and two of the members was temporary, and, even if it be conceded that the governor could not appoint the mayor and board of aldermen as permanent officers, it was competent to make a temporary appointment of such officers. We would observe, in this connection, that the appointments here authorized by the charter were not temporary in their character, but permanent, and that, when the time of the appointees of the governor expired, their successors are to be appointed by the governor. We understand this to be the plain reading of the charter provisions.

Is it necessary, in order to question the legality or constitutionality of an ordinance passed by the board of commissioners, to resort to a ¹⁸ quo warranto proceeding? Our statute (Rev. Stats., art. 4343) provides for writs of quo warranto as against one who usurps, intrudes into, or unlawfully holds or executes any office or franchise. This is in consonance with the general nature of the writ of quo warranto; that is, it furnishes a remedy or mode to try the right to an office or franchise: High on Extraordinary Remedies, *seca.* 591-621. In *State v. Smith*, 55 Tex. 447, it seems to have been held, where the question involved was simply the right to collect taxes, and not a contest for the office, that proceeding by quo warranto was not the proper remedy. In this particular case there is no contest pending for the office of alderman. Nor is this a suit to forfeit the entire charter of the city of Galveston because it is unconstitutional, nor because of nonuse or abuse of its franchise. For aught that appears, it is conceded that all the provisions of said charter are in accordance with law, except the appointment of the three commissioners. It would not necessarily follow that because the appointment of some officer of a corporation was void, being unconstitutional, the whole charter must necessarily fail. In *City of El Paso v. Ruckman*, 92 Tex. 86,

46 S. W. 25, it was held that the validity of the organization of the school board of the city of El Paso could only be inquired into by quo warranto. In that case it was held that the election was irregular, merely, and for those reasons might have been properly set aside in a proceeding instituted for that purpose. But we do not know that it has ever been held, where a pretended officer is acting by virtue of a commission which is absolutely void, his acts cannot be questioned in a collateral proceeding. If such should be the case, the result would follow that if one assumed to act as judge, and undertook to try a person, although his commission be absolutely void, a person so arraigned and tried would be driven to some procedure to stay the trial, in order to enable him to resort to a writ of quo warranto to question the authority of the officer trying him. In such case he would be compelled to seek the aid of the district attorney, who is authorized to prosecute writs of quo warranto, in order to stay the hand of that same district attorney in the prosecution. As we understand the rule as applicable both to civil and criminal matters, if a judgment is absolutely void, either because there is no constitutional tribunal, or because such tribunal has no jurisdiction of the subject matter, its action can be questioned whenever and wherever it is invoked, either collaterally or otherwise. This is especially the rule in this court: See *Ex parte Cross*, 44 Tex. Cr. Rep. 376, 71 S. W. 289—a recent case where an ordinance was held void because of the invalidity of the corporation. See, also, *Ex parte Tummins*, 32 Tex. Cr. Rep. 117, 22 S. W. 409. In *People v. Whitcomb*, 55 Ill. 172, it was said: "The proceeding in quo warranto will not lie to determine the constitutionality of a municipal law; but the proper mode to challenge such law would be to interpose an objection as a defense to the enforcement of the ordinance." And that rule, it occurs to us, accords in principle with the proper practice. And ¹⁹ see *High on Extraordinary Remedies*, 618, and *Stultz v. State*, 65 Ind. 492. We accordingly hold that appellant was not required to resort to the writ of quo warranto, but he could question the constitutionality of the ordinance in his defense when he was prosecuted thereunder. If the ordinance was merely irregular, he could not set it aside; but if it is void (that is, if we should hold that the appointment by the governor of the mayor and two of the board of aldermen was unconstitutional, and that this rendered the ordinance, the passage of which

was participated in by them, void, as being against the constitution of the state), then he can interpose the defense on the trial, and can avail himself of it here, and he would not be compelled to await the action of those who might be prosecuting him, in order to avail himself of the writ of quo warranto.

In discussing the constitutionality of the appointment of the mayor and two of the aldermen by the governor, it may be conceded: 1. That the burden is on relator to show, by the express terms of the constitution, or by strong implication, that the exercise of the power of appointment is against the constitution. What we mean by "strong implication" is: "When the validity of such legislation is brought in question, it is not necessary to show that it falls appropriately within some express written prohibition contained in the constitution. The implied restrictions of the constitution upon legislative power may be as effectual for its condemnation as written words, and such restrictions may be found either in the language employed, or in the evident purpose which was in view, and the circumstances and historical events which led to the enactment of the particular provision as a part of the organic law": *State v. Fox*, 158 Ind. 126, 63 N. E. 19, 56 L. R. A. 893, and authorities there cited. 2. The wisdom of the law is not a question; nor does it become the judiciary to try the issue as to whether the same appears expedient, politic, or necessary, these matters being exclusively within the province of the legislature.

The constitution of this state has never been construed as to the question here presented, but the subject has been thoroughly discussed in other jurisdictions—particularly in New York, Michigan, Indiana and Tennessee, and in some other states. New York, as was observed by Mr. Cooley, is the only state of the original thirteen colonies in which the mayor was appointed by the governor. But this was changed at an early date, after the Revolution, and the constitution in that state was made expressly and strongly prohibitive as to the appointment by the governor or legislature of purely municipal officers. The discussion in that state, as in some others, turned upon the proposition as to whether the appointive officers were municipal or state officers; the decisions holding that certain classes of officers, as health, quarantine, and peace officers, were state, and not purely municipal, officers, and that it was not an invasion of local self-government to ap-

point such officers through the governor or legislature: *People v. Draper*, 15 N. Y. 532; *Rathbone v. Wirth*, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408. And to the same effect, *Heister v. Board of Health*, 37 N. Y. 661; *Davock v. Moore*, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783. No question is or can be made here that the officers appointed were not municipal officers. Indeed, they were both executive and legislative officers of the city of Galveston; and the legislature, in making these appointive, went further than the legislature of any state ever attempted to go before.

In Michigan and Indiana the question has been discussed as applied to their constitutions, both of which provide, in substance, "that all officers whose appointments are not otherwise provided for in their constitutions, shall be elected or appointed in such manner as now is, or hereafter may be, prescribed by law." The decisions appear to be predicated on the proposition as to whether the appointing power, under said constitutions, referred to the power of the legislature or governor, to appoint, or to the particular localities, and it was held that it referred to the localities: See *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *Allor v. Wayne Co.*, 43 Mich. 76, 4 N. W. 492; *Davock v. Moore*, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783; *State v. Fox*, 158 Ind. 126, 63 N. E. 19, 56 L. R. A. 893; *State v. Denny*, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65. And to the same effect, see *Luehrman v. Taxing Dist.*, 2 Lea, 425. This last case followed *People v. Hurlbut*, 24 Mich. 441, 9 Am. Rep. 103, in holding that the governor was authorized to make temporary appointments of municipal officers. But the reasoning in all of the cases—those referred to as well as all others—to which our attention has been called, except *State v. Swift*, 11 Nev. 128, strongly supports the proposition that, even without some express constitutional provision, neither the legislature nor the governor has the power to appoint the permanent officers of a municipality. In the cases cited it occurs to us that the real effect of the decisions was to establish the doctrine that, in the absence of a grant of authority in the constitution authorizing the appointment of such local officers by the legislature or the governor, this power was denied by implication arising from the history and traditions which time out of mind had conferred local self-government on municipalities. This question is presented so forcibly by the distinguished judges who decided the *Hurlbut* case, and

in language so much better than we can use, that we here present excerpts from the same, both on account of the historical facts recited, and because of the eloquent language in which the opinions are couched, and, moreover, because, in our judgment, it will afford good reading to those who would ascertain the underlying principles which uphold our republican institutions, and also serve to bar the way of those who desire to overthrow the principles of local self-government, and to establish in lieu thereof a strong central power.

²¹ Chief Justice Campbell uses this language: "Incorporated cities and boroughs have always, both in England and in America, been self-governing communities, within such scope of jurisdiction as their charters vest in the corporate body. According to the doctrine of the common law, a corporation aggregate for municipal purposes is nothing more nor less than 'investing the people of the place with the local government thereof': Salk. 193. In the absence of any provision in the charter creating a representative common council, the whole body of freemen make the common council, and act for the corporation at their meetings: Comyn's Digest, Franchises (F), 25. It is agreed by historians that originally all boroughs acted in popular assembly, and that the select common council was an innovation, which may have been of convenience, or by encroachment. In modern times cities have generally acted in ordinary matters by such a select body. But townships still act by vote at town meetings, and for many purposes connected with taxation the people of cities usually have the same privilege. But whether acting directly or by their representatives, the corporation is, in law, the community, and its acts are their acts, and its officers their officers. The doctrine is elementary that all corporation officers must derive office from the corporation: Kyd on Corporations, c. 3, sec. 8. This has been, from time immemorial, settled law. By articles 15 and 16 of the Great Charter, it was stipulated that the liberties and free customs of London, and all other cities, boroughs, towns and ports, should be preserved. Those liberties were all connected with and dependent upon the right to choose their own officers and regulate their own local concerns. The sole motive of the infamous proceedings of Charles II to procure the forfeiture of these corporate charters was to enable him to interfere in the selection of corporate officers. When he had secured a decision against the city of London, adjudging the charter

forfeited on trumped-up charges of sedition and illegal tolls, he offered, through Lord Keeper North, to respite the judgment if the city could give him such right of control over its selection of officers as to enable him to exclude persons not acceptable to the crown: 8 State Trials, 1281; Lives of Lord Chancellors, vol. 4, pp. 318, 319. These interferences with both the English and American colonial charters were always regarded as legal outrages, and contrary to all constitutional principles, and one of the first acts of parliament, after the revolution of 1688, was passed to prevent any future action of that kind. Our constitution cannot be understood or carried out at all, except on the theory of local self-government, and the intention to preserve it is quite apparent. In every case where provision is made by the constitution itself for local officers, they are selected by local action. All counties, towns and school districts are made to depend upon it. All elections are required to be in local divisions where electors reside. Cities are represented in the board of supervisors, and it is quite possible for their members to outnumber the rest. It certainly cannot be that the state can control those bodies by sending its own agents there, and it cannot be ²² possible that it was contemplated that any members of that board should be selected by a different mode of election or appointment from the rest. Cities may become counties, and surely there can be no county without popular institutions. Cities have been judicially declared to come within the denomination of 'townships,' so far as to be entitled to library money; and, unless they are made to include school districts, they need not be compelled to have free schools. No one would venture to assume that the constitution was designed to leave them in such a position. It is impossible to read that document without finding the plainest evidence that every part of the state is to be under some system of localized authority emanating from the people. This is no mere political theory, but appears in the constitution as the foundation of all our polity. There is no middle ground. A city has no constitutional safeguards for its people, or it has the right to have all its officers appointed at home. Unless this power is exclusive, the state may manage all city affairs by its own functionaries. The only reasonable meaning of the constitutional clause in question is that, when the legislature has designated the time and manner of

appointment or election, the local authority shall fill the offices as so ordained."

We quote from Judge Christiancy as follows: "But when we recur to the history of the country, and consider the nature of our institutions, and of the government provided for by this constitution, the vital importance which in all the states has so long been attached to local municipal governments by the people of such localities, and their rights of self-government, as well as the general sentiment of hostility to everything in the nature of control by a distant central power in the mere administration of such local affairs, and ask ourselves the question whether it was probably the intention of the convention in framing, or the people in adopting, the constitution, to vest in the legislature the appointment of all local officers, or to authorize them to vest it elsewhere than in some of the authorities of such municipalities, and to be exercised without the consent and even in defiance of the wishes of the proper officers, who would be accountable rather to the central power than to the people over whose interests they are to preside—thus depriving the people of such localities of the most essential benefits of self-government enjoyed by other political divisions of the state—when we take all these matters into consideration the conclusion becomes very strong that nothing of this kind could have been intended by the provision. And this conviction becomes stronger when we consider the fact that this constitution went far in advance of the old one in giving power to the people which had formerly been exercised by the executive, and in vesting or authorizing the legislature to vest in municipal organizations a further power of local legislation than had before been given to them. We cannot, therefore, suppose it was intended to deprive cities and villages of the like benefit of the principle of local self-government enjoyed by other political divisions of the state. The convention must be supposed to have recognized to some extent existing ²³ things, and to have had reference to cities and villages with substantially such organizations or upon such principles of self-government as had generally become customary. And in this view, when they provide that officers in cities and villages should be elected or appointed, we must understand that they referred to appointments of such nature (though not necessarily of the same officers) as had been sometimes, at least, made by the common councils of cities, or by village author-

ities, as has been quite generally the case with marshals, collectors, city attorneys, treasurers, etc., and such others as the legislature might see fit to vest in such council or some other local boards, and resting upon similar principles. While, therefore, I have no doubt of the power of the legislature to abolish or discontinue any of the separate boards previously existing in the city, and consolidate all the powers and duties in this new board, which I think was the main purpose of this act, and to add all the new duties which have been imposed upon them, I concur in the opinions of the chief justice and my brother Cooley that the legislature had no power to make the appointment of the members of that board, as permanent officers for the full term, or the specific portions of such terms provided by this act for the respective members of the board. And to their full and exhaustive discussion of this point I refer without repeating it."

Judge Cooley, noted as a great constitutional lawyer, and the author of the work on that subject, states the question thus: "Whether local self-government in this state is or is not a mere privilege, conceded by the legislature in its discretion, and which may be withdrawn at any time at pleasure? I state the question thus broadly because, notwithstanding the able arguments made in this case, and after mature deliberation, I can conceive of no argument in support of the legislative authority which will stop short of this plenary and sovereign right." He then traces the history of township or municipal corporations in some of the American colonies, and shows clearly that these formed the nucleus around which the patriots rallied during the American Revolution, and that they subsequently formed the basis of local self-government in the republic, which neither king nor legislature were permitted to overthrow or destroy. He then proceeds to discuss the question as follows: "In view of these historical facts and of these great principles, the question recurs whether our state constitution can be so construed as to confer upon the legislature the power to appoint for the municipalities the officers who are to manage the property, interests, and rights in which their own people alone are concerned. If it can be, it involves these consequences: As there is no provision requiring the legislative interference to be upon any general system, it can and may be partial and purely arbitrary. As there is nothing requiring the persons appointed to be citizens of the locality, they can and may be sent in

from abroad, and it is not a remote possibility that self-government of towns may make way for a government by such influences as can force themselves upon the legislative notice at Lansing. As the municipal ²⁴ corporation will have no control, except such as the state may voluntarily give it, as regards the taxes to be levied, the buildings to be constructed, the pavements to be laid and the conveniences to be supplied, it is inevitable that parties, from mere personal considerations, shall seek the offices, and endeavor to secure from the appointing body, whose members in general are not to feel the burden, a compensation such as would not be awarded by the people, who must bear it, though the chief tie binding them to the interests of the people governed might be the salaries paid, on the one side, and drawn, on the other. As the legislature could not be compelled to regard the local political sentiment in their choice, and would in fact be most likely to interfere when that sentiment was adverse to their own, the government of cities might be taken to itself by the party for the time being in power, and municipal governments might easily and naturally become the spoils of party, as state and national offices unfortunately are now. All these things are not only possible, but entirely within the range of probability, if the positions assumed on behalf of the state are tenable. It may be said that these would be mere abuses of power, such as may creep in under any system of constitutional freedom, but what is constitutional freedom? Has the administration of equal laws by magistrates freely chosen no necessary place in it? Constitutional freedom certainly does not consist in exemption from governmental interference in the citizen's private affairs; in his being unmolested in his family, suffered to buy, sell and enjoy property, and generally to seek happiness in his own way. All this might be permitted by the most arbitrary ruler, even though he allowed his subjects no degree of political liberty. The government of an oligarchy may be as just, as regardful of private rights, and as little burdensome as any other; but, if it were sought to establish such a government over our cities by law, it would hardly do to call upon a protesting people to show where in the constitution the power to establish it was prohibited. It would be necessary, on the other hand, to point out to them where and by what unguarded words the power had been conferred. Some things are too plain

to be written. If this charter of state government which we call a 'constitution' were all there was of constitutional command; if the usages, the customs, the maxims that have sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood, and mutual responsibility in neighborhood interests; the precepts which have come from the revolutions which overturned tyrannies; the sentiments of manly independence and self-control which impelled our ancestors to summon the local community to redress local evils, instead of relying upon king or legislature at a distance to do so—if a recognition of all these were to be stricken from the body of our constitutional law, a lifeless skeleton might remain; but the living spirit, that which gives it force and attraction, which makes it valuable and draws to it the affections of the people; that which distinguishes it from the numberless constitutions, so called, which in Europe have been set up and thrown down within ²⁵ the last hundred years, many of which, in their expressions, have seemed equally fair and to possess equal promise with ours, and have only been wanting in the support and vitality which these alone can give—this living and breathing spirit, which supplies the interpretation of the words of the written charter, would be utterly lost and gone. Mr. Justice Story has well shown that constitutional freedom means something more than liberty permitted. It consists in the civil and political rights which are absolutely guaranteed, assured and guarded; in one's liberties as a man and a citizen; his right to vote; his right to hold office; his right to worship God according to the dictates of his own conscience; his equality with all others who are his fellow-citizens—all these guarded and protected, and not held at the mercy and discretion of any one man or of any popular majority: Story on Miscellaneous Writings, 620. If these are not now the absolute rights of the people of Michigan, they may be allowed more liberty of action and more privileges, but they are little nearer to constitutional freedom than Europe was when an imperial city sent out consuls to govern it. The men who framed our institutions have not so understood the facts. With them it has been an axiom that our system was one of checks and balances; that each department of the government was a check upon the others, and each grade of government upon the rest; and they have never questioned or doubted that the corporators

in each municipality were exercising their franchises under the protection of certain fundamental principles which no power in the state could override or disregard. The state may mold local institutions according to its views of policy or expediency, but local government is matter of absolute right, and the state cannot take it away. It would be the boldest mockery to speak of a city as possessing municipal liberty, where the state not only shaped its government, but, at discretion, sent in its own agents to administer it, or to call that system one of constitutional freedom under which it should be equally admissible to allow the people full control in their local affairs, or no control at all. What I say here is with the utmost respect and deference to the legislative department, even though the task I am called upon to perform is to give reasons why a blow aimed at the foundation of our structure of liberty should be warded off. Nevertheless, when the state reaches out and draws to itself and appropriates the powers which from time immemorial have been locally possessed and exercised, and introduces into its legislation the centralizing ideas of continental Europe, under which despotism, whether of monarch or commune, alone has flourished, we seem forced back upon and compelled to take up and defend the plainest and most primary axioms of free government, as if even in Anglican liberty, which has been gained step by step, through extorted charters and bills of rights, the punishment of kings and the overthrow of dynasties, nothing was settled and nothing established": *People v. Hurlbut*, 24 Mich. 104-108, 9 Am. Rep. 103.

We might pursue the subject further, and quote from the exhaustive opinion of Judge Hadley in *State v. Fox*, 158 Ind. 126, 63 N. E. 19, 56 L. R. A. 893, and from the reports²⁶ in other states. But the views quoted, we apprehend, are sufficient, and will serve to indicate the reasoning upon which great judges who have considered this question base their views, and that they regard the attempt on the part of the legislature to make this innovation, giving the appointing power of municipal officers to the legislature and governor, as unwarranted, in the face of our American system of municipal government, and as destructive of the rights of the people in municipalities to select their own officers.

In *State v. Moores*, 55 Neb. 480, 76 N. W. 175, 41 L. R. A. 624, there was nothing in the constitution of Nebraska espe-

cially restrictive of the authority of the legislature to make local municipal officers appointive by the governor, and so the question was here fully and fairly made. The distinguished jurists who wrote that decision were not content to rest the case on what had been said on the subject by other courts, but went into the question again; and, both on principle and authority, it was determined that the appointment and selection of municipal officers by any other than the local authorities was subversive of the principles of local self-government, which belonged to the people of the state, and inheres in every part of the constitution. A perusal of these opinions is like sounding a new note on the old Liberty Bell, and must inevitably thrill the heart of every patriotic American who loves the free institutions of our country.

Now, let us look to our own constitution on the subject. Bill of Rights, section 1, provides:

"Texas is a free and independent state, subject only to the constitution of the United States; and the maintenance of our free institutions and the perpetuity of the Union depend upon the preservation of the right of local self-government unimpaired to all the states.

"Sec. 2. All political power is inherent in the people, and all free governments are founded on their authority and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government," etc.

Article 2 divides the powers of government into three distinct departments—the legislative, executive and judicial—and the powers thereof are reserved to each department, independent of the others. These powers are defined in subsequent articles. Article 6 relates to suffrage. Section 2 thereof prescribes who are suffragans in the state. Section 3 prescribes the voters in towns and cities, and uses this language: "All qualified voters of the state as herein described, who shall have resided for six months immediately preceding an election within the limits of any city or corporate town, shall have the right to vote for mayor and all other elective officers; but in all elections to determine the expenditure of money or assumption of debt, only those shall be qualified to vote who pay taxes on property in said city or incorporated town," etc. Article 11 relates to municipal corporations. Section 4 thereof provides: "Cities and towns having a population of ten thousand inhabitants or less may be chartered

alone by general law," etc. Section 5: ²⁷ "Cities having more than ten thousand inhabitants may have their charters granted or amended by special act of the legislature," and then provides for taxation. Section 9 provides that the property of counties, cities and towns, owned and held only for public purposes, such as public buildings, etc., shall be exempt from forced sale and taxation, etc. Section 10 authorizes the legislature to constitute any city or town a separate and independent school district.

Granting, as was said, that the legislature is omnipotent unless restrained by some express provision of the constitution, or some clearly implied restriction, yet it occurs to us that we not only have a strong implied inhibition against the appointment of local municipal officers by the governor, but our constitution furnishes express prohibition as against this authority. In *State v. McAlister*, 88 Tex. 284, 31 S. W. 187, 31 L. R. A. 200, it was said that municipal governments had existed before the formation of the constitution, and the well-known and common method of city government was recognized as pre-existent. It was further said "that a purpose to destroy a system of municipal government so common in the state will not be attributed to the convention that framed the constitution unless the language used is so certain as to compel such a construction by the courts." This, as we have seen, is in consonance with the views expressed by Judge Cooley and other jurists. The fact that a system of municipal government was long in vogue prior to the enactment of the constitution, and that under this system, from time immemorial, local self-government was recognized, and the power of the suffragans in cities to elect their own municipal officers was conceded, and that nowhere and at no time had the power ever been claimed on the part of the legislature to interfere by authorizing the governor to appoint local municipal officers, must afford strong evidence of an existing condition which would indicate that there was no purpose on the part of those who framed our organic law to destroy a system of municipal government which had always heretofore been recognized. We do not understand that the constitution grants all power which is not expressly reserved to the legislative body of the government. This is reserved to the people. Only the law-making power belongs to the legislature, and this must be in accordance with the constitution and with the principles of local self-government reserved to

the people of the state, because the constitution says that all political power is inherent in the people, not in the legislature, and the right of local self-government is reserved to the state. Local self-government is not the mere whim and caprice of the legislative department, nor does it appertain to any distinctive locality of the state, but to the whole state, and as it had aforesaid existed in the state. The principle of local self-government is applicable to every organized portion of the state; and if in the history and traditions of our commonwealth, as well as that of other states, municipalities always exercised the right to select their own local municipal officers, then it would seem to follow that this was a part of the local self-government which remains unimpaired to the 28th state. The legislature is the law-making power, and to it alone is referred the authority to make laws; but it has no right, under the guise of its law-making authority, to overturn the principles of local self-government which have been handed down to us from our fathers. Nor will it be conceded that the right to make laws on the part of the legislature carries with it the right to appoint to office, either by themselves or through an agent. They undoubtedly have the right to create offices and prescribe their duties, but here their law-making functions cease, and the filling of the offices belong to the locality. As was said by Judge Hadley in *State v. Fox*, 158 Ind. 126, 63 N. E. 19, 56 L. R. A. 893: "To thus deprive the people of a locality of the right to choose their own immediate officers is to rob them of their freedom, and to defeat one of the great ends for which the government was established."

However, it is not necessary to rest this decision upon implication, as, in our opinion, the constitution expressly prohibited the legislature to either appoint directly, or through the governor, the local municipal officers of cities and towns, inasmuch as the constitution expressly confers the power on the citizen voters of the municipality "to elect the mayor and other elective officers." It is said that the article in question is merely to define the right of suffrage in cities. By this it would appear to be conceded that, if the suffrage section relating to cities had occurred in article 11, instead of article 6, there would be no question but that the office of mayor, at least, should be elective; that is, the contention is, because this particular clause of the constitution does not occur under the head of municipal corporations, it has not

the same meaning as if it occurred there. We cannot agree with this contention. We believe if the clause confers the right on the voter in cities to vote for the mayor and other elective officers, it is effective, no matter where it may have been placed by the constitution builders. The language of said provision is not dubious. It is clear and unequivocal. The terms used are strong. The language is that the suffragan "shall have the right to vote for mayor and other elective officers." If this right is conferred, by what power can the legislature deny it? If they cannot do it directly, can they accomplish it by indirection? To hold that the constitution makers undertook the task of defining qualifications of voters in cities, and providing that persons possessing the enumerated qualifications should have the right to vote for mayor and other elective officers, and then to decide without any express provision of the constitution on the subject, that the legislature should have the power to withhold this right to vote in cities, would, in our opinion, be a travesty on constitutional construction. Certainly, after the right to vote had been conferred, it would be a strange doctrine that the legislature, without some constitutional warrant, would be authorized to limit or deny the right of suffragans to vote in cities.

It is insisted that the legislature are potential in the matter of granting charters to cities; they may grant a charter, or abolish it at pleasure. However, it does not follow that they can grant any sort of ²⁹ a charter, but only that character of charter which under our system of government pertains to towns and cities. They cannot refuse to create the office of mayor or the board of aldermen: *People v. Detroit*, 29 Mich. 108. And so, if in creating a municipal corporation the legislature is constrained to create the office of mayor, this office must be elective, because the legislature cannot withhold from the municipal voter the right to vote for mayor, inasmuch as the constitution confers this right; and it also confers the right upon the suffragans of the municipality to vote for other elective officers. What other elective officers? Evidently those that aforetime the voters in the municipality had been accustomed to select at the ballot-box.

But if it be conceded that "other elective officers" means only such as the legislature may make elective, it would by no means follow that the ordinance in question was a valid ordinance, as is insisted by the respondent here, for we must

confess we are not able to exercise that subtlety of distinction which differentiates between the office of mayor in his executive and legislative capacity. The charter itself gives the mayor not merely the right to vote where there is a tie, but the right to vote on all occasions, and as it is impossible to determine whether or not there was a tie in the passage of this ordinance, and that the mayor by his vote cut the Gordian knot of legislation by voting for it, we cannot ascertain whether the ordinance was passed by a constitutional vote; that is, by one who had the constitutional right to vote for the ordinance. We think it follows, unquestionably, if the president of the board of commissioners did not have the right to vote on said ordinance, that said ordinance is tainted, and in consequence is null and void. However, we would not be understood as intimating that the board of aldermen, not being named in the constitution as elective officers, might be appointive, for, as stated, in all of our municipalities these officers had always been elected by the suffragans in the municipal locality, and the expression in the constitution was but a recognition of existing conditions, and was passed with reference to the status of municipalities theretofore in vogue. Moreover, if we had need of contemporaneous construction as to the elective character of these officers—mayor and board of aldermen—we have but to refer to the incorporation of cities and towns in the general act of 1875 (Laws 1875, c. 100, p. 113), and acts subsequent thereto, as evidence of the fact that the legislature itself regarded these offices as elective, inasmuch as they created them so under the constitution. We hold that the mayor and board of aldermen of said city were elective officers under and by virtue of our constitution, and that the majority of these, in the face of our traditions and of the organic law itself, having been appointed by the governor, any law or ordinance passed by them was without authority, inasmuch as they were not officers of the municipality, and could not, under our constitution, be such.

In what has been said, we have refrained from any expression of criticism of either the legislature or the governor. Undoubtedly, as ³⁰ is urged by counsel for respondent, they believed that a great emergency had arisen, with which ordinary methods were unable to cope. However, we believe, if the remedy adopted is to stand as a precedent, it would be productive of more serious ills than those which were attempted to be overcome by this species of legislation. A great

writer has said that "we had better bear the ills we have than fly to those we know not of." And this is true in governments, and perhaps more so than any other of the affairs of life. It may be that here and there, under our American system, cities may be given over to corruption, and lawless elements permitted to run riot over the best interests of the municipality, but this can be only temporary. If we adhere rigidly to the principles of local self-government, in the end conservatism and enlightenment and American citizenship will triumph. But if this incentive on the part of the better classes for good government is removed, and localities taught to depend on some central power to take care of them, we may never expect an improvement. On the contrary, the seeds of our free institutions, planted by the fathers in the townships and municipalities, will be scattered to the winds, anarchy will run riot throughout the entire body politic, while we look in vain for some strong central power to arrest the destruction of our liberties which have rested hitherto upon that vital and essential principle of the republic—local self-government by the people.

The judgment is reversed and appellant ordered discharged.

Mr. Justice Brooks dissented, and in the course of his opinion said that: "I do not believe that either the letter or the spirit of the constitution authorizes the opinion of the majority of the court. Charters of cities of over ten thousand inhabitants are within the sound discretion of the legislature. All municipal charters are mere creatures of the legislature, and there is no limitation in the constitution upon the power of the legislature to create municipal charters; hence I cannot hold that there are some things so plainly unconstitutional that they need not be written therein. . . .

"As to whether it is good policy for a state, through its legislature, to appoint the respective officers to govern a city, through an appointment by the governor under the act of the legislature, or whether this right should be contained in the charter, and the people alone elect said officers, is a proposition purely political, with which courts have nothing to do. If there is nothing in the constitution placing a limitation on the power of the legislature in this respect, the act is constitutional. . . .

"A municipal charter is a bare creature of the legislature, and the legislature can make, abrogate or amend the same as it deems proper. Being a creature of the legislature the question of local self-government does not enter into, nor can it be considered in passing on, the constitutional right of the legislature to grant the charter. For, as stated, it can incorporate a city without its consent,

place upon it such obligations as the legislature sees fit, and these obligations can be carried out by any agencies the legislature prescribes. . . .

"In the view I have taken up to this time, I have proceeded upon the assumption that there is nothing in the constitution against this character of legislation. But my brethren in the majority opinion insist that there is, and, to sustain them, cite certain clauses of the state constitution. . . .

"However, the majority say the charter is unconstitutional anyway, whether or not there is a clause in the constitution on the subject. If this be true, then we have no guide left for our judicial footsteps, and the division of this court on this question in itself shows absolutely the instability and lack of foundation for any such opinion. They say this matter is so plain it need not be written in the constitution. I do not think it is so plain. . . .

"Be this as it may, for this court to lay down the broad proposition that the legislature of Texas is impotent to change any clause or provision of a charter as they have heretofore existed is such an innovation and construction of our constitution and form of government, so at variance with the rules heretofore laid down, and so hampering upon the material and political prosperity of our state, I desire now to enter my most solemn protest against it. It follows from what I have said that there is nothing so plain that need not be written in the constitution, and, whether or not the right of local self-government is invaded by this grant, it is constitutional, and there is nothing in the letter or spirit of the constitution that remotely infringes upon the legislative right to create the charter with appointive officers for the stricken city of Galveston."

In support of this contention Judge Brooks cited the following cases and used the following language: "In *Commonwealth v. Plaisted*, 148 Mass. 375, 12 Am. St. Rep. 566, 19 N. E. 224, 2 L. R. A. 142, Morton C. J., says: 'There can be no doubt that the power to create, change, and destroy municipal corporations is in the legislature. This power has been so long and so frequently exercised upon counties, towns, and school districts, in dividing them, altering their boundary lines, increasing and diminishing their powers, and in abolishing some of them, that no authorities need be cited on this point. The constitution does not establish these corporations, but vests in the legislature a general jurisdiction over the subject by its grant of power to make wholesome laws, as it shall judge to be for the general good and welfare of the commonwealth. It "may amend their charters, enlarge or diminish their powers, extend or limit their boundaries, consolidate two or more into one, and abolish them altogether, at its own discretion": *Weymouth etc. Fire Dist. v. County Com.*, 108 Mass. 142. The several towns and cities are agencies of government largely under the control of the legislature.

The powers and duties of all towns and cities, except so far as they are specially provided for in the constitution, are created and defined by the legislature; and we have no doubt that it has the right, in its discretion, to change the powers and duties created by itself, and to vest such powers and duties in officers appointed by the governor, if, in its judgment, the public good requires this, instead of leaving such officers to be elected by the people or appointed by the municipal authorities.'

"This excerpt appears to settle this question, but, in deference to the opinion of the majority of the court, I will review other authorities. In *Philadelphia v. Fox*, 64 Pa. St. 169, Justice Sharswood, delivering the opinion, says: 'The sovereign may continue its corporate existence, and yet assume or resume the appointments of all its officers and agents into its own hands, for the power which can create and destroy can modify and change. Indeed, the legislature of this commonwealth, under the constitution, could not by contract invest any municipal corporation with an irrevocable franchise of government over any part of its territory. It cannot alienate any part of the legislative power which by the constitution is vested in a general assembly annually convened. . . . If the legislature were to attempt to erect a municipality with a special provision that its charter should be unchangeable or irrevocable, such provision would be a nullity, for acts of parliament derogatory from the power of subsequent parliaments bind not: 1 Blackstone's Commentaries, 90. That such political institutions have not, and cannot have, any vested rights as against the state, is strikingly illustrated and exemplified in *Borough of Dunmore's Appeal*, 52 Pa. St. 374, where it was held by this court that municipal corporations, being creatures of legislation, have no constitutional guaranty of trial by jury, and such trial may be denied them.' 'A public corporation is one that is created for political purposes, with political powers to be exercised for purposes connected with the public good in the administration of civil government—an instrument of the government subject to the control of the legislature, and its members, officers of the government for the administration of the public good: *Regents' Case*, 9 Gill & J. 365. 397, 401, 31 Am. Dec. 72; and in the same case it is said, "Public corporations are to be governed according to the laws of the land, and the government has the sole right, as trustee of the public interest, to inspect, regulate, control, and direct the corporation, its funds and franchises. That is of the essence of a public corporation": *Pumphrey v. Mayor etc. of Baltimore*, 47 Md. 145, 28 Am. Rep. 446. In *Burckholter v. McConnellsville*, 20 Ohio St. 308, it said: 'Morality and good order, the public convenience and welfare, may require many regulations in crowded cities and towns which the more sparsely settled portions of the country would find unnecessary. And it is for legislative discretion to determine, within the limitations of the

constitution, to what extent city or town councils shall be invested with the power of local legislation.' Where a charter of a city 'provides for the appointment of officers connected with the constabulary of the state, there is no invasion of the right of local self-government, but simply the exercise of the power to provide for the selection of peace officers of the state': *State v. Kolsem*, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566. If the city, as indicated above, has no right of local self-government that precludes the legislature, through the governor, appointing police, as this authority holds, then, it follows as a legal sequence which cannot be successfully combated, that the governor can appoint all the officers to govern a city. A municipal corporation is a creature of legislation, and its modes of government, and the officers conducting the same, may be changed by the legislature. By an act of the legislature of the state of Georgia, county commissioners were appointed to govern a county in which was located the town of Darien, and one of the duties put upon said commissioners was the exercise of corporate authority of such town. The court, in *Churchill v. Walker*, 68 Ga. 681, held said act was entirely constitutional, since, as stated, the municipal corporation is the bare creature of the legislature, and they can provide such officers for it as they see fit. The power of the legislature over municipal corporations, in the absence of constitutional restrictions, is unlimited, except so far as they are invested with rights incident to a private corporation. Public parks, the supply of gas, water and sewerage in towns and cities, may ordinarily be classed as private objects; but they often become matters of public importance, and whether they are the one or the other is a fact which may be decided by the legislature. And in considering an act to supply the city of Portland with water, the court may take judicial notice of the fact that said city is the metropolis of the state, having important commercial and business relations with all its citizens, and that the entire community have, therefore, a direct interest in the city's welfare: *David v. Portland Water Co.*, 14 Or. 98, 12 Pac. 174. In this case the court upholds unqualifiedly the legislative right of absolute supervision and appointment of officers of a city whenever the legislature may deem it necessary, and it is for the legislature alone to decide when it is necessary. To support this position, an array of authority is cited in 14 Or. 101, 12 Pac. 174, covering the page. In *Meriwether v. Garrett*, 102 U. S. 511, 26 L. ed. 197, the court uses this language: 'The right of the state to repeal the charter of Memphis cannot be questioned. Municipal corporations are mere instrumentalities of the state for the more convenient administration of local government. Their powers are such as the legislature may confer and these may be enlarged, abridged, or entirely withdrawn at its pleasure. This is common learning found in all adjudications on the subject of municipal bodies, and repeated by text-writers.

There is no contract between the state and the public that the charter of a city shall not be at all times subject to legislative control. All persons who deal with such bodies are conclusively presumed to act upon knowledge of the power of the legislature. There is no such thing as a vested right held by any individual in the grant of legislative power to them. . . . By the repeal the legislative powers previously possessed by the corporation of Memphis reverted to the state. A portion of them the state immediately vested in the new government of the taxing district, with many restrictions on the creation of indebtedness. A portion of them the state retained. It reserved to the legislature all power of taxation. It thus provided against future claims from the improvidence or recklessness of the new government. The power of the state to make this change of local government is incontrovertible. Its subsequent provision for the collection of the taxes of the corporation levied before the repeal of its charter, and the appropriation of the proceeds to the payment of its debts, remove from the measure any imputation that it was designed to enable the city to escape from its just liabilities.' "

A Statute Creating a Board of police commissioners for a town, to be appointed by the governor, and authorizing them to appoint, remove, equip, and fix the pay of police officers, is held not unconstitutional as taking from the town the control of local affairs: *Gooch v. Exeter*, 70 N. H. 413, 85 Am. St. Rep. 637. And it is also held that statutory power may be conferred upon the governor to appoint members of the board of fire and police commissioners of cities of the metropolitan class: *Redell v. Moores*, 63 Neb. 219, 93 Am. St. Rep. 431. See, further, *Commonwealth v. Moir*, 199 Pa. St. 534, 85 Am. St. Rep. 801; *State v. Barker*, 116 Iowa, 96, 93 Am. St. Rep. 222; *Fox v. McDonald*, 101 Ala. 51, 46 Am. St. Rep. 98.

MOORE v. STATE.

[45 Tex. Cr. Rep. 234, 75 S. W. 497.]

MURDER—Evidence—Accused as Witness.—The fact that a person accused of murder had married the principal witness for the prosecution on the day before his trial began is a legitimate subject of inquiry, and he may be required to state that fact while testifying in his own behalf, even though he married her for the purpose of suppressing her testimony. (p. 953.)

WITNESSES—Competency of Wife of Accused.—After the marriage ceremony is performed, no matter when or what the motive was or may be, the woman is prohibited from testifying against her husband, except when the offense is by the husband against her person. (p. 954.)

WITNESSES—Competency of Wife of Accused.—After a person accused of murder has testified that he married the principal

witness for the prosecution on the day before the trial, it is reversible error to call her to the witness-stand, and against objection, allow her to testify as to the time and circumstances surrounding her marriage to the accused, when it is evident that she is called and placed upon the witness-stand to show that the accused married her to suppress her testimony and to compel him to object to her testimony after it has been clearly established that she is his wife. (p. 956.)

C. M. Smithdeal, for the appellant.

M. Howard, assistant attorney general, for the state.

²³⁵ DAVIDSON, P. J. This is the second appeal from a conviction of murder: *Moore v. State*, 44 Tex. Cr. Rep. 526, 72 S. W. 595. While testifying in his own behalf appellant was permitted, over objections, to testify that he had married, on the day before his trial began, the state witness, Susie Jones. The bill is explained by the court as follows: "The court was then, and is now, of opinion that the question and answer were proper, as the state had a right to show why Susie Jones, the only immediate eye-witness to the homicide, was not put on the stand, and this tended to show that fact." That appellant had married the main state's witness on the day before his trial began is a legitimate subject of inquiry, and it was not error to require defendant to state that fact while testifying in his own behalf, even though he married her, as insisted by the court, for the purpose of suppressing her testimony.

The state also placed Sheriff Satterfield upon the stand and asked him if Susie Jones was then in attendance upon the court. He stated he did not know whether she was present or not. Whereupon the county attorney required the witness to go out and ascertain whether she was present in attendance upon the trial. After going to the witness-room, he returned with Susie Jones. After he had brought her in the court-room, the county attorney placed her upon the witness-stand. Objection was urged because it had already been shown that she was the wife of appellant, and the state had no right to call her to the witness-stand; that it was done for no legitimate purpose, and only for the purpose of prejudicing defendant in the minds of the jury. The court failed to rule upon these objections, "and the county attorney proceeded to ask ²³⁶ said Susie Jones certain questions with reference to this case. And the defendant was compelled to and did object to said Susie Jones testifying, on the ground that she was his wife, and therefore not a competent witness." The court

finally sustained this objection. The court says that the reason he failed to rule upon the first objection was that there was nothing upon which to rule, "and the court could not know what state's counsel wanted to know what Susie Jones was present for, and did not feel authorized and required to prevent the county attorney from asking the sheriff, in the presence of the jury, whether Susie Jones was present and in attendance upon the court, nor from placing her on the witness stand. Defendant while on the stand had stated that he had married Susie the day before, but this was by no means conclusive; and when Susie was placed on the stand and objection made to her testifying on the ground that she was the wife of defendant, the court then asked her if she had been married to defendant. And upon her answering that she had been and was his wife, the court sustained the objection. The state certainly had the right to explain why the only immediate eye-witness to the shooting was not placed upon the stand by the state. Besides this, the state had the right to show by her that she was not the wife of defendant and competent to testify, and if she had answered that she had not been married to defendant and was not his wife, she could have testified, notwithstanding defendant's statement, the question being one for the jury in case of an issue of the kind." The witness Satterfield could have been required to testify that Susie Jones was in attendance upon the trial and in the jury-room; and the state could have shown by any witness other than appellant's wife the matters about which the inquiry was made. The fact that appellant had married Susie Jones the day prior to his trial was also the subject of legitimate inquiry from proper sources. But here the statute expressly prohibits the use of the wife as a witness against her husband; and this though he had married her for the express purpose of suppressing her testimony against him: *Miller v. State*, 37 Tex. Cr. Rep. 575, 40 S. W. 313; *United States v. White*, 4 Utah, 499, 11 Pac. 570. It makes no difference at what time the relation of husband and wife begins. The exclusion of their testimony, under our statute, and to its fullest extent, operates wherever the interests of either are directly concerned: 1 Greenleaf on Evidence, secs. 334, 336. And this although he married the witness after she was placed under process: *Redley v. Wellesley*, 3 Car. & P. 558; *State v. Armstrong*, 4 Minn. 335. And the question of public policy is not an argument to the contrary. Public policy

must be in accord with our statutory enactment. When the marriage ceremony is performed, no matter what the motive was or may be, the witness thenceforward becomes the lawful wife of defendant, and is prohibited under our statute from testifying against her husband, except where the offense is by the husband against her person. It will be observed in this case that the county attorney called the witness in behalf of the state and asked her several questions in regard to the case, when, upon objection by appellant that she was his wife, the ²³⁷ court then asked her the question if she was his wife, and receiving an affirmative reply, excused her from the witness-stand. This whole proceeding seems to have been a spectacular performance to force defendant to object to his wife testifying against him, in order to get the benefit of her testimony thus far in aid of the supposition and theory that appellant had married her to suppress her testimony. The point insisted upon by the state in regard to this whole matter of proving the recent marriage of appellant to Susie Jones was to convince the jury, first, that Susie Jones was the only eye-witness to the homicide for which appellant was being tried; second, that he had married her for the express purpose of suppressing her testimony; and, third, her evidence was of a damaging character to him. Any fact drawn from the wife proving or tending to prove that appellant had married her for the purpose of suppressing her testimony was directly against him. The county attorney had no right to call her as a witness against him. It is thoroughly demonstrated by the fact that appellant had married her; and if the court and the county attorney were not satisfied with the statement of appellant that he had married the witness, it was a matter easily ascertained without calling the wife, and the good or bad faith of appellant in marrying her, and whether the court believed what the defendant testified in regard to it, would make no difference. The fact that she was the wife of defendant put the seal upon her lips and excluded her being called as a witness against him. The fact that appellant had married the witness, and the further fact that it was done for the purpose of suppressing her testimony, were so intimately blended under the peculiar facts that they could not be separated; and the fact that he had married her was one of the main facts relied upon by the state to show appellant's act in what the state contended was suppressing the testimony of the wife. It is well settled in

cases of bigamy that the lawful wife cannot be called to prove her marriage with the accused, nor for the purpose of identifying him: *Boyd v. State*, 33 Tex. Cr. Rep. 470, 26 S. W. 1080, and authorities cited; 3 *Jones on Law of Evidence*, sec. 752, authorities collated in note 1; see, also, sec. 753, note 18. There is no question of the injurious effect of this action of the county attorney as sustained by the court, because it tended to uphold with fearful effect the contention of the state that, by reason of his marriage with the witness the day before, his purpose was to suppress her testimony, and that her evidence was of a seriously damaging effect against him. It was admitted upon the theory that it was a suppression of the testimony, and the wife was the most important witness in regard to the killing; and it would seem that the state placed the wife on the stand to get whatever of benefit there could arise from the objection urged by appellant that she was his wife, in support of the theory of suppression of evidence. This is made patent by the reason it was the subject of considerable portion of the argument of state's counsel before the jury. It was held in *Brock v. State*, 44 Tex. Cr. Rep. 335, 100 Am. St. Rep. 859, 71 S. W. 20, 60 L. R. A. 465, that the use of the wife against accused was reversible error, whether ²³⁸ exception was reserved or not. Certainly it could not be held less an error where appellant was urging his objection from the time this matter became involved in the case until its final termination. Because of this error the judgment is reversed and the cause remanded.

Mr. Justice Henderson Dissented, and said in part that: "I believe it was proper for the state to assure itself that Susie Jones was really the wife of appellant and that she had married him only the day before; and it was not only competent to elicit this fact from the appellant himself on cross-examination, but the state was authorized to show that Susie Jones was in attendance on the court, and to prove by her also that she had married appellant. And I cannot say that this conduct on the part of counsel for the state was not done in good faith. If she had not been presented to the jury they would not have been apprised of the fact that she was then present and in a situation to testify for appellant, and her absence might have been accounted for on various pretexts. If any fact regarding the homicide had been elicited from her, of course a different question would be presented; but here we have in evidence strongly it is true, the fact of her intermarriage with the appellant the day before, and her presence then in court. This was not using her as a witness against appellant, but was offering the jury an in-

sight into his conduct with reference to her, which they had a right to know. The circumstances here shown, to wit, the fact of the appellant's intermarriage with the principal state's witness only the day before, would tend to show, at least it would bear the construction, that he married her for the purpose of suppressing her testimony. I understand it is a rule of universal application that it can always be shown that a defendant has fabricated or suppressed testimony. Appellant further maintains that the court committed an error in allowing state's counsel to animadvert on the failure of appellant to use his wife as a witness on his behalf; and in this connection he complains that the court refused to give certain requested special instructions on this subject. It has long been the doctrine in this state that argument could be made on the failure of a defendant to use his wife as a witness: *Mercer v. State*, 17 Tex. Cr. App. 452; *Armstrong v. State*, 34 Tex. Cr. Rep. 250; *Smith v. State*, 3 Tex. Ct. Rep. 357, 65 S. W. Rep. 186; *Locklin v. State*, 8 Tex. Ct. Rep. —. *Boyd v. State*, 33 Tex. Cr. Rep. 470, and authorities cited in that connection in the majority opinion are not in point, because the question there was bigamy, and the former and subsequent marriages were the material issues in the case, and, of course, the first wife was not a competent witness against the husband to prove the marriage. *Graves v. United States*, 150 U. S. 118, also cited by appellant's counsel, is not in point. There it was held by a majority of the court that, inasmuch as the wife could not be a witness for appellant, her absence from his side during the trial could not be argued before the jury to his prejudice. This is not the character of case here presented, for our statute authorizes the wife to be a witness for the husband, and his failure to produce her, where the record shows she was present at the homicide, is both upon principle and authority a legitimate subject for criticism on the part of the state. In this case she was present at the homicide, had been used on a former trial as a witness on behalf of the state. Appellant was shown to have married her on the day before. Under the circumstances, the state could not use her: *Miller v. State*, 37 Tex. Cr. Rep. 575. But it was entirely proper that the jury should be informed of the reason that prevented the state from placing her on the stand; and this although it might suggest very strongly appellant had married her for the express purpose of suppressing her evidence."

The Competency of a Wife as a witness against her husband is considered in the recent monographic note to *State v. Burt*, 106 Am. St. Rep. 763-770.

McALISTER v. STATE.

[45 Tex. Cr. Rep. 258, 76 S. W. 760.]

CRIMINAL LAW—Principal—Accomplice.—A person indicted as a principal cannot be convicted as an accomplice. (p. 958.)

THEFT—Principals.—The mere concurrence of the minds of persons in pursuance of a previously formed design to commit theft does not alone constitute them principals. To constitute a principal in crime there must be presence or participancy, or doing of some act at the time of the commission of the crime in furtherance of the common design. (p. 959.)

APPELLATE PRACTICE—Erroneous Charge.—If the charge given by the trial court is contradictory, irreconcilable, and confusing, it is reversible error. (p. 959.)

CRIMINAL LAW—Accomplices.—If the facts are unquestioned, and it is assumed that a witness is an accomplice, the court should so charge the jury, and if the facts are of such character that the failure to instruct the jury that the witness was an accomplice would result injuriously to the defendant, the charge should assume, and so instruct the jury, that the witness was an accomplice. (p. 960.)

Nugent & Pannell, for the appellant.

H. Martin, assistant attorney general, for the state.

259 DAVIDSON, P. J. The indictment contains two counts—the first charging ordinary theft of mules, and the second theft of the same mules by conversion under bailment. The accomplice Hughes testified to facts which, if true and corroborated, would justify a conviction for theft by conversion.

Appellant introduced evidence showing if the mules were taken by the accomplice Hughes that he was not only not present but had no knowledge of the intended theft on the part of Hughes. The issue was also presented that Hughes committed the theft and appellant may have been accomplice by advising, aiding, etc., Hughes, thereby rendering himself an accomplice to the crime. The court submitted the issue of principals under both counts. Error is assigned because the jury were not instructed that if he was only an accomplice to the crime he should have been acquitted under this indictment. Upon another trial this phase of the law should be given, because if he advised Hughes to take the property and Hughes did in fact take it, and appellant was not present at the time of the taking, nor aided in any way in the original taking, he could not be subject to conviction under this indictment, because it charges him with being a principal.

The following charge was given: "In the first place, then, you are instructed that all persons are principals who are guilty of acting together in the commission of an offense. When an offense has been actually committed by one or more persons, the true criterion for determining who are principals is, Did the parties act together in the commission of the offense, was the act done in pursuance of a common design and in pursuance of a previously formed design in which the minds of all united and concurred? If so, then the law is that all are alike guilty, provided the offense was actually committed during the existence and in the execution of the common design and intent of all, whether in point of fact all were actually bodily present on the ground when the offense was actually committed or not." Exception was reserved to this paragraph of the charge. This was error: See *Criner v. State*, 41 Tex. Cr. Rep. 290, 53 S. W. 873, in which the authorities are collated.

This further charge was given: "Moreover, if you believe and find ²⁶⁰ from the evidence in this case that Edgar Hughes took the mules described in the indictment, under such circumstances as to constitute such taking theft, that the defendant was not present, and did not participate in such taking of the said mules at the time they were taken, if you find they were taken, or if you have a reasonable doubt as to whether or not defendant was actually present and participated in said taking under such circumstances as to make him a principal, you will acquit him." This charge is in direct conflict with the one above quoted. In the first charge the jury are informed that appellant could be convicted as a principal whether he was present or not. In the other, the jury are told if he was not present, or they had a reasonable doubt of his guilt, they should acquit. These charges are irreconcilable, and left the jury in chaotic confusion as to the status of the law. On this question see, also, *Criner v. State*, 41 Tex. Cr. Rep. 290, 53 S. W. 873. This doubtless was given by the court to meet that phase of the evidence which called for a charge upon the law of accomplices, that is, if the property was taken and appellant had advised or had performed acts of an accomplice beforehand, and was not present at the time, the jury could not convict him under the indictment. But as the charges are presented in the record they are confusing and contradictory. The jury should be told plainly in cases of this character, where the issues of accom-

plice and principal are suggested by the testimony, that if the facts show him to be a principal he may be convicted, if they show him to be an accomplice he cannot be convicted.

Exception is reserved to the charge submitting the question of Hughes being an accomplice and the necessary corroboration, as an issue of fact to be determined by the jury. The contention is that the court should have told the jury that he was an accomplice. We believe the charge of the court, as applied to the facts in this case, was correct, because it was an issue upon the trial made by appellant's testimony that he had no guilty participancy in the taking either as a principal or as an accomplice. Where the facts are unquestioned, and upon which there is no issue that the witness is an accomplice, the court may assume that, and so charge the jury in appropriate language, and under some circumstances it has been held by this court that the charge should be so given. But usually it is immaterial whether it is given in the form of a direct charge to the jury that the witness was an accomplice or left as a matter of fact to be decided by them. If the facts are of such a character that the failure to instruct the jury that the witness was an accomplice would result injuriously to defendant, the charge should assume, and so instruct the jury, that the witness was an accomplice. The facts of each particular case, however, must determine the necessity or advisability of the form of charge in regard to accomplices as witnesses, as in most other issues arising on the facts. We are of opinion there was no error in this phase of the court's charge.

For the errors indicated, the judgment is reversed and the cause remanded.

To Constitute a Person Accused of Crime a principal therein, according to *Chapman v. State*, 43 Tex. Cr. Rep. 328, 96 Am. St. Rep. 874, he must be present thereat, knowing and adopting the unlawful intent of the other parties; he must aid by acts, or encourage by words or gestures, and consent to the commission of the crime. Compare, however, *People v. Bliven*, 112 N. Y. 79, 8 Am. St. Rep. 701.

The Crime of Larceny is the subject of an extended note to *People v. Miller*, 88 Am. St. Rep. 559-608.

VANN v. STATE.

[45 Tex. Cr. Rep. 434, 77 S. W. 813.]

MUNICIPAL CORPORATIONS—Hack Drivers' Ordinance.—

A municipal ordinance prohibiting hack drivers, hotel runners, and kindred classes of people from taking a stand at a certain place within the city limits, for the purpose of soliciting the patronage of passengers who come in on different railroad trains, and authorizing policemen to arrest without warrant whenever a violation of such ordinance was committed in their view, is valid. (p. 966.)

ARREST—Right to Resist Officer.—If an officer has a right to make an arrest and a killing grows out of such arrest, the act of the officer in arresting must not have been in a threatening and menacing manner, and if the officer acted in violation of law, the person whom he was attempting to arrest could legally resist him, if necessary to save his own life, to the extent of taking the officer's life. (p. 968.)

HOMICIDE—Manslaughter.—If a homicide is committed under circumstances which render the mind of the accused incapable of cool reflection, and in a sudden fit of anger, he is not guilty of any higher offense than manslaughter. (p. 969.)

ARREST—Charge of Court Shifting Burden of Proof.—A charge of the court that if the jury does not believe, from the evidence, that the deceased was in good faith attempting to arrest the accused, shifts the burden of proof, and is reversibly erroneous. (p. 970.)

HOMICIDE—Self-defense—Reasonable Doubt.—Instructions which require the jury to find affirmatively that the accused did not provoke the difficulty and that the deceased was acting without lawful authority at the time, and that this was known to the accused, before it can acquit, or reduce the crime below that of murder, without coupling such charge with the principle of reasonable doubt, are fatally erroneous. (p. 970.)

HOMICIDE—Self-defense.—When the issue of self-defense is raised the court must charge upon the law of self-defense without restricting its charge to the law of provoking the difficulty, and it is flagrant error to refuse a special charge correcting such erroneous general charge. (p. 970.)

HOMICIDE—Self-defense—Provoking Difficulty.—The court, in instructing the jury on the law of provoking the difficulty, must instruct it that the accused must have said or done something which produced the occasion or provoked the difficulty before he can be held responsible for the result. (p. 970.)

HOMICIDE—Self-defense.—The right of self-defense against a man using a six-shooter cannot be fettered by a charge to the jury on the relative size and strength of the two combatants. (p. 971.)

HOMICIDE—Evidence—Res Gestae.—If, at the termination of an affray ending in a killing, two officers seized the accused, and it is in doubt as to when he fired the last shot, whether after they seized him or immediately before, a statement made by him at that time relative to the homicide is admissible in evidence as part of the res gestae. (p. 971.)

WITNESSES—Impeachment.—The answer of one witness to the opinion of another witness cannot be used to impeach the former. (p. 972.)

J. M. Hart Wynne & McCart, and Bowlin & McCart, for the appellant.

H. Martin, assistant attorney general, and O. S. Lattimore, county attorney, for the state.

⁴³⁷ DAVIDSON, P. J. Appellant (a hack driver) was convicted for the murder of A. J. Grimes (a policeman), and his punishment assessed at death. The statement of facts discloses that appellant had been arrested two or three times by deceased for violating the hack ordinance. By virtue of one of these arrests, under the writ of habeas corpus, this hack ordinance was declared void. These matters engendered some ill-feeling between deceased and appellant; in fact the record discloses there seems to have been some feeling between the hack drivers on one side and the policemen on the other. The killing occurred just on the edge of what is known as the Al Hayne Triangle, immediately west of the Texas and Pacific Railway depot. Along the street west of ⁴³⁸ said depot, two street railway tracks are laid. The city council of Fort Worth passed an ordinance prohibiting hack drivers, hotel runners, and kindred classes of people from taking their stand east of this street-car track for the purpose of soliciting passengers who came in on the different railway trains. The theory of the state is that appellant took the stand within the prohibited circle and solicited passengers for his hack, and that deceased undertook to arrest him for this reason. This brought up the difficulty, in which the policeman lost his life. The theory of the defense is that appellant did not take his stand within the prohibited circle, and that deceased did not undertake to arrest him, but undertook to wreak his vengeance on appellant for real or imaginary insults offered him during the conversation immediately preceding the homicide. The testimony is very voluminous—unnecessarily so and a great deal of it is but repetition. The witness, Matkins, for the state, locates himself near the scene of the homicide, at about 6:45 o'clock A. M. He says appellant came driving around Main street toward the hack-stand and turned in toward where himself and deceased were standing, and drove up within probably eight or ten feet of the sidewalk. Deceased remarked to appellant, "Jeff, you are going to keep on running over there until you get another case filed against you." Appellant began backing up to the line, and remarked to deceased, "File it; God damn you, file it." By this time

appellant had gotten his carriage backed out to the proper place, and deceased had walked probably fifteen or twenty steps down the sidewalk away from appellant; and appellant remarked, "You are nothing but a God-damned old jobber." Deceased checked up a little, turned rather facing appellant, when appellant again remarked, "That is all you are; you are a God-damned old jobber; and if you want anything out of me you can get it." Deceased replied, "I will just place you under bond; I will place you under bond," and started over to appellant's hack. As he did so, appellant, who was sitting on his back, arose to a standing position on the boot of his hack, drew a glove off his right hand, and stood in that position until deceased walked up to the side of his carriage to the left. Deceased said to appellant, "Jeff, sign this bond." As deceased approached appellant he took out a bond; that is, he took some papers from his pocket, three or four, maybe more, selected one, and placed the others back; and said, "Sign this bond." Appellant looked down at him, and said, "I will sign nothing; God damn you; I will sign nothing." Deceased replied, "If you don't sign the bond you will have to go with me," and reached up and caught appellant on the pants leg, just above the knee, and said, "Get off and come with me; you will have to come with me." At this remark, appellant reached down to the cushion of his carriage, picked up a pistol, and said, "Here is the way I will come down," and fired at Grimes, who was standing right by the side of the wheel. Deceased dodged a little bit, and went back by the side of the hack, and as he did so, appellant fired again; and as he reached the rear end of the hack, ⁴³⁹ he and the deceased fired about the same time. The firing continued until deceased fell. According to this witness appellant drove across the street railway track toward the depot, and after crossing this he was on the prohibited territory, some twelve feet or more. Appellant drove over to meet passengers. At the time of the shooting the head of appellant's horses were on the street-car line, west of the track, as was this witness—his team being a little ahead of appellant's hack. This street railway track designated by the city ordinances is what these witnesses called the "dead-line"—east of which the hacks were prohibited going; and parties were interdicted coming nearer the depot than that unless the passengers spoke to them; and if that occurred, the hackman had the right to go and get such passengers. Wit-

ness did not know whether appellant received a signal from any of the passengers or not; but was under the impression they paid no attention to him. There were quite a number of hacks along this "dead-line." This fairly presents the state's side of the case and the attending circumstances.

Battis testified for defendant, that at the time of the difficulty defendant's horses were west of the street-car track, standing facing east toward the depot, and appellant was on his hack. The first this witness noticed of the difficulty was when a train came in and some passengers came out from the depot. Appellant called to the passengers, and his team walked on the track; did not walk diagonally across the street but a little south from a straight line, and appellant brought up his team and went to backing them. As he did, deceased hallooed at him, "Better get back across that line." Appellant said, "I am," and laughed. Deceased made a remark to the effect if he did not stay across there he would arrest him. Appellant told him he had not been across the line; and there were some other words spoken, but the witness did not understand what was said. There was some noise and trains running and a street-car passed also about that time. The next this witness noticed of deceased he was across the track right by the horses of appellant, close to the wheel of the hack; but he could not understand what either of them said. Deceased walked up by the side of appellant's hack and grabbed him by the coat, near the hip. Appellant sorter twisted a little bit, and deceased's hands slipped off appellant's coat, and there was a shot fired. This witness could not see deceased after his hands slipped off appellant's coat, on account of the carriage of hackman Brooks; but there was a shot fired from that side of the hack, and appellant got his pistol and fired immediately afterward—getting his pistol from under what this witness terms the "dickie-seat" on the hack. "He [appellant] got that pistol immediately after the two shots I heard fired. There was not a great deal of difference between the two shots I heard fired; it was all done very quick. When the first shot was fired, appellant had nothing in his hands but his lines; but when that shot was fired appellant got his gun from under the dickie-seat. Grimes went toward the rear of the hack, and the firing continued until deceased was shot down." ⁴⁴⁰ This witness did not hear appellant say, "You are nothing but a God-damned old jobber."

Witness Brooks testified that he was a hack driver and his hack was about twenty-five feet from appellant at the time of the difficulty, and there was no hack between his and appellant's; that appellant was at the stand when witness drove up; he heard something said between deceased and appellant. When the passengers came out of the depot he (the witness) remarked, "Drive over and get you, Colonel, if you want a hack"; tapped his horses and stepped over the car track. As he did this, appellant also started over just after this witness, "and cut his horses south in front of Jake Stine's team, standing perfectly still about six or eight feet west of this street-car line, and his horses were headed south, and he was after the same people that I was. He did not get them. Officer Grimes (deceased) was standing over on the sidewalk, and told Jeff if he did not look out he would arrest him. Jeff says, "You are nothing but a jobber and a knocker," and Grimes told him if he didn't look out he would arrest him. Jeff told him, "You are a knocker and a jobber." With that Grimes came on over to Vann's hack on the north side of his hack, and stopped about the single tree of the near horse, talking to him. He told him he would have to arrest him—he didn't know what for; and he says, "for driving over there." Jeff told him "I was not over the dead-line." And with that Officer Grimes wanted him to sign a bond, reached his hand down here in his pocket, and Jeff told him he would not do it. With that he moved toward Jeff's hack, and Jeff told him, "Don't climb up here; don't climb up here." At that Officer Grimes stooped over and threw his left foot on the hub, and before he put his foot up he pulled his gun out, had it up in this position, and Jeff stooped over the south side of his hack and Officer Grimes took his foot down and stepped down, I suppose about six feet from the hack, and shot first. When he shot, Jeff then lifted up the dickey seat from the south side and pulled his gun out and shot at Officer Grimes. According to this witness deceased shot again. At this time he placed appellant as standing up and Grimes going toward the rear end of the carriage, and about the time he reached the hind wheel both parties shot; and the officer on reaching the rear end of the hack shot through the glass in the back of the hack, and passed on to the other side of the hack, where the firing was renewed. He says when Grimes fired the first shot he (Grimes) was standing out from the carriage; appellant had

nothing in his hand but was standing up in the boot of his hack, and did not reach for his pistol until after the officer had fired the first shot.

Appellant took the stand in his own behalf. He says about 6:30 o'clock A. M. he drove to the Texas and Pacific station. That upon reaching the street-car track his horses' front feet stopped about the middle of the west street-car track. Deceased was standing across on the sidewalk, and remarked, "Get back there or I will make a case against ⁴⁴¹ you." Appellant replied, "Wait until I cross the line before you make any case; you have got no right to make any case until I cross the line." "Deceased started and walked off, I should think a little north; and I says, 'You are nothing but a jobber; and you make a case if you want to.' Deceased turned around and started south, and remarked, 'I will make you take that back,' stepped off the sidewalk," and came close up to appellant by the front wheel of his hack, and told appellant to get off his carriage. He declined to do it. Deceased reached up with his hand and caught appellant by the pants; he pulled loose from deceased, and deceased pulled his pistol and fired. As he fired, appellant got his pistol; and the deceased's second shot and appellant's first shot were close together, appellant's first shot going through the seat of the hack. He did not get his pistol entirely up before it went off. When deceased fired the second shot he was backing toward the north hind wheel of appellant's carriage, and was near the north hind wheel. Deceased passed on around the carriage to the southwest corner, and appellant shot over the corner of the carriage at him. Deceased shot through the back of the carriage at appellant, and appellant jumped off the hack, and as deceased came around the corner of the carriage they met, and appellant fired again, deceased firing about the same time; deceased fell.

There were other witnesses who testified pro and con as these already mentioned. The charter of the city of Fort Worth authorized the city council to pass ordinances of the character mentioned, and also authorized its policemen to arrest without warrant, whenever a violation of any city ordinance was committed in their view. My brethren are of the opinion this clause of the charter and ordinances passed thereunder are valid. The writer does not agree with these views, and believes the ordinance cannot confer such power beyond the general state law.

There was a motion for continuance made by appellant, which was overruled, and quite a deal of newly discovered testimony attached to the motion for new trial. But as the case will be reversed upon other propositions and these matters may not occur upon another trial as here presented, a discussion of them is pretermitted.

As we understand the testimony, the issues of murder, manslaughter, and self-defense are suggested. The question of killing under the theory of illegal arrest is also presented. If appellant had crossed what the witnesses term the "dead-line" and had taken his stand with his hack in the prohibited territory, this act was in violation of the city ordinance. It may be seriously questioned, however, that he had done so, even from the state's standpoint. The witness Matkins, whose testimony is referred to above, says that appellant had crossed the dead-line, and immediately began backing his hack until he got at the proper position. If this was all that appellant did, he was not in violation of the city ordinance; because he neither stopped nor took his stand within the prohibited ⁴⁴² territory. While he rushed across the dead-line in his eagerness for passengers, he immediately backed out; and this seems to have been recognized by the officer himself, when he remarked to him, in substance, if he kept running across the dead-line he would have another case against him, and by the reply of appellant, "Wait until I cross the dead-line." The provocation offered by appellant, if in fact it be a provocation, arose out of the remarks made by appellant to deceased, that he was "nothing but a jobber and a knocker," or a "God-damned old jobber and knocker"; and that deceased "could make a case if he wanted to," continuing with his challenge to deceased to file a case against him if he desired. If appellant had not violated the ordinance, as he contends and his witnesses testified, then the officer had no authority to arrest, and was in the wrong when he threatened him with a case of prosecution. It was the duty of the officer, under the ordinance, if appellant had violated it, to arrest him; and his threat to do it seems to indicate that appellant had not violated the ordinance. If in fact appellant was not violating the ordinance, the officer was the first to use remarks that tended to bring on the difficulty, for if appellant had not crossed the dead-line and taken his stand in violation of the ordinance, the officer's remarks to appellant were uncalled for and unnecessary. There were two

facts omitted in the above statement of the evidence, which are here stated. Each side produced testimony showing that the other had made threats of a serious character. While of a general nature, the threat by deceased included the hackmen, of which appellant was a member, and appellant's threats were against the policemen, and one witness that he made a threat directly against deceased.

Appellant contends, and we think correctly, that he had the right to have a charge on manslaughter unfettered by a charge on provocation with the apparent intention to kill; and also that, under the law and the facts, he was entitled to a clear and unequivocal charge on self-defense unlimited by the law in regard to provoking a difficulty. After defining manslaughter, the court places this qualification upon it: "Though a homicide may take place under circumstances showing no deliberation, yet if the person guilty thereof provoke the contest with the actual and apparent intention of killing, or doing some serious bodily injury to deceased, the offense does not come within the definition of manslaughter." While this is the statutory law, and perhaps in this case was properly given, still appellant was entitled to a charge on manslaughter unfettered by this statute. While perhaps the court should have given this charge for the benefit of the state, at the same time he should have given a charge on manslaughter without this qualification. Certainly, the appellant should have a clear, unqualified charge on each controverted issue of fact.

And again, the charge on manslaughter is criticised, and a special charge requested, submitting appellant's theory of this difficulty. That is, if the officer had the right to arrest, and the killing grew out of this ⁴⁴³ arrest, the act of the officer in arresting must not have been in a threatening and menacing manner. This charge should have been given, and it was error to refuse it. If appellant was violating the law, and deceased undertook to arrest him, and did it in the manner indicated in the testimony, by trying to jerk him from his hack, and failing to do this, drew his pistol on him, the officer himself was in violation of law, and appellant had the right to resist it, and if it became necessary to kill to save his own life from the onslaught of deceased when he drew his pistol and fired at him, he would have been justifiable. If he shot deceased out of anger, because he undertook to

pull him off his hack, under the circumstances detailed, and this rendered his mind incapable of cool reflection, he would not be guilty of any higher offense than manslaughter. This phase of the law of manslaughter was not presented by the charge, and the special requested instruction refused.

The court gave several charges in reference to self-defense, which from a casual inspection are clearly erroneous. For instance, he charges the jury, "If you do not believe from the evidence that A. J. Grimes was in good faith attempting to arrest defendant immediately before the difficulty in question, for an alleged violation of the city hack ordinance introduced in evidence; or if you believe that he was attempting to make such arrest, but further believe and find under foregoing instructions that he had no lawful authority to make such arrest; and further believe from the evidence that at the time defendant began to shoot at Grimes, if he did shoot at him, it reasonably appeared to defendant from act or acts then done by Grimes or from some words coupled with his act or acts, that it was the purpose and intent of Grimes to shoot defendant with a pistol, and that defendant then began firing at Grimes, for the purpose of preventing being shot by him, and if you do not believe from the evidence beyond a reasonable doubt that defendant willfully and intentionally provoked said difficulty, if he did provoke it, for the purpose of using unlawful violence upon Grimes, then you will find that the killing of Grimes by defendant, if he did kill him, was not an unlawful killing, but was done in his lawful self-defense, and therefore justifiable, even though you should further believe that said apparent danger to defendant, if any, was not real." Exception was reserved to this charge. It will be noted in the first statement of this charge that it required the jury to find as an affirmative fact that Grimes was not in good faith attempting to arrest appellant; in other words, it shifts the burden of proof. Appellant is entitled to the reasonable doubt on every proposition where his life or liberty is sought to be taken. This, as every other charge given on self-defense, is limited and restricted by a charge on provoking the difficulty. While exception was not reserved to the paragraph of the court's charge following the one above quoted, still a special charge was asked and refused covering the error in that charge; and to the failure of the court to give the special instructions, exception ⁴⁴⁴ was

reserved. This refusal was error, and the charge of the court sought to be corrected by this special charge was flagrantly erroneous.

Again, the court instructed the jury: "If you do not believe from the evidence that defendant provoked the difficulty in question with the apparent intention of killing A. J. Grimes, or doing him serious bodily injury, and if under foregoing instructions you find that said Grimes had no lawful authority to arrest defendant, and that defendant knew of such want of authority to make such arrest, and if you further believe from the evidence that immediately prior to the time defendant began firing at A. J. Grimes, he, Grimes, was attempting to arrest defendant, and that said attempt aroused in defendant sudden passion, as sudden passion is above defined," etc. As before stated, the jury are required here to find affirmatively from the evidence that appellant did not provoke the difficulty with the apparent intention of killing Grimes or doing him serious bodily injury; and they are further required to find affirmatively that Grimes had no lawful authority to arrest defendant, and that defendant knew of such want of authority to make such arrest before they could acquit or reduce his crime below that of murder. It would take no reasoning to show this to be error. If there was a reasonable doubt upon either proposition, defendant was entitled to the benefit of it. That is, the jury should be required to find beyond a reasonable doubt that defendant provoked the difficulty; and if there was a reasonable doubt as to whether Grimes had the authority to arrest or not, appellant has the benefit of such doubt. But this charge solves both doubts adversely to defendant and required the jury to find affirmatively that neither existed before they could give him the benefit of the law.

In every charge on self-defense appellant's right of self-defense was limited by a charge on provoking the difficulty. The charge is further criticised because it nowhere informs the jury what is necessary to constitute provoking the difficulty. The language is as above quoted: "If the jury do not believe that defendant provoked the difficulty." Under all the authorities, and under the law, in order to constitute provoking a difficulty, there must be something said or done by the accused with intent to produce the occasion or bring about the difficulty which makes him responsible criminally. The jury are nowhere told in regard to the law of provoking the

difficulty that defendant must have said or done something which produced the occasion or brought about and provoked the difficulty. These matters are criticised in the court below and special charges asked and refused. All the special charges, except number 3, were directly applicable to the facts of the case and should have been given. The last case decided by this court with reference to the court limiting throughout the charge on self-defense by a charge on provoking the difficulty, is *Drake v. State*, at the present term. However, that case but follows the unbroken line of authority.

Independent of appellant's right to have a charge on self-defense ⁴⁴⁵ growing out of his theory of illegal arrest, as well as a proper charge on manslaughter in that connection, defendant's evidence presents clearly and emphatically a case of self-defense from an attack made by the officer independent of the question of arrest. If deceased approached defendant's hack and undertook to pull him from it, and failing to do this, began firing upon him with his six-shooter, appellant had the unquestioned right to defend; and the further right to continue shooting until all danger to himself had passed. This issue was presented by the testimony.

Again, the court fettered appellant's right of self-defense by a charge on the relative strength and size of the parties. It would make no difference how large one may be or how small the other; if the smaller one is shooting with a six-shooter, the other has a right to protect himself without any question as to the relative strength of the parties or their size. A six-shooter is as dangerous in the hands of a small man as in the hands of a robust person: *Hickey v. State*, 8 Tex. Ct. Rep. 579.

At the termination of the difficulty Fulford and Witcher seized appellant; and it is left in doubt when appellant's last shot was fired whether while they had hold of him, or immediately before they seized him. Fulford testified that he remarked, "Jeff, you have played the devil now." Appellant replied, "Damned big son of a bitch ought to be killed; there is no son of a bitch can pull me off my hack." Objection was urged to this, that appellant was under arrest, having been seized by the officers. Under the unbroken line of authority in this state, this testimony was admissible as *res gestae*. Witcher denied hearing this.

Judkins, after predicate laid to impeach witness Battis, was permitted to testify, as follows: "That he [Judkins] said to

witness Battis, 'It is a shame to murder a man like that.' Battis replied, 'He ought to have been killed, and I would kill any man, God damn him, that would try to pull me off my hack.''' Judkins was permitted, after Battis denied these statements, to swear before the jury to this conversation. We think the exception was well taken. This was an opinion of Judkins, gotten before the jury as to his view of the homicide; and the answer to this, if Battis did make it, was not legitimate impeachment.

Objection was urged to the action of the court permitting the witnesses Nellie Garey and Lizzie Murray testifying, because it seems that they had been from under the rule in the courtroom part of the time, and had discussed their testimony and the facts of the case, after being placed under the rule. This will not occur upon another trial, and is therefore not discussed.

As before stated, the questions arising on the action of the court refusing the continuance and overruling the motion for new trial are not discussed. The witnesses mentioned in both instruments may be present ⁴⁴⁶ on another trial; and if they are not, the questions will come in an entirely different shape and under different environments.

For the errors discussed, the judgment is reversed and the cause remanded.

BROOKS, J., Dissenting. I dissent from the opinion of the majority and do not believe there is any reversible error in this case. I may write my views later.

The Law of Self-defense is the subject of a monographic note to State v. Sumner, 74 Am. St. Rep. 717-740. The right of self-defense may be exercised by a citizen to the extent of taking the life of an officer making an illegal arrest: See the monographic note to State v. Evans, 84 Am. St. Rep. 700-702, on the right of policemen to arrest and of citizens to resist.

SANDERS v. STATE.

[45 Tex. Cr. Rep. 518, 78 S. W. 518.]

VERDICT by Lot.—If, in a criminal case, the jury agree to ascertain the verdict as to the penalty, by each juror setting down on paper the number of years he is in favor of giving the accused in the penitentiary, then adding the total, dividing the result by twelve, the quotient to be the verdict of the jury as to the penalty, a verdict thus reached is arrived at by lot, and is illegal and void. (p. 974.)

J. I. Moore and L. A. Sallas, for the appellant.

H. Martin, assistant attorney general, for the state.

518 BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of eighteen years.

There is no statement of facts in the record. The only question that can be reviewed, in the light of this record, is a bill of exceptions which insists that the verdict of the jury was arrived at by lot. Juror Burton testified that after the jury had agreed to find defendant guilty of murder in the second degree, they had trouble in agreeing on the term of punishment. Some of the jury wanted to give appellant five years, some seven, some ten, some fifteen, and some sixty years. It was finally proposed that each juror should put the number of years he wanted to give defendant down on paper and add the total, and then divide the result by twelve, and the result thus obtained should be the verdict of the jury. This was agreed to by all the jury, with this additional agreement, ⁵¹⁹ that no juror should put down on the paper a longer term than twenty-five years. After this agreement was made, each did put down the number of years he wanted to give defendant, ranging from five to twenty-five years. This was added up, and then divided by twelve, and the result was eighteen years and one month. After a little discussion, the one month was knocked off, and eighteen years was adopted as the verdict of the jury. Without having taken the ballot as we did, I do not believe we would have ever arrived at the verdict we did, or at any other verdict. The jurors who were willing to give five years only were the ones who were stubborn, and would not agree for a longer term than five years. The juror Story testified substantially as did Burton; and further states that he could not say

whether the jury would have reached a verdict in any other way or not; that up to the time of this agreement they had failed to arrive at a verdict, after discussing the case fully. The juror Starnes states the same, and says he does not think they would have reached a verdict in any other way. Foreman Callier testified to the same effect. Appended to the bill of exceptions presenting this matter is the following qualifications by the court: "That while the jury agreed to arrive at a verdict by lot, they did not abide by the agreement, but ultimately all agreed that the punishment should be eighteen years."

In the opinion of the writer the action of the court in overruling the motion for new trial on this ground is supported by *McAnally v. State*, 57 S. W. 832; *Barton v. State*, 34 Tex. Cr. Rep. 613, 31 S. W. 671; *Pruitt v. State*, 30 Tex. Cr. App. 156. However, a majority of the court hold that the judgment should be reversed under the authority of *Driver v. State*, 37 Tex. Cr. Rep. 160, 38 S. W. 1020. In that case the jury agreed to ascertain the verdict as to the penalty by each juror setting down on paper the number of years he was in favor of giving defendant in the penitentiary, and then add up the same, divide by twelve, and the quotient should fix the number of years to be given defendant in the penitentiary. And it was further agreed to be bound by and abide by this result; and the verdict returned was for the round number of years thus ascertained, leaving off the fraction of months over. It was held on motion for new trial that the burden was on the state to show that this agreement had been subsequently abandoned, and that the verdict was not in conformity with the agreement, before it could be upheld as returned. And the fact that after the number of years of punishment had been ascertained two of the jurors refused to abide the result, but after several hours' deliberation did agree and the same verdict was returned by all the jurors, there being no evidence that the original agreement had ever been abandoned, the verdict was contrary to law, and a new trial should have been granted. Under the authority of *Driver's case*, the court holds that the verdict in this instance was arrived at by lot. The judgment is accordingly reversed and the cause remanded.

On Quotient Verdicts in criminal cases, see Williams v. State, 15 Lea. 129, 54 Am. Rep. 404; *Wood v. State*, 13 Tex. App. 135, 44 Am. Rep. 701; *State v. Harper*, 101 N. C. 761, 9 Am. St. Rep. 46; and on such

verdicts in civil cases, see *Ponca v. Crawford*, 23 Neb. 662, 8 Am. St. Rep. 144; *Dixon v. Plums*, 98 Cal. 384, 35 Am. St. Rep. 180; *Gordon v. Trevarthan*, 13 Mont. 387, 40 Am. St. Rep. 452; *Sullens v. Chicago etc. Ry. Co.*, 74 Iowa, 659, 7 Am. St. Rep. 501; *Watson v. Reed*, 15 Wash. 440, 55 Am. St. Rep. 899; *Ottawa v. Gilliland*, 63 Kan. 165, 88 Am. St. Rep. 232; *Conover v. Nehr-Ross Co.*, 38 Wash. 172, 107 Am. St. Rep. 841.

HUCKABY v. STATE.

[45 Tex. Cr. Rep. 577, 78 S. W. 942.]

FORGERY—Indictment.—In an indictment for forgery, where there is no similarity of names, it is not necessary to allege that the forged instrument purports to be the act of another than the accused. (p. 977.)

FORGERY—Indictment—Explanatory Averments.—If the instrument alleged to have been forged does not show on its face that it imports an obligation in regard to money or property, but is the subject of forgery, and can be shown to be such by extrinsic averments, these extrinsic or explanatory averments must be alleged in the indictment. (p. 977.)

FORGERY—Wills—Indictment.—Although a will cannot be the subject of forgery during the lifetime of the purported declarant, it may become the subject of a prosecution for knowingly having come into the possession of the accused with intent to pass it as true after the declarant's death, and in such prosecution the death of such declarant must be alleged in the indictment and proved at the trial. (p. 979.)

FORGERY.—Wills are not the subject of forgery during the lifetime of the purported declarant. (p. 979.)

H. B. Daviss, for the appellant.

H. Martin, assistant attorney general, for the state.

580 HENDERSON, J. Appellant was convicted of uttering or passing as true a forged instrument in writing, and his punishment assessed at two years' confinement in the penitentiary; hence this appeal.

Appellant made a motion to quash the indictment on several grounds, which was overruled by the court. In order to present the matter, we will set out the charging part of the second count, under which appellant was convicted, to wit: That Henry Huckaby, on or about October 21, 1898, "did then and there unlawfully and knowingly and fraudulently have in his possession, with intent to use and pass the same as true, a false and forged instrument in writing, to the tenor

following: 'In the name of God, Amen. I, Bry Huckaby, of Dew, Texas, Freestone County, do hereby make, publish and declare this my last will and testament, hereby revoking any and all wills heretofore made by me. First. I direct my executors hereinafter named, to pay my funeral expenses, and all my just debts and liabilities as soon as can be done after my decease. Second. I give and bequeath to my son, Bry, and daughter Mary's heirs, executors, administrators and assigns forever, two-thirds of my real estate, except my grandson Henry, who is exempted. Third. I give and bequeath to my wife Easter, the remaining one-third of my real estate, the same to contain my dwelling house and the improvements around the same. Fourth. I further agree to give my wife Easter all of my personal property after my debts and other liabilities are paid. Fifth. I hereby appoint my wife, Easter, executrix, and my son, Bry, executor, of this my last will and testament. In witness whereof I have hereunto subscribed my name and affix my seal, this 2nd of July, 1897.

his

Bry X Huckaby. (Seal.) Signed, sealed and published
mark

and declared by the said Bry Huckaby, as and for his last will and testament, of us, who at his request in the presence of him and of each other have hereunto subscribed our names as witnesses. Mary Wilson of Corsicana, Texas. H. E. Huckaby, Luna, Texas.' Against the peace and dignity of the state."

Appellant insists that the indictment should have been quashed, because it is not alleged in said count that it purported to be the act of Bry Huckaby; that is, the act of another person than appellant. As a matter of fact there is no such allegation in the second count, and we are not authorized to bring this allegation forward from the first count. In *Anderson v. State*, 20 Tex. Cr. App. 595, which was a case of forgery, the court appears to hold that this averment is necessary. However, in that case the allegation was contained in the indictment, and the question was not before the court. *Rhudy's Case*, 42 Tex. Cr. Rep. 225, 58 S. W. 1007, follows the above case; but holds that while it is necessary to allege that the act purported to be that of another than defendant, it is not necessary to state the name of such other person alleged to be forged. In ⁵⁸¹ *Webb v. State*, 39 Tex. Cr. Rep. 534, 47 S. W. 356, the court went still further and

held in a forgery case, that the indictment need not allege that it was the act of another where the instrument was set out in the indictment according to its tenor. This case cites *Thurman v. State*, 25 Tex. Cr. App. 366, which is authority for holding, in a charge for uttering a forged instrument, it is not necessary to allege that it purports to be the act of another, where the instrument alleged to be forged was set out according to its tenor. From this statement it seems that the authorities on this subject are in a state of some confusion. We believe under our system of pleading that the last two cases announce the correct doctrine. Of course, there might be a case where there was similarity of names between that of the alleged forger and the party whose name is charged to have been forged; and in such case it might be necessary to allege that the forged instrument purporting to be the act of another than the party charged with forging the instrument. We accordingly hold that the indictment is good as to this objection.

Appellant also questions the indictment because it does not import an obligation on its face, and if it was the subject of forgery this should be shown by extrinsic and explanatory averments. It is the rule in this state, where the instrument does not show on its face that it imports an obligation in regard to money or property, but is the subject of forgery, and can be shown to be such by extrinsic averments, that these extrinsic or explanatory averments must be alleged: See *Cagle v. State*, 39 Tex. Cr. Rep. 109, 44 S. W. 1027; *Womble v. State*, 96 Tex. Cr. Rep. 24, 44 S. W. 827; *Crawford v. State*, 40 Tex. Cr. Rep. 344, 50 S. W. 378; *Colter v. State*, 40 Tex. Cr. Rep. 165, 40 S. W. 379; *Black v. State*, 42 Tex. Cr. Rep. 585, 61 S. W. 478. The instrument here, which is charged to be the subject of forgery, is not one of the ordinary instruments used in commercial transactions, such as a note, draft, bond, contract, etc., but purports to be the will of Bry Huckaby. Before this paper could have the effect to create or discharge a pecuniary obligation, or transfer or in any manner affect any property, certain facts would have to be proven; that is, that the alleged testator was possessed of an estate subject to be devised by will. And we also believe, as will be shown hereafter, it would have to be proven that he was dead at the time of the alleged forgery. None of these matters are alleged in the indictment. We believe it was defective on this account. We understand it to be conceded in the statement of

facts that the testator was alive at the time of the alleged forgery; nor is there anything in the agreement that he has since died. The agreement appears to indicate that he was still living at the time of the prosecution.

Appellant insists that, under these circumstances, the alleged instrument purporting to be the last will of Bry Huckaby could not be the subject of forgery, and per consequence could not be held for passing or uttering as a forged instrument. In *Johnson v. State*, 9 Tex. Cr. App. 249, it is held that although an instrument may not be the subject of forgery at the time it is made, yet if subsequently a law is passed which makes such an instrument forgery, and it is subsequently uttered, a prosecution ⁵⁸² for passing the same as true may be sustained. If it be conceded that this decision announces a sound doctrine, and is applicable to a case of this character, then it would follow, if the will could not be forged during the lifetime of Bry Huckaby, but it might become the subject of prosecution for knowingly having same in possession with intent to pass it as true after his death; in such case the death of said Huckaby must be alleged and proven in order to sustain a conviction. The death of said Huckaby is not shown in the agreement, and consequently there can be no illegal uttering of the will, much less having same in possession, with intent to utter, as we believe no one will contend that the will had any legal efficacy to affect property during the lifetime of the alleged testator, and could only affect property under certain formalities after his death: Rev. Civ. Stats., arts. 53, 54, 55, 1842, 1884, 1904, 1905, 1906; 1907. The above-cited articles show statutory formalities which must be observed in order to give a will any legal efficacy or standing for the purpose of transferring or affecting property.

However, the most important question raised by appellant is that, under our statute, a will is not the subject of forgery during the life of the declarant. In England, as we understand the authorities, it is distinctly held that forgery can be committed by falsely making the will of a living person: See 2 Russell on Crimes, 748. We are cited to a number of cases in the text-writers which support this view; but the cases cited are mostly, if not all, English cases. These cases would only be persuasive if under a definition of forgery similar to our statutory definitions of that offense. But, as we understand the English or common-law definition of forgery, the instrument must be such that, if genuine, it would be ap-

parently of some legal efficacy (2 Bishop's Criminal Law, sec. 523); and it is not necessary, as under our statute, that the instrument must be such that, if the same were true, it would have created, diminished, discharged or defeated any pecuniary obligation, or would have transferred or in any manner have affected any property whatever; the injury intended must be such as to affect one pecuniarily or in relation to his property: See Pen. Code, arts. 36, 37. It will be noted that all the provisions of our statute are used in the past and the present tenses; that is, the language "would have created," is, "would have transferred," and do not depend on some future contingency in order to give them legal efficacy. Now, can it be held that the will, if genuine, during the lifetime of the testator would have the effect, in presenti, to create or discharge any pecuniary obligation, or to transfer or affect any property whatever. It is essentially ambulatory during the lifetime of the declarant, subject to his revocation at any time, and cannot possibly take effect until his death. Being such an instrument we hold that it is not the subject of forgery, where the making of the instrument occurs during the life of the testator. It is hardly necessary to observe that all our offenses are purely statutory; and the statute must clearly define and cover the offense before a prosecution can be maintained. We cannot have recourse to the common law to make out an offense: *Rogers v. State*, 8 Tex. Cr. App. 400. As ⁵⁸³ in our forgery law defects in the past have been discovered and amended by the legislature, so as to embrace matters not theretofore criminal, we here call the attention of the legislature to this matter in order that the statute with reference to forgery may be amended so as to embrace wills, if deemed necessary.

For the errors discussed, the judgment is reversed and the prosecution ordered dismissed.

Mr. Justice Brooks Dissented and expressed the opinion that both at common law and under a proper construction of the statutes of Texas, the will of a living person may be the subject of forgery. "Clearly, when the legislature enacted these statutes they had in contemplation the forgery of wills as well as any other instrument that would change or affect property. This was the common law; and in the light of such construction said statutes were evidently adopted. In view of this fact, I think the clear legislative intent, as well as the words of these articles under consideration, make it imperative on this court to hold that the forgery of a will of a person living is forgery within the contemplation of our law. In my opin-

ion the indictment is properly drawn, and charges an offense against the laws of this state; and no error being manifested in the record, I believe the judgment should be affirmed."

What Instruments may be the Subject of Forgery are discussed in the monographic note to *Hendricks v. State*, 8 Am. St. Rep. 466-470. It has been held that forgery may be committed of the will of a living person: See the monographic note to *Arnold v. Cost*, 22 Am. Dec. 319.

GLASS v. STATE.

[45 Tex. Cr. Rep. 605, 78 S. W. 1068.]

COUNTERFEIT COIN—Passing—Evidence.—On a prosecution for knowingly passing as true a counterfeit coin, if the evidence shows that the imitation or resemblance is such as is capable of imposing on persons of ordinary observation, exercising ordinary care, it is sufficient to convict. The evidence is also sufficient if it shows that the alleged counterfeit coin bears such resemblance to the genuine as to be calculated to deceive an honest, sensible, and unsuspecting man of ordinary observation and care dealing with men supposed to be honest. (p. 982.)

COUNTERFEIT COIN—Passing.—One who passes as a dime a cent piece merely covered with a wash, giving it the color of a dime, may be convicted of passing a counterfeit coin, provided the evidence shows such a resemblance of the cent to a dime as is calculated to impose its genuineness on a person of ordinary observation exercising ordinary care. (p. 982.)

Douglass & Shwitleff, for the appellant.

H. Martin, assistant attorney general, C. F. Greenwood, county attorney, and B. Y. Cummings, assistant county attorney, for the state.

606 DAVIDSON, P. J. Appellant was convicted of knowingly passing as true a counterfeit coin, the penalty assessed being two years in the penitentiary. The proof shows that it was a copper cent, changed by some chemical process to resemble a ten cent piece; that he passed it to T. H. Forrester, under the following circumstances: That defendant and Jim Johnson, on January 31, 1903, were together. Defendant went into the store of Forrester, in the early part of that night; stated he wanted change for a dime, and handed Forrester what he took to be a dime. He gave him two nickels in exchange for the dime. Forrester turned to place the money in the drawer, and noticed as he did so that defendant went out of the house in a run. He immediately looked at the money defendant had given him, and saw it was a

copper cent, the color of it being changed so as to look like a dime. Defendant called it a dime, and asked for change for a dime. Immediately upon discovering the cheat, Forrester went to the sidewalk and hallooed to defendant two or three times to stop. He finally did so, and came back, meeting Forrester. Forrester told him that the dime he had given him was a copper cent, and wanted him to return his money. Appellant immediately returned the two nickels, and Forrester gave appellant the copper. Appellant looked at the copper and said, "I am a son of a bitch." The copper he gave Forrester "was colored like silver and looked like a dime." The sheriff went in pursuit of defendant and Johnson, and finally arrested them, and found some copper cents on them. "The coppers were bright, like silver," but the bright appearance had partially rubbed off. They resembled dimes, and did not look as much like them as they had before they had been rubbed off. "I got a bottle of stuff that Mr. Treadwell turned over to us and turned it over to the county attorney. I had some experience with the liquid in the bottle Mr. Treadwell had, in applying it to copper cents. I put it on them, and then rubbed the copper with a piece of paper, and it turned them the color of a dime, and made the coppers look like a new silver dime. I ⁶⁰⁷ treated the coppers with the stuff several times, and it had the same effect every time. Don't know what the stuff was, but it looked like quicksilver. On cross-examination this witness says there is a difference in color between a dime and one cent piece. A copper is yellow and a little larger than a dime. There is a difference between the edge of a copper and a dime. A dime is milled on the edges, and has a woman's head on one side, and reads 'one dime' on the other side; and a copper cent has an Indian's head on it. The reading matter on the copper was not changed. When the fluid was applied to the coppers it made them look like dimes. After that stuff was applied to the coppers it is a fact that you could detect they were not dimes if you examined them closely."

It is contended this evidence is not sufficient to support the judgment of conviction. Article 557 of the Penal Code provides: "He is guilty of counterfeiting who makes, in the semblance of true gold or silver coin, any coin of whatever denomination, having in its composition a less proportion of the precious metal of which the true coin intended to be

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impose upon any witness who is witness to the crime and the evidence which I would be able to give under the statute.

No error appearing in the transcript of the trial.

To sustain a conviction of murder in the first degree by imitation or maintenance of a false identity, the evidence must be on persons of ordinary intelligence. *People v. ...*
75 Am. Dec. 75.

CRIMINAL LAW - EVIDENCE

[98 Cal. 2d 600, 35 Cal. Rptr. 100, 215 P.2d 100]

INCEST - Accusation. - A charge of incest is not a crime of a person accused of incest with his wife or daughter, but is a crime of a person accused of incest with his wife or daughter. *People v. ...*
into such acts with the same person as the person accused. (p. 600.)

INCEST - Evidence of other acts. - Evidence of other acts of incest is not admissible to prove the commission of the offense. *People v. ...*
than those charged in the indictment.

CRIMINAL LAW - Evidence. - Evidence of other acts of incest is not admissible to prove the commission of the offense. *People v. ...*
must be introduced in evidence. *People v. ...*
in such case was inadmissible. *People v. ...*
CRIMINAL LAW - Prosecution. - A prosecution for incest is not proper in such case. *People v. ...*
to do so, and the fact that the prosecution is not proper against the person charged.

and Moore. *People v. ...*

in, consistent with the facts of the case.

1955, P. 2. *People v. ...*

accused being convicted of the crime.

of five years. *People v. ...*

of appellant. *People v. ...*

as an accessory. *People v. ...*

be determined by the jury. *People v. ...*

under the law. *People v. ...*

interference with the jury. *People v. ...*

would be an error. *People v. ...*

she did not do so. *People v. ...*

enter into it for the purpose of the crime. *People v. ...*

and willing. *People v. ...*

and whatever is necessary to the commission of the crime.

imitated is composed, than is contained in such true coin, with intent that the same should be passed in this state or elsewhere." Article 558: "He is also guilty of counterfeiting who, with like intent, alters any coin of lower value so as to make it resemble coin of higher value." Article 559: "The resemblance between the true and the false coin need not be perfect to constitute the offense of counterfeiting." Article 561 provides the punishment against those who shall pass or offer to pass as true, or bring into this state, with intent to pass as true, any counterfeit coin, knowing the same to be counterfeit, etc. We believe the evidence is sufficient to bring it within the provisions of the statutes cited. If the imitation or resemblance is such as is capable of imposing on persons of ordinary observation, this would be sufficient; and it is further sufficient if the alleged counterfeit coin bears such resemblance or likeness to the genuine as to be calculated to deceive an honest, sensible and unsuspecting man of ordinary observation and care dealing with men supposed to be honest. This resemblance of the counterfeit coin to the genuine must be sufficiently strong to deceive persons exercising ordinary care: 7 Am. & Eng. Ency. of Law, 2d ed., 877; United States v. Morrow, 4 Wash. (U. S.) 733; United States v. Mitchell, 1 Baldw. (U. S.) 366; United States v. Abrams, 18 Fed. 823, 21 Blatchf. 553; Dement v. State, 2 Head (Tenn.), 505, 75 Am. Dec. 747; United States v. Sprague, 48 Fed. 828; United States v. Hopkins, 26 Fed. 443. It is not necessary that the counterfeit be exact in its similitude. It is enough that the similarity in the likeness is sufficient to deceive a man of ordinary observation: See, also, United States v. Ottey, 31 Fed. 68. The intent of appellant to defraud is placed beyond any question. The coin was passed at night and under circumstances that led the witness Forrester to believe it was a dime; it had the appearance of a dime, and was passed by appellant as a dime. Under these circumstances it was sufficient to deceive any honest, unsuspecting man of ordinary observation, dealing with another supposed to be honest. Under the circumstances detailed in the testimony it had the effect and ^{was} purpose intended by appellant. Our statute has expressly provided that the resemblance between the true and the false need not be perfect to constitute the offense of counterfeiting. So under that statute we believe the evidence is sufficient. While it was not a true representation of a dime, it was sufficient to

impose upon any ordinary man in ordinary transactions; and the evidence brings it within the rule set out in our statute.

No error appearing in the record, the judgment is affirmed.

To Sustain a Conviction for passing a counterfeit bank note, the imitation or resemblance must be such as to be capable of imposing on persons of ordinary observation: *Dement v. State*, 2 Head, 505, 75 Am. Dec. 747.

CLIFTON v. STATE.

[46 Tex. Cr. Rep. 18, 79 S. W. 824.]

INCEST—Accomplice.—A niece who is also the stepdaughter of a person accused of incest with her, and who did not oppose the acts of carnal intercourse, is an accomplice, although she did not enter into such acts with the same desire, intent and purpose, as did the accused. (p. 984.)

INCEST—Evidence of Other Acts of Intercourse.—Incest is not a continuous offense and each act of incestuous intercourse constitutes a different offense. Hence, evidence of other acts of incestuous intercourse than those charged in the indictment, is not admissible. (p. 986.)

CRIMINAL LAW—Evidence.—The acts and conduct of third persons cannot be introduced in evidence against the accused, unless he has been in some way connected therewith. (p. 986.)

CRIMINAL LAW—Production of Witnesses.—A person accused of crime is not required to issue process for witnesses unless he desires to do so, and the fact that he does not cannot be used as a criminative fact against him. (p. 987.)

R. Lyles and Moore, Hearrell & Moore, for the appellant.

H. Martin, assistant attorney general, for the state.

¹⁹ DAVIDSON, P. J. This is a conviction of incest, the punishment assessed being confinement in the penitentiary for a term ²⁰ of five years. The prosecutrix is the niece and stepdaughter of appellant. With reference to the attitude of the prosecutrix as an accomplice, the court left it as a matter of fact to be determined by the jury; and the criterion upon which it turned under the charge was if she entered into the sexual intercourse with the same intent which actuated defendant, she would be an accomplice. This she denied, and affirmed that she did not do so. On this point she testified: "I did not enter into it for the same purpose he did. I was not desirous and willing for it. I just felt I was under his influence and whatever he would do would be all

right, until I began to really find out the wrong of it. I was under his influence and control. That continued every week or two along that way up to January of this year. . . . Speaking of his fondling me when I was quite young with his hand. . . . That was changed to another method when I was about 13, or 14 or 12. Then he would perform carnal intercourse. Sometimes it would be once or twice a week. I am twenty-years old. I have a good common school education, and I have clerked in two stores." It is contended that the criterion given by the charge is entirely too restrictive, and not correct under the circumstances of this case; and appellant cites in support of this proposition *Tate v. State*, 8 Tex. Ct. Rep. 741, 77 S. W. 793; *Caesar v. State* (Tex. Cr. Rep.), 29 S. W. 785; *Dodson v. State*, 24 Tex. Cr. App. 514, 6 S. W. 548; *Ratliff v. State* (Tex. Cr. Rep.), 60 S. W. 666. These cases are authority for the statement that the prosecutrix was an accomplice. The facts in each of those cases, except the *Tate* case, were stronger in favor of prosecutrix not being an accomplice than in this case. The *Tate* case is very similar to this case. It was held in the *Tate* case, under the circumstances developed on that trial, that the charge here complained of was too restrictive. Prosecutrix denies that she engaged in the sexual intercourse with the same purpose and intent; that she was neither desirous nor willing to it; that she did so because she was under his influence, and whatever he did would be all right. Now, the jury evidently understood from the charge that unless she engaged in the intercourse with the same desire as did appellant, she would not be an accomplice. This is not the true criterion under the facts of this case. If she submitted to his embraces, as she says, at intervals for a considerable period of time and kept silent, she would nevertheless be an accomplice, although she did not willingly enter into it with the same desire as did appellant; that she did so is apparent not only from what has already been said but from other portions of her testimony. She says: "I never made any complaint to my mother or anyone else about Clifton's intercourse with me. Before I went to Breckenridge I did deny to my mother that I had missed my period at that time. Mother and I talked about it. She got some medicine for me for it. She asked me then whether or not I had been guilty of an imprudent act of this kind. I denied it to her. I just said nobody had done so. I did say no man has ever

touchd me. But I wanted to protect him. I told her I never had connection with ²¹ anybody, to shield him, and keep our home together. . . . He did become willing for me to have company this year, since the latter part of January; it was along in the spring. When this occurred in January he never attempted to have intercourse with me after that. What caused him to stop was that I had made up my mind that I would not allow it any more. I did not say anything to him. We just had hard feelings after that. The reason there was no more of it was I just simply would not allow it." These extracts are copied simply to demonstrate that she was an accomplice. Under the facts, the court should have gone further in the charge and informed the jury, if in fact she did not enter into it with the same desire, intent and purpose as did appellant, yet if these matters occurred as she testified, and she remained silent, this would constitute her an accomplice. If she did not oppose the act she would be an accomplice. We are not laying down a form of charge. In fact, as stated in some of the cited cases, the court instructed the jury that the witness was an accomplice. It has always been held to be the safer practice, where the facts are unquestioned as to the relation of the witness to the crime as an accomplice, to so inform the jury. Where this occurs, there is no question for the jury to solve. The law constitutes the witness under such circumstances an accomplice, and there must be the necessary corroboration. Upon the motion for new trial the court would have no option but to hold her an accomplice; nor would this court on appeal. That under this character of case the court should have instructed the jury that she was an accomplice: See *Sessions v. State*, 37 Tex. Cr. Rep. 58, 38 S. W. 605; *Armstrong v. State*, 33 Tex. Cr. Rep. 421, 26 S. W. 829; *Wilkerson v. State* (Tex. Cr. Rep.), 57 S. W. 956; *Tate v. State*, 8 Tex. Ct. Rep. 741, 77 S. W. 793.

While prosecuting witness was testifying, she stated that appellant had sexual intercourse with her about the 10th of November, 1902. She was then permitted to further testify that the last act was about the middle of January, 1903, with intervening acts. Various objections were urged to the introduction of the subsequent acts, among others, that there were other pending indictments charging incest between appellant and herself, numbered 7129, 7130, 7131, and 7132 on the docket of the district court of Milam county. This is

shown as a matter of fact, and the indictments are made a part of the bill of exceptions. Testimony of the same character was also admitted, as shown by another bill of exceptions. She was also permitted to testify that appellant had slapped her in the mouth and hit her once or twice with his fist; and that had no connection with the acts of sexual intercourse between them. It would arise about other conduct of hers with which he found fault. She was also permitted to testify that she quit home and boarded at Mrs. Arnold's, because appellant forbid her going to the store and working at night, informing her if she did so she could not return home; and that this was in no way connected with these acts of sexual intercourse. All this testimony should have been excluded: ²² Ball v. State, 44 Tex. Cr. Rep. 489, 72 S. W. 284; Smith v. State (Tex. Cr. Rep.), 73 S. W. 401; Barnett v. State, 44 Tex. Cr. Rep. 592, 100 Am. St. Rep. 873, 73 S. W. 399. While the above were rape cases, the question involved is practically the same. There are no reasons which exist in regard to the admission of other acts of intercourse in rape that would not reasonably apply to the crime of incest. Incest is not a continuous offense; each act of incestuous intercourse constitutes a different offense. The state relies upon Burnett's Case, 32 Tex. Cr. Rep. 86, 22 S. W. 47. The opinion in that case is authority for the contention of the state. The cases cited supra are in conflict with Burnett's case, and therefore overrule it. Upon another trial this testimony should be rejected. These acts in no way tend to develop the *res gestae*, show intent, or connect defendant with the case on trial. The witness testifies definitely to the act of intercourse.

Prosecutrix testified that Una Clifton, her sister, was about seventeen years of age; and that during the month of November, and throughout all the time defendant had been copulating with her, Una Clifton slept in the same bed with her. The sheriff was then introduced and stated that he arrested appellant in Stephens county in September, 1903, and since said arrest he had held him in confinement in jail in Stephens and Milam counties. The state then asked the question: "Have you had process sued out for Una Clifton, as a witness in this case?" Appellant objected for various reasons, which were overruled; and the witness answered, "Yes, sir; I sent process for this witness to Dallas, Brown, and Runnels counties, and made one trip to Runnels county

myself, and have used every means in my power to find Una Clifton, and produce her as a witness upon the trial of this cause, and have been wholly unable to find her." This testimony was clearly inadmissible. The acts and conduct of others cannot be introduced against the accused, unless the accused has been in some way connected with such acts and conduct: See authorities collated in *Burnett v. State* and *Lowden v. State*, just decided.

The state was also permitted to prove by the district clerk, James Hooks, that defendant had never made application for a subpoena for Una Clifton or Mamie Clifton. This testimony should have been excluded. In fact, if this had been a question to be investigated, the bill shows that the state had issued process, and this would have been sufficient as to diligence by appellant on application for continuance. Appellant is not required to issue process for witnesses, unless he desired to do so; and it is not a criminative fact against him that he does not. It occurs to us that Una Clifton was a necessary witness in behalf of the state, if the testimony of the accomplice is true. Conviction could not be predicated upon her evidence alone, and she places Una Clifton in the same room and bed with her while the incestuous acts were being indulged. If Una Clifton was in the bed at the time of these incestuous acts, she must have had cognizance of the intercourse, and was a very material witness to corroborate her sister.

²³ We do not enter into a discussion of the sufficiency of the evidence. The case may develop differently upon another trial. There are some other questions suggested for revision, which we deem unnecessary to discuss; but for the errors mentioned the judgment is reversed and the cause remanded.

As to Whether the Woman is to be Regarded an accomplice in the crime of incest, see the monographic note to Stone v. State, 98 Am. St. Rep. 178.

When Evidence of Other Crimes is admissible in criminal prosecutions is the subject of a recent extended note to Sykes v. State, 105 Am. St. Rep. 976-1006.

STAYTON v. STATE.

[46 Tex. Cr. Rep. 205, 78 S. W. 1071.]

SLANDER—Contemporaneous Statements.—A statement made by one charged with slander, if made at the time of, or shortly before or after the alleged slander, although not exactly the same as the one set out in the indictment, is admissible to show with what intent the slanderous words set out in the indictment may have been uttered; but the jury must be instructed that this is the only purpose for which such statement can be introduced. (p. 989.)

SLANDER—Privileged Communications.—A communication which would otherwise be slanderous and actionable is privileged if made in good faith upon a matter involving an interest or duty of the person making it, though that duty is not strictly legal, but an imperfect obligation to a person having a corresponding interest or duty. (p. 989.)

SLANDER—Privileged Communications.—A statement made by a husband to his neighbor that he was going away, and, at the request of the neighbor, giving as his reason therefor, the infidelity of his wife, is not privileged, as there is no duty or interest on the part of the husband requiring him to make such statement. (p. 990.)

SLANDER—Prosecution by State—Husband and Wife.—The state may maintain a prosecution against a husband for slander in imputing a want of chastity to his wife. (p. 990.)

SLANDER—Criminal Prosecution.—Malice is a necessary ingredient of the offense of criminal slander, and the jury must be instructed that unless it finds from the evidence that the imputation arising from the alleged slanderous words was wantonly and maliciously made, although it is shown to be false, it must acquit. (pp. 990, 991.)

R. F. Arnold, for the appellant.

H. Martin, assistant attorney general, for the state.

207 HENDERSON, J. Appellant was convicted of slander, and his punishment assessed at a fine of one hundred and fifty dollars; hence this appeal.

Appellant insists that the court erred in permitting the state to prove the conversation had by defendant with witness Lamons, to the effect that in January or early in February, 1903, defendant came to him in his house and said to witness that he could not keep his cattle any longer; that witness must take them back; that defendant was compelled to leave the country and separate from his wife; that he had scriptural grounds for the separation. This was objected to by appellant because the statement of the witness was not the same as set out in the indictment, and was therefore inadmissible. If this statement was shown to have been made by appellant

contemporaneous with the allegation contained in the indictment, or shortly before or after the same was uttered, then there could be no question as to the admissibility of the testimony. This character of testimony would be admissible for the purpose of showing with what intent the slanderous words set out in the indictment may have been uttered: *Collins v. State*, 39 Tex. Cr. Rep. 30, 44 S. W. 846; *Whitehead v. State*, 39 Tex. Cr. Rep. 89, 45 S. W. 10. However, the bill shows that this statement was made to Lamons a considerable time after the alleged offense, and just shortly before the indictment was returned; so there may be some doubt as to its admissibility under these conditions. But if its admissibility be conceded, the court should have instructed the jury as to the purpose of its introduction, which was not done, and exception was reserved in the motion for new trial on account of the failure of the court to do this: See *Collins v. State*, 39 Tex. Cr. Rep. 30, 44 S. W. 846.

Appellant contends that the statement he made to Moore, and on which the charge of slander was predicated, was of the character of a privileged communication, and that the same was not slander. In this connection he refers us to *Hix v. State* (Tex. Cr. Rep.), 20 S. W. 550; *Davis v. State* (Tex. Cr. Rep.), 22 S. W. 979. These authorities are in point as showing that where it was reported to the father that the party had slandered his daughter, and such party when approached by the father made the statement to him of what he had heard, this was in the nature of a ²⁰⁸ duty and was privileged, and consequently could not be ground of prosecution for slander. In *Hix's* case, *supra*, *Ormsby v. Douglass*, 37 N. Y. 477, is cited. This excerpt is quoted approvingly by the court: "The rule is well settled that a communication which would otherwise be slanderous and actionable is privileged if made in good faith upon a matter involving an interest or duty of the party making it, though such duty be not strictly legal but an imperfect obligation to a person having a corresponding interest or duty." The question here is as to the applicability of said legal principle. Here the facts show that appellant had resolved to leave his wife and approached Moore for the purpose of getting him to take charge of his children. He did not tell Moore of the alleged infidelity of his wife on the first occasion, but on the second day, when he again called on Moore in regard to his children, Moore inquired the reason for wanting to leave his children with

him, and why he was leaving the country. And he then told him of the infidelity of his wife; that he had caught her and one Farmer in the act of illicit intercourse as alleged in the indictment. And in that connection witness stated he appeared grieved, and asked him not to say anything about it. Unquestionably appellant owed no legal duty to Moore that would authorize this statement to him. Nor do we believe this case comes within the rule laid down in the two cases above cited.

There the statement was made to the father of the alleged slandered party, in regard to rumors that had reached him in connection with the defendant, and defendant was called on to explain the matter; and in order to justify himself defendant told the father of the slandered party what he had heard. Here Moore had no right to make any such demand of appellant; nor was it necessary that appellant should explain to Moore the reason for leaving his children with him. We accordingly hold that the communication was not privileged under the authorities above cited. As to whether or not the state can maintain a prosecution for slander against the husband for imputing a want of chastity to his wife, so far as we are advised there is no direct decision on the question in this state. *Baxter v. State*, 34 Tex. Cr. Rep. 516. 53 Am. St. Rep. 720, 31 S. W. 394, was a case of this character; but the question was not made, and the judgment was reversed on other grounds. At common law one of the spouses could not maintain a civil suit against the other for slander: 18 Am. & Eng. Ency. of Law, p. 1053, subd. D. and authorities there cited. However, our statute on the subject is all-embracing, and does not exclude slanders perpetrated by the husband against the wife; and we accordingly hold, that such prosecution can be maintained.

In this case, it will be observed that malice, which is a necessary ingredient of the offense (see Pen. Code, art. 750; 18 Am. & Eng. Ency. of Law, p. 998) was proven by very slight testimony. The court gave a charge in accordance with the statute authorizing the jury to convict defendant if they believed the elements of the definitions of ²⁰⁹ malice were proven. He also defined the meaning of the words malice and wanton, as used in the charge. However, he did not give a charge the converse of the proposition. We believe, under the circumstances of this case, he should have given appellant's requested special instruction, to the effect that.

unless the jury find from the evidence that the imputation was maliciously and wantonly made, notwithstanding it was shown to be false, they should acquit defendant.

For the errors discussed the judgment is reversed and the cause remanded.

On the Question of Privileged Communications involved in the principal case, see the note to *Holmes v. Clisby*, 104 Am. St. Rep. 140; and the recent case of *Leonard v. Whetstone*, 34 Ind. App. 383, 107 Am. St. Rep. 252.

A Suit Against a Husband cannot be maintained by his wife, in the absence of an enabling statute, for a personal tort committed on her during coverture: *Bandfield v. Bandfield*, 117 Mich. 80, 72 Am. St. Rep. 550. Nor can an action be maintained against a father for a personal wrong to his minor child: *Roller v. Roller*, 37 Wash. 242, 107 Am. St. Rep. 805.

SMITH v. STATE.

[46 Tex. Cr. Rep. 267, 81 S. W. 936.]

MURDER—Conspiracy to Commit—Statements of Conspirators.

In a murder trial where a conspiracy between the accused and another to commit the crime is established, the acts, declarations, and threats of the co-conspirators prior to the killing, though made in the absence of the defendant, before the conspiracy was formed, are admissible against the defendant to show the animus and purpose actuating defendant in the commission of the crime. (p. 999.)

CONSPIRACY—Time of Entering.—On a trial for crime, if a conspiracy to commit it is established, it makes no difference at what time anyone entered into such conspiracy, as everyone who enters into the common purpose and design is deemed a party to the act which has been done before by the others, and to every other act which may afterward be done by any of the others in furtherance of such common design. (p. 1000.)

WITNESSES—Refreshing Memory.—A witness for the prosecution in a criminal case may have his memory refreshed by having read to him a prior statement made and signed by him in the same case before the grand jury. (p. 1001.)

CRIMINAL LAW—Evidence of Experiments.—In the absence of evidence to show that a person accused of murder knew of the resisting power of sacks of grain to bullets fired therein and of the declarations of any of his codefendants indicating that they knew of such power of resistance, testimony of a witness that after the homicide he fired into one of such sacks of grain, and that the bullets did not go through them, is inadmissible. (p. 1001.)

HOMICIDE—Evidence.—If, prior to a homicide, a judgment of foreclosure has been obtained against the accused, and execution thereon suspended until default in the payment of certain interest thereon

to the purchaser thereof, the prosecution is entitled to show that such contingency had happened by the introduction of certain instruments in writing showing that the order of sale and writ of possession under such judgment, and which the deceased attempted to enforce, were not prematurely issued. (p. 1004.)

CRIMINAL LAW—Advice of Counsel as Defense.—Advice of counsel furnishes no excuse to his client for violating the law, and cannot be relied upon as a defense in either a civil or criminal action. (p. 1007.)

CRIMINAL LAW—Evidence of Intent.—If the prosecution proposes to show a criminal intent against the accused in procuring firearms, he is entitled to show that his criminal intent, if any, was against another and different person than the one killed. (p. 1009.)

CRIMINAL LAW—Evidence—Intent.—While a person accused and on trial for crime cannot introduce the opinion of attorneys as to his rights in the premises, he may explain why he procured firearms, and what he intended to do with them. (p. 1009.)

HOMICIDE—Evidence—Self-serving Declarations.—Declarations and exclamations of the defendant or his co-conspirator, made long after the commission of the homicide, are not *res gestae*, but self-serving, and hence not admissible in evidence. (p. 1009.)

HOMICIDE—Evidence.—If a person is accused of killing an officer while the latter was in the performance of his legal duty in attempting to evict the accused from premises claimed by him as his homestead, evidence that he had, in writing, designated another and different parcel of land as his homestead is admissible to show a valid foreclosure on the land where the difficulty occurred. (p. 1010.)

HOMICIDE—Malice Toward Particular Person Killed.—If several persons accused of murder of an officer conspired to resist any officer in the execution of a writ of possession, it is immaterial, as affecting their guilt, whether they had any personal animosity or cherished any malice against the particular officer killed in an attempt to execute such writ. (p. 1010.)

WRIT OF POSSESSION, When Functus Officio.—If a writ of possession is issued, the sheriff has the right to serve it as many times as is necessary to remove the defendant or one claiming under him until the day he is required to return the writ, and it does not become *functus officio* until the day required for its return. (p. 1010.)

CONSPIRACY TO MURDER—Acts and Declarations of Conspirators.—On the trial for murder by conspirators, the evidence must show beyond a reasonable doubt that the conspiracy was formed prior to the killing, otherwise the acts and declarations of the conspirators cannot be considered by the jury. (p. 1011.)

CONSPIRACY—Acts and Declarations of conspirators before the conspiracy was formed, are admissible in evidence only to illustrate the motive, purpose and intent of the co-conspirators forming the conspiracy. (p. 1011.)

CONSPIRACY—Husband and Wife as Co-conspirators.—Husband and wife may be co-conspirators to commit murder, and the acts and declarations of either after such conspiracy is formed are admissible in evidence against the other. (p. 1012.)

J. B. Durrett and R. B. Seay, for the appellant.

H. Martin, assistant attorney general, for the state.

²⁷⁰ BROOKS, J. Appellant, Catherine M. Smith, was jointly indicted with T. E. Smith (her husband) and Addison Smith (her son) for the murder of I. B. Grubbs, deputy sheriff, on the 6th of August, 1903. Appellant was granted a severance, and upon trial was convicted, ²⁷¹ her punishment being assessed at twenty-five years in the penitentiary for murder in the second degree.

The evidence adduced is substantially as follows: Appellant and her husband were joint defendants in a civil suit foreclosing a mortgage lien upon their property, in favor of the Union Trust Company. After the mortgage was foreclosed, one Brooker had the judgment transferred to himself. Subsequently the property, so far as the interest of defendant and her husband was concerned, was transferred to A. J. Harris, in trust, to secure a loan to pay off the foreclosed mortgage. Harris joined with defendant and husband, executing to said Brooker a deed of trust on the growing crops for the year 1903, stipulating that the mortgage lien should not be affected in any manner whatever, and on failure to comply with the stipulations of said last instrument, Brooker had the right to foreclose the mortgage as per the terms of the judgment. Harris, defendant and husband failing to comply with the terms of the instrument they executed to Brooker, a writ was issued on the judgment, properly advertised, sale made, and Brewster Brothers bought the land upon which the homicide occurred. On July 16th, the deed having been made to the said Brewsters, or rather to their vendee, Hall, Brewster had the officers Ike Grubbs and J. E. Sparks, deputy sheriffs, to go to the premises and put appellant and husband off of the same, being for the benefit of said Brewsters and Hall. The officers left some effects upon the premises—a hog, some grain in the shock, chickens, and perhaps a few other articles. This act was performed by deceased (Ike Grubbs) and J. E. Sparks, deputy sheriffs of Bell County. On the next day after the Smiths were ousted of the premises, they returned and took possession of the house upon the land in controversy. On August 6, 1903, deceased and Sparks returned to the premises to dispossess the Smiths by virtue of the same writ under which the former dispossession took place, having the writ in their possession at the time. Five wagons had preceded them to the home of defendants, and a short while after they arrived there the officers above named came up. While one of the officers was hitching the horses (they having come in a buggy) appellant's husband approached deceased, stat-

ing he came out "under a flag of truce." Deceased informed him he would have to dispossess him anew, and appellant's husband protested against this, saying he thought, and had been informed by his lawyers, that the writ of possession could not be used the second time for that purpose. After some parleying over this question, the officers got between appellant's husband and the house, and deceased (Grubbs) started toward the door of the cottage, the husband following and attempting to get into the house before the officers. Sparks caught T. E. Smith and detained him and at this juncture Grubbs entered the house. He opened the screen door and it slammed behind him. In a few moments a gunshot was heard, and then another shot. Sparks drew his pistol—T. E. Smith being behind ²⁷² him—and when he attempted to draw his pistol Smith grabbed it, and Sparks halloed, "Ike! Ike!" (being the given name of deceased officer). No answer came in reply to this call. At this juncture appellant and her son Addison came out on the gallery, appellant with a shotgun and her son with a rifle. Appellant remarked, "I told you I would fight for my home." She demanded of Sparks that he turn her husband loose. The husband replied, "Don't shoot; you will shoot me." After some colloquy between Sparks and T. E. Smith, Smith turned Sparks' pistol loose. Sparks asked appellant if Grubbs was dead. She replied that he was, and that he (Sparks) would be dead if he did not get away from there. The state proved by various witnesses that T. E. Smith, after the first dispossession, secured a magazine shotgun, another shotgun, and a 32-Winchester rifle. These were in the house at the time of the homicide. The house consisted of four rooms, fronted east. two rooms in front, and immediately back of these two more with a gallery in front nearly the whole length of the house. The killing occurred in the southeast room, which was about fourteen feet square. There was a door in this room, leading onto the gallery, and also a window opening on the gallery: a door in the south end of the room, and a door in the partition between the two front rooms. There was a table somewhere near the center of the room, and a bed in the southeast corner. To get to the window opening on the gallery it would be necessary to be on the bed. Sparks testified that he saw defendant, Addison Smith, on the bed just before the shooting.

The only eye-witness to the shooting were appellant and her son Addison. After detailing the coming of the officers and

other matters substantially as stated, Mrs. Smith testified: "When I saw the officers approaching, I said to Mr. Smith and Mr. Sanders, 'There are the officers now.' Mr. Sanders and Mr. Smith went down to where they were at a point southeast of the house a short distance. I sat down on the bed by my boy, and in a little while I noticed that Mr. Sanders was not with them any more; and I got up and went to the south window and looked out to see if I could see where he was. I then walked back to the door and saw Mr. Smith and the officers standing down by the front fence talking. I then walked back to the window and back again to the door. When I got back to the door I saw the officers running around keeping Mr. Smith from coming to the house. It looked to me like they were trying to catch him. This frightened me, and I ran to the east window so that I could see out of the east window from the bed; and when I got there I saw Mr. Sparks and Mr. Smith close up to the gallery, south of the steps, and Mr. Sparks had a pistol in his hand and Mr. Smith grabbed it. I thought at first it was a pair of handcuffs they were trying to put on him. In an instant I saw it was a pistol, and that Mr. Smith had caught it by the barrel. When I saw this I started at once to the door to get out there. When I got pretty well to the foot of the bed, Mr. Grubbs rushed in at the door and took a ²⁷³ step toward me. I did not see him open the screen door. He rushed in right on me. I was not looking for him. When I saw him start toward me, I threw up my hands, and said, 'Don't you touch me; don't put your hands on me.' About this time he saw a gun that was lying on the table, right close to the foot of the bed and to my right, and started for it. When he started for the gun I grabbed it, and he sort of stepped and caught me and the gun; and we commenced scuffling over the gun. He tried to take the gun away from me and I held on to it, and he forced me back against the wall, near the north partition door, and the gun went off between us, and he fell to the floor and dragged me with him. I fell over the back of a rocking-chair, west of the partition door. I was terribly frightened and struggled up, and stood against the partition wall and looked down at him. I saw he was dead. I saw the wound in his head, the blood spurted from it, and brains were scattered on the floor. I saw particles of his brains about the size of a piece of lead pencil spattered on the front of my dress, on my breast. I tried to brush them off. At

the time I told Grubbs not to touch me, his face looked so angry. He had been so kind and good to me when he was there before that I hardly knew him the way he looked when he started to me. I did not point the gun at him, or attempt to shoot with it. I did not have time to do anything with it, he caught me so quick. The moment he caught the gun he commenced trying to take it away from me, and I was holding on to it with all my might. My son Addison was lying on the bed with his head toward the window the last time I saw him before Grubbs came in the door. I do not know what he did when Grubbs came in the room, or what he did while we were struggling. I have no recollection of getting a gun and going out on the gallery and ordering Mr. Sparks to turn my husband loose. I heard all the testimony in this case and heard the testimony on habeas corpus trial, and I feel sure from what I heard that I went out on the gallery and that I had the gun as they say I did, but I have never been able to recollect anything more than I have told, I did not have any malice or unkind feelings toward deceased or Sparks when they came out there that morning.'

This is the substance of the defense testimony in reference to the killing; there are some minor details which we do not deem necessary to state. The undisputed evidence on the part of the state is that deceased was killed with a shotgun, part of the buckshot having been found in his head and part of the wadding of the gun. The proof also shows that the discharge from the Winchester in the scuffle detailed by Mrs. Smith went in the wall about four feet from the floor, and evidently did not cause the death of deceased. The entire side of deceased's head was shot off, and his brains were scattered on the floor.

There are fifty-three bills of exception in this record. We will discuss ²⁷⁴ those which we deem necessary for a proper disposition of this case.

By bill of exceptions No. 1 the state was permitted to prove by the witness S. M. Dodd, over appellant's objection, the following: "I know these guns here. This Winchester rifle belongs to my stock. I remember the circumstance of Grubbs being killed, about the 6th of August last. Before that time I rented these guns to T. E. Smith. He got the Winchester rifle on the 5th of August, and the magazine shotgun on the 23d of July. The day he got the rifle, when I went in the store Alexander was waiting on Mr. Smith, and was having

some trouble loading the gun. Mr. Smith asked me how many cartridges it carried, and I looked in the catalogue and told him it carried fifteen in the magazine and one in the chamber. I asked him if he was going to carry it out loaded, and we were laughing and joking, and he said he was going to take it out to the farm and kill some jack-rabbits and bring their ears in to vote the prohibition ticket. I do not know whether he was a pro or an anti. As well as I can remember it was about 3 or 4 o'clock in the evening of August 5th." Appellant objected to this testimony on the ground that said acts and declarations of T. E. Smith were made in the absence of defendant, and there is nothing shown for her to be in any way responsible for them; because at the time of making said declarations and said acts he was the husband of deceased, and to prove the same against defendant is in effect using the husband of defendant as a witness against her; and because said acts do not appear to have been done or declarations made pending any combination between T. E. Smith and defendant, or any other person, to take the life of any officer who attempted to execute the writ of possession; and do not appear to have been made in pursuance of such conspiracy; and because evidence aliunde of acts and declarations of said Smith wholly fails to show or even make a prima facie showing that there existed at the time thereof any combination or conspiracy between said Smith and defendant or any other person to kill deceased or to resist any officer who might attempt to execute the writ of possession; and because it appears from the evidence at the time said acts were done and declarations made no conspiracy was in existence; and because said Smith had no idea at the time that any attempt would be made to remove him from the premises under the writ, but was informed that the dispute over the premises would be settled by a law suit in court. The court appends this explanation: "The record showed that defendant and T. E. Smith were jointly indicted and severed at the request of defendant, with the consent of T. E. Smith. The court submitted to the jury, as a question of fact, whether or not a conspiracy existed between defendant and T. E. Smith at the time said acts and declarations occurred, and if there was not such a conspiracy then to disregard said testimony." It is immaterial whether the conspiracy was formed at the time the acts and declarations of Smith were committed ²⁷⁵ or not. If it was subsequently formed, this was a question of

fact for the jury to determine. The fact that he was the husband of appellant would not preclude him forming a conspiracy to take the life of the officers. This being true, his acts and declarations would be admissible against him, as well as defendant. We think the evidence in this case clearly shows, from the state's standpoint, that there was a conspiracy. And the evidence introduced by appellant indicating that she and her husband did not think the officer would attempt to again execute the writ, would not preclude the introduction of this testimony, but could only go to its weight or credibility.

Appellant's bill No. 2 complains of the introduction of the testimony of Tom Alexander, practically upon the same question.

The third bill complains that the court permitted George C. Pendleton, to testify: "I had some conversation with Mr. and Mrs. Smith about the land, about the 16th of July—the day before Sparks and Grubbs went out and moved them off the first time. On that day Mr. Brewster, Mr. Warren, and deputy sheriff and myself went out on the place to get the tenants to sign contracts acknowledging tenancy to us, and after we got about all of them to sign contracts acknowledging tenancy to us, we went down to the house occupied by the Smiths. We found Mrs. Smith at home, but did not find Mr. Smith there. I had a conversation with Mrs. Smith. I told her that I supposed she knew we had bought the land at the sale, and asked her if she and Mr. Smith had decided what to do about it. She replied she did not know what Mr. Smith was going to do, but she knew what she was, but she declined to say what she was going to do. I left and met Mr. Smith in Temple. I told him that we had been out to the place, and was sorry he was not at home; that we recognized him as a tenant on the place for the year 1903, with the other tenants; that we had gotten attornments from several of the tenants, and were going to get them from the balance; that we did not claim the small grain rent on the place, but as to the growing crops on the place we claimed the rent for the year; that we wanted him to stay on the farm until the end of the year, and all we asked of him was to acknowledge Brewster as his landlord; that we wanted the matter settled amicably. His reply was that this was no proposition; that if I would make him a proposition worth something he would consider it. He said to me, 'You have heard that I claim a

homestead out of the land.' I told him that we wanted to settle the matter without trouble, but if we could not do it, that we had a writ of possession to put him off the land. I told him that the sheriff would be out to put him off the land, and I hoped he would be there, and we could manage it without any more trouble to him than was necessary. The next morning I went out with Mr. Austin and Strange to finish up with the other tenants and also with Mr. Smith if he would attorn. I met Mr. Smith between Temple and the land, and stopped and spoke to him. I told him I was going out, and regretted he was not there; and ²⁷⁶ asked him if he would be back again. I told him I wanted to settle this thing amicably, pleasantly and in a legal way; and asked him if he would be back that evening. He stated he had business in Temple and said, 'I want to warn you now not to go to my house bothering my wife.' I never saw Mr. Smith after that time. He warned me not to go on the place, and I did not go there again." Appellant objected to this evidence on the ground that it was not in the presence of defendant, and the various reasons urged as objections in the first bill. None of these objections are well taken, and the testimony was properly admitted.

By the fourth bill the state proved by A. J. Owens, "that on Saturday, the eighteenth day of July, 1903, while we were waiting for Mrs. Smith to get ready to go, or while we were waiting for it to get cool enough for her to go, or to take her off, T. E. Smith, Sparks and Grubbs and myself were sitting in the shade on the north side of the house; and I heard Smith do some talking there about being evicted. I heard Smith say that under the same circumstances as this, if it were to do over again, he would sell out, and he said that by sell out he meant, by God, that he would kill or get killed. He said that he had three boys and that he was going to teach them the same thing. That was about all that I heard him say." By the fifth bill it is shown J. E. Sparks was permitted to testify to the same facts as the witness Owens; and he states that Smith, in that conversation, said "he had no hard feelings toward the officers, but that they ought not to put themselves up as targets." By the sixth bill, appellant complains of the testimony of J. W. Hunnicutt, in which he details a long conversation with T. E. Smith, showing animus toward the officers. This last bill is approved with this qualification: "That the court admitted the

testimony, and in its charge to the jury submitted to them the questions of fact as to whether or not a conspiracy existed between defendant and T. E. Smith at the time said acts and declarations occurred, and if there was not such a conspiracy, then to disregard said testimony. That the record showed defendant and T. E. Smith were jointly indicted and severed at the request of defendant, with the consent of T. E. Smith." To all of this testimony practically the same objections were urged. We hold that, on a trial for murder, where the evidence shows a conspiracy between defendant and another party to commit the crime, the acts and declarations and threats of the co-conspirator prior to the killing, though made in the absence of defendant, before the conspiracy was formed, are admissible in evidence against defendant to show the animus, object and purpose actuating defendant in the commission of the crime. We further hold that it makes no difference at what time anyone enters into a conspiracy to commit a crime; everyone who enters into the common purpose and design is generally deemed a party to the act which has been before done by the others, and to every other which may afterward be done by any of the others in furtherance of such ²⁷⁷ common design: *Hudson v. State*, 43 Tex. Cr. Rep. 420, 66 S. W. 668; *Stevens v. State*, 42 Tex. Cr. Rep. 154; *Chapman v. State*, 8 Tex. Ct. Rep. 392, 45 Tex. Cr. Rep. 479, 76 S. W. 477; *Blaine v. State*, 33 Tex. Cr. Rep. 236, 26 S. W. 63. It follows, therefore, that the qualification of the court as to the giving of such charge was more favorable to appellant than the law permits. If T. E. Smith made these declarations, subsequently formed a conspiracy with his wife and son to kill deceased and his brother officer, or other parties who might attempt to dispossess him of the premises, then such declarations, though made previous to the formation of the conspiracy, would be admissible to illustrate and make manifest the intent with which the parties were acting at the time of the consummation of the conspiracy. This should be the character of qualification placed upon the testimony by the court in his charge, and he should not have instructed the jury that it would not be considered unless the conspiracy was formed at the time of the declarations and threats.

Bill of exceptions Nos. 7 and 8, complain of the introduction of similar declarations of T. E. Smith, as stated in bill No. 6. All this testimony was admissible for the purpose

above indicated, and the objections urged by appellant are not well taken.

The ninth bill of exceptions complains of the following: "The state introduced J. W. Hunnicutt, and after he had testified to conversations with witness Smith, counsel for state proposed to refresh his memory by reading a statement made and signed by him before the grand jury, and after hearing the statement stated it was correct, and that he knew the statement was correct independent of said written statement, and that same merely refreshed his memory of the facts therein detailed." The bill is quite lengthy and we will not detail it. We do not think there was any error in this.

By the tenth bill, it appears the state introduced Sam Sparks, who testified: "When I went out to the Smith place on the Sunday following the killing, I fired a pistol into one of the sacks of grain that was piled up there on the gallery when Grubbs was killed. The pistol I used was a 45-caliber Colt's. The sacks of oats were the ordinary sacks, such as oats are usually sacked in. When I fired the shots into the sacks of oats, the bullets did not go through the sacks of grain. The pistol I used was the very best pistol made." In addition to the statement made above, the testimony showed that the sacks were piled up as a barricade against the doors and windows of the house; and the state's insistence was that the same was done as a preparation for resisting the officers. The bill shows that defendant contended, and so testified, that she knew of no agreement or conspiracy to kill the officers or resist them to the extent of taking life, and that the sacks of grain were placed on the gallery and in the back room of the house for the purpose of protecting the grain from the weather and the depredation of stock running in the field where the grain had been threshed, and that neither she nor her husband had any intention of using said sacks of grain for the ²⁷⁸ purpose of resisting officers. Appellant objected on the ground that it was irrelevant and inadmissible for any purpose, and did not and could not throw any light upon the issue in the case; and did not and could not illustrate the question as to the purpose of defendant and said T. E. Smith in placing said sacks of grain on the gallery and in the house; and because proof of the fact that said sacks of grain were suitable for the purpose of forming a barricade could not be used for the purpose of proving that the same were used for that purpose. We do not think this testimony is admissible.

There is no evidence in the record to show that appellant knew of the resisting power of the sacks of grain to bullets fired therein. There is no declaration of any of the codefendants indicating that they knew of any such power of resistance. It is entirely proper and germane for the officer or any other witness to testify as to the sacks being there, the number, how placed, etc., but subsequent experiments to show how effective the barricade was, would not throw any light upon the guilty intent of the perpetrators of this crime.

By the eleventh bill of exceptions it is shown that Dr. Barton was permitted to testify: "When I made an examination of Mrs. Smith at the hospital in Temple she said something about the officers having put her off of the place and hurt her. I did not find any injury of any sort. She asked me about her suit against the officers for damages, for having put her out and hurt her; and I told her that I did not know anything about that, to consult a lawyer. I don't remember her saying anything about my standing by her in her suit." Appellant objected on the ground that it was a privileged communication between physician and patient; irrelevant, inadmissible and incompetent for any purpose, in this, that the same occurred more than three weeks prior to the time of the homicide, and before defendant had ever returned to the premises where the killing occurred, and before she could have known or contemplated that she would ever return, or that the officers would ever return and undertake to evict her from said premises the second time; that the said declaration of defendant with reference to having been injured could have been in no way connected with the facts and circumstances of the homicide occurring long after; was calculated to prejudice the jury against defendant by leading them to believe that defendant had pretended to be injured by the officer when she was evicted for the first time, when in fact she was not so injured. The court qualifies this bill, as follows: "Defendant took the stand in her own behalf, and testified, among other things, that deceased assisted in putting her out the first time; that he was kind, careful and considerate of her feelings and in no way acted rough or ungentlemanly toward her, and did not make any assault on her to injure her in any way, or attempt to injure her in any way; that she and T. E. Smith went from the farm to the King's Daughters' hospital in Temple; that Dr. Barton attended her. Counsel for state then asked her if at any ²⁷⁹ time Dr. Bar-

ton made an examination of her at her request. To which she replied that he did not. Counsel for state then asked this question: 'At that time and place did you not in substance say to Dr. Barton that the officers had put you out of your home and farm, and in so doing so had hurt and injured you.' To which she replied, that she did not. Counsel then asked, 'Did you not at the same time and place, in substance, say to Dr. Barton after he had told you that he could find nothing the matter with you, 'Well, Doctor, what am I going to do about my suit against the officers for putting me out and hurting me?' To which she replied that she had no such conversation. Counsel then asked her, 'if Dr. Barton did not tell her, in substance, that that was a matter he did not know anything about, and that she had better consult a lawyer.' To which she answered, 'No, sir.' Counsel then asked defendant if she did not say, 'Doctor, won't you stand by me in my suit?' To which she answered, that she did not. Defendant also testified that at the time of the homicide deceased assaulted her. The state in rebuttal sought to impeach defendant by placing upon the stand Dr. Barton, and asking him the same questions that were asked defendant, as above set out in the bill of exceptions; and the witness Barton gave answers as set out." This testimony is clearly admissible as indicative of the fact that appellant had animus against deceased for the previous ejection of appellant from the premises and her declaration to the doctor that he (deceased) had hurt her, is clearly admissible to illustrate and show the animus and malice she had toward deceased. Clearly, if it was permissible for her to testify that deceased had been kind and considerate in ejecting her from the premises, in order to show to the jury that she had no animus toward deceased at the time of the homicide, it was proper for the state to rebut this by adverse declarations made by her to Dr. Barton.

Bill of exceptions No. 12 shows that appellant "offered to prove by J. N. Brooker and A. J. Harris: [It having been proved by the state by instrument in writing that when said Brooker agreed to extend the time for the payment of the judgment against defendant and T. E. Smith, bought by him and assumed by A. J. Harris, as shown by the evidence, that said Harris agreed to pay the interest on said judgment annually, upon the pain of the whole debt becoming due and payable upon default in the payment of the said interest.] The further facts were proved by said witnesses that said

Harris made default in the payment of said interest, and that Brooker thereupon declared his option and made the entire debt due, and had his order of sale issued upon said foreclosed lien judgment and the land sold thereunder." Appellant objected to this testimony on the ground that by the purchase of the judgment by Brooker and the purchase of the land upon which the judgment was a foreclosed lien and the assumption of the payment of said judgment by said Harris, and by the contract of extension and the additional security between said Harris and Brooker, ²⁸⁰ defendant T. E. Smith and Catherine Smith, who were the original defendants in the foreclosure suit, were eliminated from the same; and the order of sale issued upon said judgment at the instance of Brooker did not apply to the Smiths, only as they held under Harris, with the permission and consent of Brooker for the year 1903, and exempt from the operation of said order of sale until their time as tenants had expired; and it was immaterial to them whether the order of sale was issued legally or not; and the said testimony was calculated to prejudice the jury against defendant by leading them to believe that defendant was connected with said Harris in the default of the payment of said notes to Brooker. We have carefully gone over these various deeds, deeds of trust, chattel mortgages, etc., alluded to and recited in this bill of exceptions. They all appear and show upon their face to have been executed subsequent to the procurement of the original foreclosure judgment, which foreclosure judgment was transferred to J. N. Brooker. It also shows that appellant signed legal instruments—the exact verbiage of which we do not deem necessary to state; but to the effect that, if the parties made default in the payment of interest due upon said judgment of foreclosure, Brooker had the right to issue his order of sale, and have the land sold. The clear legal import of said instruments is to this effect; and the facts are undisputed as to the default made by Harris, appellant and T. E. Smith. There is no merit in appellant's contention that she and her husband held under A. J. Harris, since Harris merely held a permissive right to do certain things, which neither of them performed. We accordingly hold that said instruments were properly introduced to show that the order of sale was not prematurely issued by the terms of the collateral agreement.

The thirteenth bill complains that after appellant had introduced A. J. Harris, and he had testified that he was the

legal adviser and attorney for defendant and husband in all the business and litigation connected with the foreclosure of the mortgage upon the premises where the homicide occurred, and in the suit in which the writ of possession in this case was issued, appellant then offered to prove by said witness, "That he had bought the equity of defendant and husband in said premises, after the mortgage was foreclosed; and procured Brooker to buy the judgment and extend the time for the payment of same until January, 1904. That witness rented the premises to T. E. Smith for the year 1903. That when the land was sold under the order of sale, T. E. Smith came to witness for legal counsel and advice as to what course for him to pursue in the event of the purchaser of the land attempting to evict from the premises; that he advised them that, if they acknowledged their tenancy to the purchaser of the premises, they would afterward be estopped from claiming any right to a homestead in the premises; and further advised them that they had a right to the possession of the premises for the remainder of the year 1903, under their rental contract with him, and were entitled to their growing crops upon the ²⁸¹ rented premises less the rents for the year 1903, which they would have to pay to the purchaser—even though they failed to establish their homestead claim; that witness advised them when the officers came out at first to evict them, while they had a right to remain upon the premises for the remainder of the year 1903, the fact that they were defendants in the original suit and were named in the order of sale as defendants, would give the officers a right to evict them from the premises, unless they could give an injunction bond, and that there was nothing for them to do but to submit quietly to being put off the place by the officers; that at the time the officers were evicting them from the place the first time witness was on the premises and told T. E. Smith if he could regain possession of the premises peaceably, after the officers had put him off, and put Brewsters in full possession and complete possession of the same under the writ, that he could rightfully hold possession of the same as against the said Brewster until he gathered crops from the premises, or until the end of the year of 1903, and that Brewster would be forced to sue him either for the title of the land or for forcible entry and detainer, and that he could defend his right to the land in that suit. That two or three days after the

Smiths were evicted from the premises, witness met said Smith in the town of Temple, and he told witness that he had moved back on the premises and was living there again; that after the officers put him off the place, and put Brewster in possession under the writ, he went back the next morning and found no one on the place and moved back into the house; that witness then advised Smith that he had a right to hold said premises against Brewster until his right to the property was settled by a suit, and that if Brewster attempted to put him off by force, he would have a right to resist force with force; that the witness then advised Smith that the order of sale and writ of possession in the suit for foreclosure was *functus officio*, and the sheriff had no right to evict him a second time under said writ; and that he would not attempt to do so, and that the only thing he had to watch was to keep Brewster and his friends from catching him off his guard and putting him off the place by force; that if they could get him off and get in possession, he would have no right to take the place by force, but would have to give bond and sue them for the place. That witness warned Smith to be on guard against Brewster and his friends. That witness never at any time before or after the Smiths were evicted from the land on July 20, 1903, advised T. E. Smith to resist the officers or to shoot it out with them if they came to put him off the premises. He advised him that he could not resist for a moment the officers, no matter what their legal rights were."

The bill further shows that the state had introduced the acts and declarations of T. E. Smith for the purpose of showing that Smith and appellant had re-entered the premises for the purpose and with the intention of holding it against any person attempting to evict them, ²⁸² even though it were the officers acting under said order of sale, to the extent of taking life, if necessary, to hold possession. On the other hand, appellant contends that she knew nothing of such intention on the part of said Smith, and that the same did not in fact exist. But that all the acts and declarations of T. E. Smith were made with reference to other and different persons than deceased or any other officer who might come to evict them under said writ of possession; and that the same were made and done with reference to the Brewsters and their friends, and for the lawful and

rightful purpose of resisting an unlawful attempt on the part of Brewster to put them off the place by force. That neither appellant nor T. E. Smith at any time had any idea or thought that the officers would come to put them off the place the second time under the writ at the time such acts and declarations occurred. The state objected to the testimony of the witness Harris on the ground that it was no part of any act or declaration of T. E. Smith introduced by the state; that it was the advice of a lawyer and interested party; that the advice is no defense to a crime and that the same was hearsay, and a self-serving declaration of a codefendant, and incompetent. The court sustained said objections, and excluded all of said testimony from the jury. It is a general rule that the advice of counsel furnishes no excuse to the client for violating the law, and cannot be relied upon as a defense in either civil or criminal actions: 1 Am. & Eng. Ency. of Law, p. 897. In *Weston v. Commonwealth*, 111 Pa. St. 251, 2 Atl. 191, it was held: "On a trial of one charged with murder, testimony that defendant had consulted counsel, and had by counsel been advised that he had a legal right to maintain possession of the land in the dispute, about which the alleged murder took place, was held not to be admissible in evidence." In *Gallaher v. State*, 28 Tex. Cr. App. 280, 12 S. W. 1087, in discussing this question, Judge Wilson, delivering the opinion of the majority of the court, says: "It was not competent for any purpose, we think, to prove by said witness the advice he gave as an attorney to defendant in relation to said litigation, or defendant's opinion of his legal rights in said litigation, or the advice given by the judge and others to deceased to accept a compromise offered her by Gallaher. . . . Nor can we see upon what principle the opinions and advice of his counsel in the land suit could be held admissible evidence in his behalf. Suppose his attorney had advised him that he would certainly be defeated in the suit and would lose the land, would such testimony be admissible in behalf of the state? Certainly not. Then why should it be admitted in his behalf? We know of no rule or precedent which would admit such testimony": See, also, *Ward v. State*, 42 Tex. Cr. Rep. 435, 60 S. W. 757. Independent of these authorities we believe the proposition is sound, that appellant cannot set up immunity from punishment by reason of

advice of counsel, since such holding would be placing the advice of ²⁸³ the attorney above the law. We therefore hold that the court did not err in excluding this testimony.

By the fourteenth bill of exceptions appellant offered to prove by witness Ed Brewster that he had a conversation with T. E. Smith on July 20th; and that Smith stated he had moved back on the premises, that he had a right on the premises which had not been settled, and that witness would have to sue him, and then whatever the courts decided as to his rights he would abide by the decision; that his attorney had told him witness would have to sue him, and he would have a chance to defend the suit and have his rights in the matter decided by the courts; that the writ of possession had been fully executed, and that witness would now have to sue him either in trespass to try title or in forcible entry and detainer, and their dispute over the possession of the premises would be settled in the courts. The state objected to this testimony on the ground that the same was a declaration of co-conspirators, self-serving declarations, and not in any way connected with the conversation introduced by the state. These acts and declarations are clearly self-serving and are not admissible.

By witness Ed. Rancier appellant offered to prove, in substance, that T. E. Smith secured his services to assist in moving back on the premises, and Smith felt he could hold the premises against all parties if he could get in possession the second time; and that he got the guns to protect himself against a contemplated effort on the part of the Brewsters to regain possession of the premises; and that this was his purpose in getting the guns. It appears from the statement of facts that the state proved divers and sundry declarations on the part of T. E. Smith, indicating malice, and a settled purpose on his part toward the officers who had previously ousted him, and armed himself for the purpose of resisting said officers; had partly barricaded his house, and was watching their approach at the time of the difficulty. To combat this, as shown by this bill, she proposed to show that Smith's purpose in getting the weapons was to protect himself against the contemplated dispossession by the Brewsters only. We believe this testimony was germane, going to show the intent with which he procured the weapons. Our statute on this subject is broader than the common law. In *Greene v. State*, 17 Tex. Cr. App. 395, we held that ar-

ticle 751 expands the common-law rule with reference to such evidence. At common law when a confession or admission is introduced in evidence against a party, such party is entitled to prove the whole of what he said on the subject at the time of making such confession or admission. The above-cited article does not restrict the explanatory act, declaration, conversation or writing to the time when the act, declaration, conversation or writing sought to be explained occurred; but extends the rule so as to render such acts or statements admissible, if necessary to a full understanding of or to explain the acts or statements introduced in evidence by the adverse party, although the same may have transpired at a ²⁸⁴ different time and at a time so remote even as not to be admissible as *res gestae*: *Koller v. State*, 36 Tex. Cr. Rep. 496, 38 S. W. 44; *Wood v. State*, 28 Tex. Cr. App. 61, 12 S. W. 405. The same character of testimony was offered by bill No. 16, through the witness Robert Dennis, as to the reason of Smith in securing a pistol. As to this matter we hold that where the state proposes to show a criminal intent against one procuring arms, appellant can show that his criminal intent, if any, was against another and different party. We do not wish to be understood as holding that he can introduce the opinion of attorneys as to his rights in the premises; but he can explain why he secured the arms and what he intended to do with them.

The seventeenth bill complains of the failure of the court to allow Harris to testify to advice and suggestions made T. E. Smith in reference to his rights along the line of the preceding bill. We do not think this testimony was admissible.

The court did not err in excluding the testimony of J. P. Kinnard as to the declarations and exclamations of defendant after the homicide. The bill shows that said statement occurred long afterward, and was not *res gestae*, but was self-serving.

Nor did the court err in excluding the testimony of Brooker and A. J. Harris to the effect that Harris rented the disputed premises to tenants to make a crop for the year 1903, with the knowledge and consent of Brooker. Said rental contracts were all subsequent, and made dependent upon the order of sale.

Nor did the court err in excluding the testimony of A. J. Harris as to the statement Addison Smith made on the

habeas corpus trial, since it was a self-serving declaration of a co-conspirator after the consummation of the conspiracy.

Nor did the court err in admitting, over the objections of defendant, the written designation of a homestead, because the same showed that appellant and her husband had designated another and different parcel of land situated in the town of Temple as their homestead, which was necessary in order to make a constitutional and valid foreclosure on the land where the difficulty occurred.

In bill No. 31 appellant urges "that the charge of the court taken as a whole is erroneous, in that it is made up of statutory definitions and abstract definitions of law. without any attempt to apply the same to the facts of the case; is argumentative in subject matter, form and arrangement; clearly calculated to disclose to the jury the opinion of the court as to the weight to be given to the end and as to the guilt of defendant." These objections are too vague and general to be considered and reviewed.

Appellant complains of the following portion of the court's charge: "And in case you believe beyond a reasonable doubt that the defendants conspired to resist any officer in the execution of the writ of possession read in evidence, then it would be immaterial whether they had ²⁸⁵ any personal animosity or cherished any malice toward I. B. Grubbs personally." We understand this to be the law: *Kipper v. State*, 8 Tex. Ct. Rep. 852, 45 Tex. Cr. Rep. 377, 77 S. W. 611.

Bill No. 34 insists that the court erred in the twenty-first paragraph of the charge, which is, "That the writ of possession and the return thereon read in evidence, as having been in the possession of I. B. Grubbs at the time of his death, was a valid legal process at the date of the homicide, was authorized by law; and it was the duty of the officer having the same in his possession to execute the same and return the same by the return day specified therein." In our opinion the writ was not *functus officio* and the court did not err in so charging. Where a writ of possession is issued, the sheriff has the right to execute it as many times as necessary until the day he is required to return said writ; and that it does not become *functus officio* until the date required for its return. In *Murfree on Sheriffs*, section 1021, this language is used: "A writ of possession may be issued without any return day stated in it, and so may be re-executed if the plaintiff, after having been put in possession, is ejected by defend-

ant or anyone claiming under him": Citing *Jackson v. Hawley*, 11 Wend. 182. "It is said, too, that an alias writ will be issued if the ejection takes place and the application is made before the writ is returned and filed, provided the intruder is the defendant or one in privity with him. But if the plaintiff be ousted by a stranger he will be driven to a new ejectment. The authorities on this subject are somewhat conflicting, but it would seem to be the better opinion that after the first writ is returned satisfied there can be no alias and the plaintiff will be driven to a new ejectment, or other like process; though it is otherwise during the lifetime of the original process": *Fowler v. Currie*, 2 Dana, 52, 26 Am. Dec. 436.

Crooker on Sheriffs, section 575, says: "Where the writ is not made returnable, as it seldom is, the sheriff may under it remove defendant or one claiming under him from the premises as often as he intrudes upon them": See, also, *Freeman on Executions*, secs. 474-477. The evidence in this case shows that appellant and her husband are the defendants in the original writ, and clearly the writ was ample authority for dispossessing them, inasmuch as it had not been returned at that time. We do not deem it necessary to review appellant's authorities on this question. Suffice it to say that wherein they hold contrary to the rule herein laid down, we cannot agree thereto.

Appellant also insists that the court erred in failing to tell the jury that they could not consider the acts and declarations of appellant's co-conspirators for the purpose of proving a conspiracy; but that they must believe from the evidence, beyond a reasonable doubt, that the conspiracy was formed, before they could consider said acts and declarations. This charge should have been given: *Chapman v. State*, 8 Tex. Ct. Rep. 392, 45 Tex. Cr. Rep. 479, 76 S. W. 477; *Loggins v. State*, 8 Tex. Cr. App. 434; *Luttrell v. State*, 31 Tex. Cr. Rep. 493, 21 S. W. 248; *Blain v. State*, ²⁸⁶ 31 Tex. Cr. Rep. 248, 26 S. W. 63. We hold, under the authorities cited, that it was error for the court to fail to so charge the jury, since the acts and declarations of a co-conspirator could not be considered for the purpose of proving the conspiracy; but the conspiracy must be proved aliunde beyond a reasonable doubt, and the court should have so charged, before the acts and declarations of the conspirator could be considered, since said acts and declarations are only admis-

sible to throw light upon, illustrate and make manifest the purpose, object, motive and intent of the parties forming the conspiracy, and not to prove the conspiracy. We note that the learned trial judge in his qualification to the admission of the declarations of the co-conspirator stated that he limited it in his charge to consideration for this purpose, and that said acts could not be considered by the jury unless they believed that the acts and declarations were made pending the conspiracy. It will be seen from the case of *Hudson v. State*, 43 Tex. Cr. Rep. 420, 66 S. W. 668, and other cases cited above, that this rule does not prevail. But the declarations of a co-conspirator can be admitted, although the same was made before the conspiracy was formed, though it is the duty of the court to limit the same for the purpose for which it was introduced, to wit, to illustrate the motive, purpose and intent of the parties forming the conspiracy.

Appellant further insists that the court erred in refusing to charge the jury that defendant could resist excessive force in the execution of the writ. There is no testimony in this record suggesting this issue. The officers having a valid writ, they had the right to go to the premises and use all reasonable force to execute it. There is nothing showing they did more than this. Hence it was not error to omit to charge on an issue not raised by the testimony.

There are various other assignments of error, but after a most painstaking and searching reading thereof, we do not believe any are well taken. We believe the charge of the court was full and fair in all respects, except in the particulars stated above.

For the errors discussed, the judgment is reversed and the cause remanded.

DAVIDSON, P. J. I agree to the reversal, but do not agree that the writ of possession could be used as evidence. It was *functus officio* in my judgment. Nor do I agree that the statement of the husband could be used against the wife, appellant herein. She in my judgment should not be held conspirator with her husband. That she may be a principal may be conceded. I do not believe the *Hudson* decision is involved in this case. If the husband and wife can be held for conspiracy, then the *Hudson* case would apply as stated by brother Brooks. I may write out my views more fully.

²⁸⁷ HENDERSON, J. I agree to the result reached reversing the case, but do not agree to all the views expressed in the opinion. The writ under which the officers operated and which they were attempting to enforce at the time of the homicide was not *functus officio*; and in my opinion the officers were authorized to act under it.

Under the doctrine of conspiracy only statements or declarations of T. E. Smith were admissible as against Mrs. Smith when she was not present, which were made after the formation of the conspiracy, and in furtherance thereof. I accordingly believe that the testimony as to what T. E. Smith said to the officers on the occasion of the first eviction, or shortly thereafter, when they were waiting for Mrs. Smith to get ready to go, was not admissible against her, she not being present at the time and there being no pretense that the conspiracy was then formed. However, the charge of the court adequately protected appellant against the evil effects of this testimony. Of course, husband and wife, according to my understanding, can be co-conspirators to commit murder. All acts or declarations of Smith, such as getting arms and other preparations, when the circumstances indicate that the conspiracy had been formed, were admissible in evidence.

According to my view it was permissible for appellant to show any fact by competent evidence that rebutted the state's theory. The state's theory was to the effect that the conspiracy was against the officers who might undertake to re-execute the writ. On the other hand, defendant's theory was that they did not intend to oppose the officers and did not expect the officers to attempt to re-execute the writ, but they did expect Brewster to attempt to regain possession. It was therefore competent for appellant to offer testimony in contravention of the state's theory on this point; and I think in this respect the advice of attorneys and what they told him could be shown.

I also believe that it was competent for appellant to show Grubbs' object or purpose in going into the house.

Everyone Who Enters into a Conspiracy is deemed a party to every act connected therewith done by the others before that time, and a party to every act afterward done by any of the others in furtherance of the common design: *Jenkins v. State*, 35 Fla. 737, 48 Am. St. Rep. 267; *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320, and note.

Every Act and Declaration of each member of a conspiracy, in pursuance of the original concerted plan and with reference to the common object, is original evidence against each of them, without

reference to the time at which they entered the conspiracy: *Jenkins v. State*, 35 Fla. 737, 48 Am. St. Rep. 267; *Patch Mfg. Co. v. Protection Lodge*, 77 Vt. 294, 107 Am. St. Rep. 668. As to whether it is material whether the declarations were made in the presence of the one against whom they are sought to be introduced, see the note to *Spies v. People*, 3 Am. St. Rep. 487; *Fort v. State*, 52 Ark. 180, 20 Am. St. Rep. 163; *People v. Dow*, 64 Mich. 717, 8 Am. St. Rep. 873; *Knox v. State*, 164 Ind. 226, ante, p. 290.

SCALES v. STATE.

[46 Tex. Cr. Rep. 296, 81 S. W. 947.]

CRIMINAL LAW—Dealing in Futures—Indictment.—An indictment for the crime of dealing in and selling cotton futures need not allege an actual sale. (p. 1015.)

CRIMINAL LAW—Selling Futures—Indictment—Separate Crimes on Different Days.—An indictment for selling cotton futures attempting to allege a separate offense on each day that such sales were made, and not setting out in distinct counts the different days upon which each offense occurred, but attempting to charge a separate offense for each day in one count is vicious and not cured by confining the prosecution to one day. (p. 1015.)

CRIMINAL LAW—Selling Futures—Evidence of Actual Delivery.—On a trial for the crime of selling cotton futures the charters of the cotton exchanges with which the accused transacted business are admissible in evidence to show that one belonging to such exchanges was not permitted to make a sale of cotton unless an actual delivery thereof was contemplated. (p. 1017.)

CRIMINAL LAW—Dealing in Futures—Elements of Crime.—In order to constitute the crime of dealing in futures the accused must conduct a business where future contracts are bought and sold within the state. If the evidence shows that the accused received offers for the sale and purchase of staples, and conveyed such offers to persons outside the state where they were accepted and the sale and purchase made, he is not guilty and the jury should be so instructed. (p. 1019.)

CRIMINAL LAW—Dealing in Futures—Necessary Evidence.—Failure on the part of the prosecution to show any sale of staples to be delivered in the future, in which an actual delivery is not contemplated, and that both seller and purchaser so understood the agreement, is fatal to a conviction of the offense of dealing in futures. (p. 1019.)

CRIMINAL LAW—Dealing in Futures—Proof of Wagering Contract.—Before either of the parties to a contract to deal in "futures" can be convicted under a statute making such transaction an offense, the prosecution must show that both parties engaged in a wagering contract. (p. 1019.)

Hogg, Robertson & Hogg, for the appellant.

H. Martin, assistant attorney general, for the state.

³⁰⁰ HENDERSON, J. Appellant was convicted of selling cotton ³⁰¹ futures, under article 377 of the Penal Code, and his punishment assessed at a fine of two hundred and fifty dollars and thirty days' imprisonment in the county jail; hence this appeal.

Appellant made a motion to quash the indictment, on the ground that it failed to allege a sale to any person. This indictment, under the former holdings of this court, would appear to be in the respect mentioned vicious: *Goldstein v. State*, 36 Tex. Cr. Rep. 193, 36 S. W. 278; *Cothran v. State*, 36 Tex. Cr. Rep. 196, 36 S. W. 273. However, those cases on this question have been overruled in *Fullerton v. State*, 75 S. W. 534. In accordance with that decision it is no longer necessary to allege an actual sale.

Motion was also made to quash the indictment because it alleged more than one offense. The language of the indictment in this respect is as follows: That appellant "on the 1st of July, 1902, did then and there unlawfully, and on each succeeding day thereafter, until the 1st of July, 1903, conduct, carry on and transact a business, commonly known as dealing in futures in cotton," etc. The contention is that the statute makes the carrying on of said business an offense for each day it is carried on. The language of the statute in this respect being, "provided that each day such business is carried on or kept shall constitute a separate offense." Under the decisions of some of the states and in the United States court it is allowable in the prosecution of misdemeanors to set out a number of misdemeanors in separate counts in the same indictment, and to convict on each or as many as may be proven. And this seems to be the doctrine in this state: *Hall v. State*, 32 Tex. Cr. Rep. 474, 24 S. W. 407. In this indictment, the separate days are not set out in distinct counts, but it seems that the attempt was here made to charge a separate offense for each day in one count. We believe that the separate occasions should be set out in distinct counts, and the dates and proof should correspond with some degree of particularity, so that in case of conviction or acquittal, appellant might be secure in his right against being placed in jeopardy again for the same offense. In our opinion the indictment is vicious in the respect pointed out. And being so it was not cured by the court confining the prosecution to one day.

Appellant complains that the court erred in refusing to permit him to introduce the charters of the New Orleans and New York exchanges, being those through which appellant dealt in the purchase and sale of cotton, showing that under the charter of these corporations, no one belonging to such exchanges was permitted to make a sale of cotton, etc., unless an actual delivery was contemplated. We find in the record a good deal of parol proof of this sort, but the court in the trial of the case appears to have ignored this. We think the proof which was excluded should have been admitted. The exchanges, as above stated, were corporations, and could only act in accordance with the provisions of their charter. These provisions indicate not only their power, but method of doing business. The admission of this testimony, ³⁰² of course, would not bind the state, if it was able to show otherwise that appellant through his agents did make sales of cotton futures, the delivery of which was not contemplated by the parties. But in the absence of such proof, a sale through a corporation would be presumed to be in accordance with the power and method prescribed in the charter of the corporation. What we have said with reference to the charters also applies to the rules and regulations adopted by said exchanges.

Appellant contends that the court should have given the special requested instructions asked by him. These instructions raise, in effect, two questions: 1. That appellant did not deal in futures—that is, carry on a business in which future contracts for cotton were bought or sold with no intention of an actual bona fide delivery of said cotton; 2. That what was done by him was not conducting a business for the sale of cotton at Taylor, in Williamson County, but he simply acted as an agent for the parties desiring to sell or purchase cotton, and that the sale was made and consummated in New Orleans or New York, as the case might be. Appellant strenuously insists that the facts presented in the record, and almost without controversy, required the court to give his requested instructions on these subjects. We have examined the record carefully in that respect, and we find appellant's mode of doing business as follows: That a person desiring to purchase cotton for future delivery would come to appellant's office in the city of New Orleans, and make request to purchase, say, one hundred bales of cotton at a stated price; that

³⁰⁰ HENDERSON, J. Appellant was convicted of selling cotton ³⁰¹ futures, under article 377 of the Penal Code, and his punishment assessed at a fine of two hundred and fifty dollars and thirty days' imprisonment in the county jail; hence this appeal.

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he would take the offer and telegraph to some member of the Cotton Exchange in New Orleans, and that this broker in New Orleans to whom the order was telegraphed would take the same and go upon the exchange in New Orleans and make the offer to buy the number of bales covered in the order at the prices mentioned therein, and for delivery at the time mentioned in the order; and if the offer was accepted by anyone on the exchange, then the contract would be closed, the broker acting under the instruction sent him by appellant. When the contract was so made the broker to whom the order had been telegraphed in New Orleans would telegraph the acceptance of the same to the firm of Scales & Co. at Taylor, that the order had been executed and the contract made for the delivery of the cotton. On receipt of this, notification was given to the purchaser at Taylor by appellant; and thereupon said purchaser would pay to the firm of Scales & Co., at Taylor, the sum of two dollars per bale, called "margin" to cover fluctuations in the market price of the cotton; that on every one hundred bales of cotton so purchased a commission of ten dollars was charged by appellant, five dollars of which he retained, and the other five dollars he sent to the broker employed by him in New Orleans. On the payment of this money by the purchaser upon the transaction, the firm of Scales & Co., who at all times kept money to their credit with the broker through whom they dealt at New Orleans, would telegraph to the New Orleans broker ³⁰³ that the margin of two dollars per bale had been paid to them, and to charge their account with said sum; that if at any time the purchaser desired his cotton to be sold Scales & Co. would telegraph the broker in New Orleans, who would go upon the exchange and sell the contract, if he could do so, at the price stated. That all of such transactions were real and not fictitious, and that the broker would make the sale if he could. If consummated he would telegraph back to Scales & Co. that he had sold the contract, and the price for which the sale was made, and would notify Scales & Co. that they were credited with the profits, if any had accrued; or if there was a loss, charged with the loss. Thereupon Scales & Co. would make a settlement at once with the party at Taylor according to the report of the transaction had in New Orleans. In cases where the contracts were made and the money deposited with Scales & Co. for the purchase of cotton, the money was transmitted to New Orleans by telegraph, and there deposited

to cover the contract for the party making the same, and all money received at New Orleans on account of profits made on such transactions were telegraphed to Taylor and there paid by Scales to the party to whom it belonged. That Scales & Co. did not receive any part of the money put up as margin, except the commission of five dollars on every one hundred bales of cotton bought or sold; nor did they retain any part of the money when the contract was closed out at New Orleans or New York, but the whole of the same was paid to the person who was the owner of the contract which had been sold. It is further stated that all these transactions in New Orleans were with the Cotton Exchange, and the names of the parties with whom he dealt are given; and that all such transactions were real and not fictitious; that they were all made and agreed to be made, and to be governed by the rules and by-laws of said exchange where they were to be executed; and that in their making the understanding was that the rules of the said exchange were that all cotton should be actually delivered upon the contracts in accordance with the terms of the contract, and all persons were prohibited from making a contract on either of said exchanges in New York or New Orleans relating to the future delivery of cotton which did not contemplate actual and bona fide delivery thereof. That witness had never been informed by anyone, nor did he ever know that it was the intention or purpose of any person making the transaction through the exchange or brokerage business of E. G. Scales & Co. that they did not intend, if they kept their contracts until their maturity, not to accept cotton bought or actually delivered that sold in accordance with the terms of the contract. That said firm never did at any time in conducting their business at Taylor, in Williamson county, sell any contract or contracts for the future delivery of cotton or grain or produce or meats, etc., and never did in their business at said point buy from any person any future contract for any such articles, or delivery thereof; that their only business was that of brokers, and that all they³⁰⁴ did was to accept orders from persons who wished to buy cotton and telegraph such orders to the different exchanges where the persons desired to have the orders executed and have them there executed through brokers as hereinbefore explained.

This is a substantial statement of appellant's business as testified to by him, but we do not understand it to materially

vary in any respect from the testimony given by the state's witnesses.

As stated, appellant contends that this was not a sale at all by him in the state of Texas, but he acted merely as the agent of the buyer or purchaser, as the case might be, and the sale was actually consummated through another agent in New Orleans; that what he did was simply to convey the offer to sell or buy to the agent at New Orleans, and the transaction was closed by him. We believe this contention is correct, and under our statute it requires in terms that the person, in order to be guilty of the offense defined, must conduct or carry on a business where future contracts are bought and sold. Under the authorities, as we understand them, the facts here stated do not show that appellant either bought or sold cotton in the city of Taylor, Williamson county. True, his business was to receive offers for the sale and purchase of cotton. He conveyed these propositions to parties in New Orleans; there the proposition was accepted, the minds of the parties met, and the sale or purchase was made. This we understand to be the doctrine enunciated by the current of authorities: *Sinclair v. State*, 8 Tex. Ct. Rep. 791, 45 Tex. Cr. Rep. 487, 77 S. W. 621; *Windsor v. State*, 9 Tex. Ct. Rep. 900, 79 S. W. 312; *Rich v. State*, 38 Tex. Cr. Rep. 199, 42 S. W. 291, 38 L. R. A. 719; *Ryan v. M. K. & T. Ry. Co.*, 65 Tex. 13, 57 Am. Rep. 589; *Seiders v. Merchants' Life Assn.*, 93 Tex. 199, 54 S. W. 753; *Lascallet v. Commonwealth*, 89 Va. 878, 17 S. E. 546; *Garbracht v. Commonwealth*, 96 Pa. St. 449, 42 Am. Rep. 550; *Minn. Oil Co. v. Collier Lead Co.*, 4 Dill. C. C. 431, Fed. Cas. No. 9635; *State v. Hughes*, 22 W. Va. 743; *State v. Gritzner*, 134 Mo. 512, 36 S. W. 39.

It further occurs to us that the other proposition of appellant is well taken; that is, the evidence for the state fails to show any sale of cotton to be delivered in the future, in which an actual delivery was not contemplated. We understand the authorities to teach that it is not alone sufficient that one of the parties to the contract contemplates that there will be no delivery of the thing sold, but that both must so understand the agreement. In this respect the burden is on the state to show, before either of the parties to the contract can be convicted, that both parties engaged in a wagering contract: *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. Rep. 160, 28 L. ed. 225; *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. Rep. 950, 37 L. ed. 819; *Clews v. Jamison*, 182 U. S. 461, 21

Sup. Ct. Rep. 845, 45 L. ed. 1183; Gr jury v. Wendell, 40 Mich. 432; Connor v. Robertson, 37 La. Ann. 814, 55 Am. Rep. 521; Ramsey v. Berry, 65 Me. 570; McCarthy v. Weare Com. Co., 87 Minn. 11, 91 N. W. 33; Staniger v. Tabor, 103 Ill. App. 330; Jones v. Jones, 103 Ill. App. 382; Clay v. Allen, 63 Miss. 426; Wall v. Schneider, 59 Wis. 352, 48 Am. Rep. 520, 18 N. W. 443; Johnston v. Miller, 67 Ark. 172, 53 S. W. 1052; Gaylord v. Duryea, 95 Mo. App. 574, 69 S. 305 W. 607; and we might cite a number of cases in appellant's brief to the same effect. And on the same subject see Oliphant v. Markham, 79 Tex. 543, 23 Am. St. Rep. 363, 15 S. W. 569. In Fullerton v. State (Tex. Cr. Rep.), 75 S. W. 534, the facts constituting the transactions were not as here presented. In the case at bar, so far as the proof is concerned, the state failed to show that the transaction charged against appellant was a wagering contract. Appellant, on the other hand, assumed the burden and showed that, under the rules of law as laid down by the authorities, what he did, if he could be held to have consummated the contract in Taylor, was not a wagering contract; that is, that the parties in fact intended an actual delivery of the cotton. It may be that the *modus operandi* here pursued is an evasion of the spirit of the statute in question, but certainly the proof does not establish a violation of the letter of our law on the subject. We accordingly hold that the court should have given the requested instructions, or rather should have given an instruction to the jury to find appellant not guilty. But, as before stated, in our opinion the indictment is bad and should have been quashed; and the judgment is accordingly reversed and the prosecution ordered dismissed.

A Contract for the Future Delivery of goods not then in existence is not a wagering contract, when actual delivery is contemplated by either or both of the parties: Forsyth Mfg. Co. v. Castlen, 112 Ga. 199, 81 Am. St. Rep. 28. See, too, Jamieson v. Wallace, 167 Ill. 388, 59 Am. St. Rep. 302; Crawford v. Spencer, 92 Mo. 493, 1 Am. St. Rep. 745.

A Contract of Dealing in Futures made and to be performed in another state where it is valid may, according to Peet v. Hatcher, 112 Ala. 514, 57 Am. St. Rep. 45, be enforced in a state where it is forbidden by statute and contrary to public policy. See, in this connection, Bartlett v. Collins, 109 Wis. 477, 83 Am. St. Rep. 928; note to Gist v. Western Union Tel. Co., 55 Am. St. Rep. 775.

PARKER v. STATE.

[46 Tex. Cr. Rep. 461, 80 S. W. 1008.]

MURDER—Opinion Evidence as to Tracks.—Before a witness can give his opinion as to the similarity of human tracks as a circumstance of guilt, he must testify to something more than a mere casual observation of the tracks found at the locus in quo, and tracks made by the accused and known to be his. (p. 1023.)

MURDER—Opinion Evidence as to Tracks.—Before a witness can give his opinion as to the similarity of human tracks as a circumstance of guilt, he must have made some measurement of the tracks found upon the ground, and the foot or shoe of the accused, or he must have made some comparison by placing such shoe upon such tracks, or if there are peculiarities in the tracks made and also peculiarities in the shoes known to belong to the accused, the witness can detail such facts and give his opinion as to the similarity between them. (pp. 1023, 1024.)

MURDER—Evidence as to Tracks.—On the trial of one accused of murder a witness may testify as to human tracks found upon the ground at the place of the homicide, and to what point they led and the size thereof as they appeared to him, and he may also testify as to the size, shape, or any peculiarity of any track or tracks that he may have seen the accused make after the homicide. (p. 1024.)

MURDER—Evidence as to Tracks.—On a trial for murder a witness may testify, as a circumstance tending in some degree to connect the accused with the offense, that he trailed certain human tracks found by him, from near the scene of the homicide to or near to the home of the accused, and he may describe them and state that the tracks trailed appeared to him to be the same as the tracks found. (p. 1025.)

EVIDENCE—Trailing by Bloodhounds.—If a human track assumed to be that of the person accused of murder, and which the circumstances in evidence tend to show was his track, was pointed out to a bloodhound trained in trailing human tracks and such dog trailed this track from where it was pointed out to him to the residence of the accused, some mile and one-half away, and the course of his pursuit of such track was followed by witnesses, who testified that the dog followed this same track, which they described, evidence of these facts is admissible as showing a circumstance connecting the accused with the killing. (p. 1027.)

MURDER—Trailing with Bloodhounds—Evidence of Qualities of Hound.—On the trial of one accused of murder, whose tracks have been trailed by a bloodhound, a witness is competent to state his knowledge of, and experience with, such dog as being an animal trained and used for the purpose of running down human beings. (p. 1028.)

CRIMINAL LAW—Evidence—Impeachment of Witness.—The opinion of a witness as to who committed a particular crime is inadmissible and cannot form the basis for his impeachment. The admission of such evidence over the objection of the accused is reversible error. (pp. 1029, 1030.)

CRIMINAL LAW—Confessions as Evidence.—If one under arrest for crime has made a general statement after being warned that it may be used against him, answers questions propounded to him on a rigid cross-examination by the prosecuting attorney, such answers are not admissible in evidence as a confession. (p. 1031.)

S. D. Snodgrass, A. S. Zachry and L. D. Schluter, for the appellant.

H. Martin, assistant attorney general, for the state.

⁴⁶³ HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of eighteen years; hence this appeal. This case is one depending on circumstantial evidence. The theory of the state being that appellant was opposed to the marriage of his daughter to deceased, which occurred about twenty days before the homicide. The state's case depended on the identity of appellant as the person who committed the homicide. This involved a number of circumstances, which, it is insisted, point to appellant—such as former conduct of appellant toward deceased, particularly after intermarriage of deceased with his daughter; also tracks found at and near the place of the homicide and leading to the home of appellant, something like a mile or mile and a half distant; and the correspondence of such tracks with those of appellant; and the trailing of these tracks by witnesses, and also by a dog, from the scene of the homicide to the home of appellant. Appellant relied upon the want of testimony sufficient to connect him with the homicide. There is also testimony in the record tending to show appellant's condition of mind at the time of the alleged homicide, suggesting he was not in a sane condition of mind at that time; and also some evidence suggestive of alibi.

Appellant insists that the court committed error in admitting the testimony of J. D. Stafford as to tracks. The substance of his testimony, as taken from the bill, is as follows: That he found a track near the scene of the homicide, leading from the direction of the killing toward defendant's house; the tracks seem to have been made by a worn everyday shoe; that he did not measure these tracks, nor did he measure the track or shoe of defendant after the homicide; that he ⁴⁶⁴ saw the shoes defendant had on after the homicide, but did not believe said shoes would make the track he found on the ground; that they were better shoes and would have

made a better track, but the length and size of them were about the same; that he did not have defendant make a track and compare it with the track he found going from the scene of the killing in the direction of the house; that he just observed his foot; that he saw him make a track in the sand, and it was about the same size shoe as the other track; it looked to be about a No. 8. This was objected to by appellant on the ground that, in the absence of some measurement or some comparison of the tracks found on the ground and the shoe worn by defendant after his arrest, witness was not authorized to give his opinion as to the similarity of said tracks. In effect we understand the contention urged by appellant to be, that witness failed to detail any such facts, in connection with the tracks found on the ground and of shoe tracks known by him to have been made by defendant, as would authorize him to give an opinion as to the similarity of the tracks on the ground and tracks made of shoes worn by defendant. In order to support his contention, appellant refers us to *Gill v. State*, 36 Tex. Cr. Rep. 589, 38 S. W. 190; *Grant v. State*, 42 Tex. Cr. Rep. 275, 58 S. W. 1025; *Smith v. State* (Tex. Cr. Rep.), 77 S. W. 455. On the same subject, the state has referred us to a number of authorities, beginning with *Thompson v. State*, 19 Tex. Cr. App. 593. In *Thompson's* case, which is followed by *Clark v. State*, 28 Tex. Cr. App. 189, 19 Am. St. Rep. 817, 12 S. W. 729, and other cases, it appears that the court, under a state of facts no stronger than here presented, permitted the witnesses to give their opinion to the jury as to the similarity of tracks found upon the ground and tracks made by defendant, or tracks that would be made by shoes known to be worn by him. In *Clark's* case, the court seems to predicate its opinion that the evidence was admissible, under authorities which authorize the witness to give a shorthand rendering of the facts. More recently, however, this court has held in a number of cases that before a witness can give his opinion to the jury as to the similarity of the tracks, the witness must testify to something more than a mere casual observation of the tracks found at the "locus in quo," and tracks made by defendant and known to be his. Before he can give his opinion, the witness must have made some measurement of the tracks found upon the ground, and the foot or shoe of defendant; or that he made some comparison between tracks found upon the ground and shoes known to be defendant's as placing

the shoe of defendant in tracks on the grounds; or, if there are peculiarities in the tracks made upon the ground, such as worn places or peculiar tracks, and such places or tracks were found upon the shoes known to belong to defendant, the witness can detail such facts, and can then give his opinion as to the matter of similarity between said tracks: *McLain v. State*, 30 Tex. Cr. App. 482, 28 Am. St. Rep. 934, 17 S. W. 1092; *Rippey v. State*, 29 Tex. Cr. App. 37, 14 S. W. 448; *Grant v. State*, 42 Tex. Cr. Rep. 275; *Moseley v. State*, 4 Tex. Ct. Rep. 435, 67 S. W. 103; *Thompson v. State*, 8 Tex. Ct. Rep. 768, 77 S. W. 449; *Smith v. State*, 8 ⁴⁶⁵ Tex. Ct. Rep. 843, 77 S. W. 453. It occurs to us that the above decisions announce the better doctrine; and we accordingly hold that the witness Stafford did not detail sufficient facts in order to give his opinion to the jury as to the similarity of the tracks made upon the ground and tracks known to be made by appellant. We would not be understood, however, as holding that the witness Stafford was not authorized to testify before the jury as to the tracks he found upon the ground—where he found them, and to what point they led, and the size thereof as they appeared to him, and other conditions and circumstances connected therewith. He could also testify before the jury as to the size, shape, etc., of any track or tracks that he may have seen defendant make after the homicide, and, without giving any opinion of his own, leave the jury to draw their own deductions therefrom: *Ransom v. State*, 6 Tex. Ct. Rep. 259, 70 S. W. 960.

Appellant also assigns as error the action of the court permitting the witness Lucas Edmunds to testify as to tracks. This witness stated, in substance, that he found a track near the scene of the killing and followed it to where defendant lived; that said tracks appeared to be made by a No. 8 or 9 shoe, and appeared to be shoes that were worn and run down to some extent; that he did not see the track all the way from the scene of the homicide to where appellant lived; that he began in about forty yards of the south end of the house where deceased was killed, and followed the track to the branch, about one hundred and fifty yards from said house; that here he lost the track for some fifty yards and struck it again and followed it pretty regularly until they reached the woodland; that they were unable to find any tracks in the woodland except one or two; said woodland was about four hundred or five hundred yards across. "After

passing out of the woodland we found one other track, about fifty or seventy-five yards from defendant's house." The tracks witness found along the way looked like the other tracks that he found near the place of the homicide; that he thought they were the same tracks; that there was something about the tracks that would attract attention, and this peculiarity was in all the tracks he found. This testimony was objected to on the part of appellant because witness was not sufficiently definite about the size and appearance of said tracks to give his opinion that the track found in the woodland was the same track found near defendant's house; and that it was not shown that witness took any measurement of the track; and he stated he did not know whether it was made by a No. 8 or 9 shoe, and that he did not detail any peculiarities about the tracks. However, the court in explanation of the bill states that the witness said that the tracks he followed "appeared to have been made by a tolerably old and worn shoe, and one of the shoes was a little turned, but one shoe was turned a little worse than the other, and it appeared that it was an old shoe, a work shoe. Some of the witnesses measured the track. It had rained that day. The track that was trailed had been rained on; all other tracks were fresh and made since the rain. ⁴⁰⁶ The track was trailed from about forty yards of the scene of the killing almost continuously to the wood-lot that surrounded the dwelling-house of defendant. The witness described the size and appearance of the tracks and their peculiarity." It will be observed that this witness, according to the bill, did not undertake to give his opinion as to the similarity of the tracks he trailed upon the ground with shoes known to be worn by defendant, or tracks known to be made by him; but merely testified before the jury that he trailed certain tracks from near the scene of the homicide to or near appellant's home, describing said tracks, and the tracks he trailed appeared to his mind to be the same tracks. In our opinion this testimony was admissible as a circumstance tending in some degree to connect appellant with the offense. He was shown by other witnesses to have worn an 8 or 9 shoe; and this witness trailed certain tracks which appeared to him to have been made by a No. 8 or 9 shoe from near the homicide to or near appellant's home. We do not believe the admission of this testimony conflicts with any of the opinions referred to, but is in accord with Ransom's case,

supra. As heretofore stated, this was a case depending on circumstantial evidence and every circumstance which might tend in any degree to identify appellant with the homicide was admissible against him. If, as in this case, tracks were found upon the ground where the homicide was committed, and these were traced to appellant's home, regardless of any ascertained or determined similarity between such tracks and other tracks made by defendant, said testimony would be admissible. Of course, if the tracks agree in a general way with the tracks made by defendant or shoes worn by him, the circumstances would be stronger. If they agree accurately, or there were peculiarities between the tracks found upon the ground and shoes worn by defendant, the circumstances would be very strong. But the want of strength in the circumstances would not render the evidence inadmissible. If the circumstance has a tendency to connect appellant with the offense charged, under the general rule such circumstance is admissible.

Appellant complains of the action of the court receiving the following testimony, over his objections. W. D. Snodgrass was introduced as a witness for the state, and in substance stated that he was constable of precinct No. 1 of Titus county, Texas, and when he heard of the homicide he went over to where it occurred, and carried Sam Porter's dog; that this dog was kept for the purpose of running people, and was a bloodhound; that he had had experience with this dog, and it had been trained and was reliable; that if he was taken to a place and put on the track, and he ever opened on the track, he would run that track to its destination, and he would run no other track except that particular track; that after he had run said track to its destination he could be put on another track; that he was present when the dog was put on the track at the scene of the killing; that he kept up with him a part of the way, but he ran so fast he could not keep up all the way; that when he got to where appellant lived, the dog was there. Appellant ⁴⁶⁷ objected to that part of the evidence where the witness testified that the dog would keep the track—that he would run it till he reached its destination—because said evidence was necessarily the expression of the witness' opinion in the matter, about which he could give no opinion. Appellant also objected to the acts of the dog running the track, on the ground that said evidence was immaterial, irrelevant, hearsay, and a matter wholly discon-

necting from the defendant, and was a transaction that occurred when defendant was not present, and one for which he could not be bound. The court, in overruling the objections, explained that the witness said he had seen this dog tried often, and he spoke from experience with the dog. With reference to the last proposition—that is, whether testimony that the dog took a certain track and trailed it to appellant's house—we would observe that so far as we are advised, the authorities are not numerous. Such testimony, however, has been held admissible in Alabama and Kentucky, and perhaps other states: See *Hodge v. State*, 98 Ala. 10, 39 Am. St. Rep. 17, 13 South. 385; *Simpson v. State*, 111 Ala. 6, 20 South. 572; *Pedigo v. Commonwealth*, 103 Ky. 41, 82 Am. St. Rep. 566, 44 S. W. 143, 42 L. R. A. 432. In the latter case, the court, citing two other cases, bases its opinion as to the admissibility of such evidence upon our common knowledge and experience with reference to the qualities of trained dogs of certain pure breeds, and that such evidence is admissible in connection with other circumstances, as a fact or circumstance tending to connect a party with a crime. We quote from that case as follows: "After a careful consideration of this case by the whole court, we think it may be safely laid down that, in order to make such testimony competent, even when it is shown that the dog is of pure blood and of a stock characterized by acuteness of scent and power of discrimination, it must also be established that the dog in question is possessed of these qualities, and has been trained or tested in their exercise in the tracking of human beings, and that these facts must appear from the testimony of some person who has personal knowledge thereof. We think it must also appear that the dog so trained and tested was laid on the trail, whether visible or not, concerning which testimony has been admitted, at a point where the circumstances tend clearly to show that the guilty party had been, or upon a track which such circumstances indicated to have been made by him. When so indicated, testimony as to trailing by a bloodhound may be permitted to go to the jury for what it is worth, as one of the circumstances which may tend to connect the defendant with the crime of which he is accused." It occurs to us that the reason for the admissibility of such testimony is founded upon correct logic. It is a matter of common knowledge and observation that trained animals of the hound species are capable of trailing and following tracks of human beings;

and they have been used time out of mind for that purpose. Here, according to the testimony of the witness, the track assumed to be that of the supposed murderer, and which the circumstances in evidence tend to show was his track, was pointed out to the dog. He trailed this track ⁴⁶⁸ from where it was pointed out to him, to the residence of the defendant, some mile and a half; and the course of his pursuit of the track was followed by witnesses who testified in the case, and they show that the dog followed this track which they saw upon the ground and which they described to the jury. We hold that this character of testimony is admissible.

The other objection urged is, that the witness was permitted to speak of his knowledge and experience of the dog as being an animal trained for the purpose of running down human beings. Without this testimony we do not believe the evidence would have been admissible.

Appellant objected to the state laying a predicate for the contradiction of Mrs. Phoebe Spearman, wife of deceased, in this, that the state was permitted to ask her, "Did you not on the day that your husband was buried, at Mrs. Ella Spearman's house, tell her that on Saturday before Travis was killed on Wednesday, they sent for you to go over to your father's house, and that you went without Travis, and that when you got there your father asked you if Travis was coming, and your father immediately got his gun and went in the direction that Travis would come afoot, and that when Travis came, he came in a buggy around the road, and that now, since your husband was killed, you could look back over it all, and see that your father had killed Travis?" To which she replied in the negative. The state was then permitted to contradict her, showing that she did use the language above quoted to Mrs. Ella Spearman. Of course, defendant having put Phoebe Spearman on the stand, it was competent to cross-examine her in regard to any fact about which she testified, and it was competent to ask her with reference to the transaction that occurred at her father's house on the Saturday before the homicide; that is, that she informed her father, when he asked her if Travis was coming, and she said yes, and that her father then got his gun and went off with it, etc. But it was certainly not competent to adduce from this witness her belief or opinion, after looking back over all that had happened, that she had the belief that her father had killed Travis, her husband; much more was

it not competent, when she denied her belief, or the expression of it in that respect, to impeach her by another witness.

And in this same connection it was further shown that the state was permitted to lay the predicate for this witness' contradiction on another matter, which involved her belief in appellant's guilt. In her cross-examination she was asked if she did not tell Jewel Spearman, while she was in the buggy with her following the body of her husband home from the scene of the killing, the following: "I believe that my father killed Travis, and nobody else, and he killed him because I married Travis." She denied this. Thereupon the witness Jewel Spearman was placed on the stand for the state, and it was proven by her that the witness Phoebe Spearman did not state to her as above shown. This testimony was equally inadmissible. Like the former, it was not an impeachment upon any fact pertaining to the case, but an impeachment ⁴⁶⁹ of the witness, as to statements made by her or assumed to be made by her, as to her belief of appellant's guilt. This question was directly before the court in *Drake v. State*, 29 Tex. Cr. App. 265, 15 S. W. 725; and it was there distinctly held that such evidence was not only inadmissible, but was exceedingly hurtful. It is not necessary to reiterate the argument of the court in that case here, but under this authority, as well as other cases following it, this testimony should not have been permitted: *Wilson v. State*, 37 Tex. Cr. Rep. 64, 38 S. W. 610; *Cogdell v. State*, 43 Tex. Cr. Rep. 178, 63 S. W. 645; *Morton v. State*, 43 Tex. Cr. Rep. 533, 67 S. W. 115.

The attempt to control this testimony by the charge of the court was without effect and futile.

We further hold in this same connection that it was not competent to ask this witness Phoebe Spearman if she did not refuse at the examining trial to go in the room where her father was, and stated in that connection to the witness Ella Spearman, "If my father is in the opera house, where they are holding the examining trial, I do not want to go there, for I don't want to see him"; and then on her denial of said statement to impeach her by the witness Ella Spearman. This was clearly getting before the jury in an indirect manner the opinion of the witness as to her father's guilt, and was not proof of any fact or circumstance from which that guilt could be legitimately inferred. All of this testimony was hurtful and injurious to appellant and should not have been

admitted. Of course, this does not exclude any fact connected with any transaction having legitimate bearing upon the question of appellant's guilt about which the witness may have been asked, but all testimony in regard to her opinion or belief as to any fact, much less as to appellant's guilt, was not legitimate evidence to be proven originally against appellant, and if she denied the same, she could not be impeached in regard thereto.

Appellant objected to the following testimony of state's witness Lightfoot, by whom the state proved certain inculpatory statements made by appellant to him, or in his presence, as the voluntary statement of appellant at the inquest, he being the county attorney, and after defendant had been duly warned. It appears that after Lightfoot had testified as to certain statements made by appellant to him, after being duly warned, defendant then quit talking; and the district attorney questioned him as follows: "Mr. Parker, didn't you take your gun with you?" And he said yes. He then asked, "Why did you take your gun with you if you were going over there to rent land?" He replied, "I had it along to shoot rabbits with; he said the rabbits had been bothering his corn." I said, "Mr. Parker, why do you want to kill rabbits this time of year?" and he said, "I just shoot a rabbit every time I see one." I said, "What did you shoot the rabbit with?" and he said, "With buckshot." I expressed some surprise that he would use buckshot to shoot rabbits with, and he said he had them in his shot sack. I then said, "Now, Mr. Parker, isn't it true that after you got over into the Archer field that you went over to Travis Spearman's ⁴⁷⁰ house, that you went through the mouth of the lane, that you crossed over the road and went up into those bushes in front of the house; and then didn't you go back around the hill and get around to the back of Spearman's house, and under cover of those peach trees and weeds, and then didn't you slip up to that window; and when you saw him through the door with his back to you, didn't you fire and shoot him in the back, and then when you heard him halloo, 'Oh,' didn't you walk around and fire another shot in his temple?" He said, "Men, if I did, I don't have any recollection of it. I may have done it, but I don't know anything about it. My mind was a perfect blank." I then said, "Mr. Parker, isn't it strange that you know when you left your home: isn't it strange that you remember carrying your gun; isn't

it strange that you remember that you shot a rabbit; isn't it strange that you remember that you reached the Archer field, and then your mind became a blank, and you have no recollection of what occurred after that, and yet you can remember leaving the Archer field; you can remember coming home, and describe your course all the way back; you can remember sitting down on the back steps and pulling off your shoes; and you can remember going in the house and pulling off your clothes, and you can remember the sheriff coming out there; you can remember that after you changed your clothes you went up to your son's house, and how long you stayed there; you remember you went back to your house, and yet you can't remember what happened to you at that particular time?" He then said, "Men, I may have done it, but I don't remember anything about it." Defendant was not represented by counsel at that time.

This testimony was not admissible. We understand the rule to be that when one is under arrest, there must not only be the statutory warning given, but the statement made must be freely and voluntarily made, and the burden is on the state to show this. Here defendant, after he had made a statement, was rigidly cross-examined by the attorney representing the state. There is evidently a distinction between testimony which is freely and voluntarily given and that which is elicited by means of a cross-examination. We would not be understood as holding that all statements made in answer to questions are not admissible on that account; but the line must be drawn somewhere, and while it may be difficult in some character of cases to see where the line should be drawn, yet we believe in this case there is no difficulty. Elicited as it was on a severe cross-examination, it was not freely and voluntarily made: *Gallaher v. State*, 40 Tex. Cr. Rep. 296, 50 S. W. 388.

Appellant criticises the charge of the court on murder in the second degree. In our opinion said charge in applying the law to the facts should also have embraced the idea of an unlawful killing and upon malice aforethought. We would further suggest, if the facts on another trial are the same as shown in this record on the subject of alibi and insanity, the court should instruct the jury on these subjects. The court ⁴⁷¹ should also follow the approved forms in a charge on circumstantial evidence.

For the errors discussed, the judgment is reversed and the cause remanded.

Evidence as to Trailing with a Bloodhound of one accused of crime is discussed in *Pedigo v. Commonwealth*, 103 Ky. 41, 82 Am. St. Rep. 566, and note. In the recent case of *McClurg v. Brenton*, 123 Iowa, 368, 101 Am. St. Rep. 323, it is held that in an action to recover for an unlawful search, photographs of hounds used in making such search are not admissible in evidence.

SCOTT v. STATE.

[46 Tex. Cr. Rep. 536, 81 S. W. 294.]

HOMICIDE—Evidence—Res Gestae.—A declaration by a person accused of murder, made within five minutes after the killing, that his pistol had been discharged by some person running against him while he was engaged in making an arrest, and upon being informed that he had killed a man, his further declaration that it must be a mistake, but if true, the killing was unintentional and accidental, is admissible in evidence as part of the *res gestae*. (p. 1033.)

TRIAL—Argument of Counsel—Remarks of Court.—It is proper for the court, or for the attorney for the prosecution, to enjoin upon the jury not to arrive at the verdict by lot or chance. (p. 1034.)

HOMICIDE.—Instructions that if the jury believe beyond a reasonable doubt that the shooting by the accused was accidental and not intentional it must acquit, are not objectionable as being too onerous. (p. 1034.)

HOMICIDE—Accomplice.—The mere fact that another person went with the accused to make an arrest, with or without lawful authority, does not make him an accomplice to a homicide committed by the accused, but not in contemplation by such persons, nor directly connected with the contemplated act. (p. 1034.)

Makemson, Hudson & Lord, for the appellant.

H. Martin, assistant attorney general, for the state.

538 **BROOKS, J.** Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of twenty years.

The bill of exceptions shows that defendant offered to prove by witness Russell Holder that defendant stated to him, about 9 o'clock of the night of the homicide, at the county jail, which was within three or five minutes walk of the place of the alleged killing, that his (defendant's) pistol had been discharged by some person running against him while he was engaged in making an arrest of several vagrants at Rowland & Folley's saloon. And that while defendant and witness Holder were talking about the matter Officer Jake Douglass came to the jail where they were, and told witness Holder, who was jailer, to hold Jeff Scott, as he had killed a man.

And thereupon defendant said that it must be a mistake; but if it was true he had done so unintentionally, and that his pistol went off accidentally when he was arresting parties, and that he did not know that the ball struck anyone, and he could not think it did, as he would have known it if it had. This testimony was offered, as the bill shows, in connection with the following facts already testified by said witness Holder: "I was jailer at the time of this shooting. Jeff Scott brought two persons to the jail somewhere about 9 or 9:30 o'clock that night; said he had arrested them at Rowland & Folley's saloon. I took the prisoners he brought and locked them up in the jail. I had this conversation at the jail in Beaumont. I can walk from Rowland & Folley's saloon to the jail in about three minutes, anyway five minutes. It is about six blocks distant. Yes, in this conversation Jeff Scott told me other things; and while we were talking, Officer Jake Douglass came to the jail and told me to hold Jeff Scott as he had killed a man." Appellant offered this testimony on the ground that it was *res gestae*. The court approves the bill with the following qualification: "The witness Holder said that he knew nothing about when the shooting took place; that the jail and courthouse, where he must have been at the time, are about eight blocks or about one-half mile from the Folley & Rowland saloon, where the shooting occurred; that he did not know where defendant had been nor what he had done between the time the shooting took place up town and the time defendant came to where said witness was at the courthouse. And the court further explains that defendant himself testified that after the shooting he took charge of two other prisoners, and walked from the place of the shooting to the courthouse and jail; and that he never got to the courthouse and jail before ten or fifteen minutes after the shooting; and the court sustains the objection by the county attorney to the proffered testimony on the part of the witness Holder on the ground that such testimony was not admissible as *res gestae* and was self-serving." The bill of exceptions shows that this testimony is *res gestae*. The court erred in excluding the same: *Freeman v. State*, 40 Tex. Cr. Rep. 545, 46 S. W. 641, 51 S. W. 230.

Bill of exceptions No. 2 complains that during the speech of ⁵³⁹ the county attorney to the jury, he was enjoining upon the jury not to arrive at a verdict by lot, and in doing

so he used the word "ballot" instead of "lot." Thereupon the court corrected counsel, using the following language: "You mean that would be arriving at a verdict by lot or chance." We see no error in the statement of the court. It was proper for the court and for the state's counsel to enjoin upon the jury not to arrive at their verdict by lot or chance.

Various errors are assigned as to the admission of testimony, but no bill being reserved we cannot consider them.

Appellant objects in the eighth ground of his motion for new trial to the twenty-first paragraph of the court's charge, because the same required the jury to believe that the shooting was accidental beyond a reasonable doubt before they could acquit defendant; and because said charge fixes too onerous a rule, in that it requires that the shooting must have been both accidental and not intentional. The charge complained of is as follows: "If you believe from the evidence beyond a reasonable doubt that defendant, Jeff Scott, about the time alleged in the indictment, did shoot and thereby kill the deceased, John T. Williams; and you further believe from the evidence that such shooting was accidental, and not intentional upon the part of defendant, then and in that event the homicide is excusable, and if you so believe from the evidence, or if you have a reasonable doubt thereof, then you will find defendant not guilty." We think the charge is correct, and not subject to the criticism urged by appellant: *Hull v. State*, 43 Tex. Cr. Rep. 479, 66 S. W. 783.

The ninth ground of the motion for new trial insists that the court erred in not charging the jury that Tom Lewis was an accomplice, because the testimony in this case makes said witness an accomplice. We do not agree with this contention. The mere fact that Lewis went with appellant to arrest parties for vagrancy, with or without lawful authority, would not make him accomplice to a homicide that appellant committed that was not within contemplation of the parties and directly connected with the unlawful act, if it be conceded to be unlawful, that they agreed to commit. In other words, we hold that Lewis had no guilty participation in the shooting, was not consenting to it, aiding, advising or in any manner connected with said shooting, such as to require the court to charge on the law of accomplice.

The judgment is reversed and the cause remanded.

The Question of Res Gestae is discussed in the monographic note to *People v. Vernon*, 95 Am. Dec. 51-76, and in the recent cases of *Dixon v. Northern Pac. Ry. Co.*, 37 Wash. 310, 107 Am. St. Rep. 712; *Vann v. State*, 45 Tex. Cr. Rep. 434, 107 Am. St. Rep. 997; *Bachant v. Boston etc. R. R. Co.*, 187 Mass. 392, 105 Am. St. Rep. 408. No fixed time or distance from the main occurrence can be established as a rule to determine what is a part of the *res gestae*. In fact, time is not necessarily a controlling element. Generally speaking, however, the declarations must be substantially contemporaneous with the litigated transaction, and be the instinctive, spontaneous utterance of the mind while under the active, immediate influences of the transaction, the circumstances precluding the idea that the utterances are the result of reflection or design to make false or self-serving declarations: See *Redmon v. Metropolitan St. Ry. Co.*, 185 Mo. 1, 105 Am. St. Rep. 558, and cases cited in the cross-reference note thereto. As to whether the declarations of an accused person made after the commission of the crime are admissible as part of the *res gestae*, see *Ferguson v. State*, 134 Ala. 63, 92 Am. St. Rep. 17; *State v. Gillespie*, 62 Kan. 469, 84 Am. St. Rep. 411; *Griffin v. State*, 40 Tex. Cr. Rep. 312, 76 Am. St. Rep. 718; *Powell v. State*, 101 Ga. 9, 65 Am. St. Rep. 277; *Kinnard v. State*, 35 Tex. Cr. Rep. 276, 60 Am. St. Rep. 47; *State v. Harria*, 45 La. Ann. 842, 40 Am. St. Rep. 259; *Miller v. State*, 31 Tex. Cr. Rep. 609, 37 Am. St. Rep. 836; *Stockman v. State*, 24 Tex. App. 387, 5 Am. St. Rep. 894; *Lynch v. State*, 24 Tex. App. 350, 5 Am. St. Rep. 888.

EX PARTE GREEN.

[46 Tex. Cr. Rep. 576, 81 S. W. 723.]

CONTEMPT—Newspaper Comments not on Pending Case.—The publisher of a newspaper cannot be held guilty of contempt of court in using expressions defamatory of such court and its proceedings, unless they relate to some case pending therein. (p. 1039.)

CONTEMPT by Publications.—There can be no constructive contempt of court with reference to publications reflecting on the court or the judge thereof, unless the publication is both defamatory and untrue, and relates to some particular case then pending and is calculated to embarrass the court in the trial or disposition thereof. (p. 1040.)

Johnson & Edwards and F. J. McCord, for the appellant.

H. Martin, assistant attorney general, W. A. Hanson and S. Robinson, for the state.

⁵⁷⁷ **HENDERSON, J.** This is an original habeas corpus proceeding, sued out before this court. During the January term, 1904, of the county court of Smith county, L. M. Green, one of the editors of the "Tyler Courier," a newspaper, published and circulated in Tyler, Smith county, and vicinity,

in the issue of said paper on January 21st, wrote and published the following editorial, to wit:

"Why is it Thus?—The people of Smith County are having the wool pulled over their eyes and a great many of these poor creatures don't know it. But if they were tied hand and foot and compelled to sit in the courthouse and forced to witness the proceedings in the trial of criminal cases for one week in the county court they would come out of that building in full agreement with the Courier, which asserts that the county criminal court proceedings are not far removed from a public disgrace. Witnesses are denounced and accused of all sorts of crimes while in the witness box, and jurors are offended, ridiculed and forced into argument and to answer questions put with the sole purpose of aggravating and provoking them to say something that will disqualify the juror in that case.

"The editor sat in the courthouse recently and heard a lawyer tell the judge that 'I know I cannot get a fair trial for my client in this ⁵⁷⁸ court,' and the judge sat like a schoolboy would when being lectured by the teacher.

"The taxpayers of the county are paying dearly for this public disgrace. They foot the bills and pay the penalty for tolerating these proceedings, that are making mockery of court trials. For several years the Courier has been indirectly and directly trying to arouse the people in their own interest and for their own benefit, but it has made poor headway. What is needed is jurors and witnesses with nerve enough to sit in the jury box and witness chair with a gun, and then pull down on the first lawyer that offers them an insult. Where the court will offer no protection the individual should protect himself from insult. He wouldn't have to kill any lawyer. A lawyer can scent danger as far as anyone.

"The people of Smith County owe it to themselves to get together in their own neighborhoods and discuss this disgrace and what is best to be done with it. If any of the farmers are so ignorant as not to know what is going on in the courthouse, let them talk with the witnesses and jurors who have been in the present county court now in session, and then they will know how to proceed. They will have the information, not from the Courier, but from other sources as well, and in order to help along the Courier here publishes the names of the jurors for this week, but they are not onto the jugglery on the outside, but Rev. M. O. Meador and other

good citizens are onto it. Here are the names of the jurors: J. S. Hill, E. R. Gibson, W. T. Smith, R. M. Johnson, J. D. Curry, E. P. Barbee, S. J. Morris, E. L. Stuart, W. J. Howard, C. C. Cross, T. F. Morris and F. S. Zackery."

Relator was summoned to appear before said county court on January 23d, to show cause why he should not be held in contempt for the publication of said writing. He came before said court and answered, among other things: 1. That the court was without jurisdiction to adjudge him guilty of contempt. 2. That the matters and things set forth in said article did not constitute contempt. 3. That said publication was not in reference to any cause, suit or proceeding then pending, or at any time pending in said court, and was not a criticism upon any decision, order or ruling of said court, in any suit or proceeding then or ever pending in said court; and in no manner interfered with, obstructed or impeded the trial or disposition of any suit, cause or proceeding in said court; nor did said article obstruct or impede the due administration of the law in said court. Nor does it interfere with or prevent the judge of said court, the parties, witnesses, jurors, attorneys or officers of said court from the discharge of their duties. 4. And further, that the writing and publication of said article could not be punished, as it is protected by that clause of the state constitution which guarantees the liberty of speech and of the press, etc. The answer further proceeds to set out at length that said article was not ⁵⁷⁹ intended in any manner to reflect upon the honesty of the judge of said court, nor does it charge that the law was not fairly administered in said court; that said article was written and published without malice and in good faith, relator believing that the same was proper matter for publication, and was designed and intended to call attention to a practice believed to be the subject of criticism, and calculated to interfere with and prevent the due and orderly administration of justice in and by said court; that the evil complained of and criticised was the treatment of witnesses and jurors by certain attorneys in said court, and any conduct on their part lacking in proper regard for the dignity of said court and its proceedings. That the publication was written while its author was smarting under indignation on account of proceedings which he had witnessed in said court, wherein the witnesses had been unnecessarily and improperly denounced and abused, jurors asked many impertinent, pro-

voking and unnecessary questions; and in which one of the lawyers had stated to the court, and to the judge, "that he could not hope to get a fair and impartial trial in said court." That relator was indignant at the lack of respect shown for said court and its proceedings which said conduct manifested; and the sole purpose and object of said publication was to express relator's disapproval of such unseemly proceedings, and to bring about a greater respect for the court. That its publication was not intended as a contempt of said court, nor to interfere with the due administration of the law in said court, but to arouse public opinion and to prevent the unjust abuse of witnesses and conduct lacking in proper respect for the court. Relator further disclaimed any intention to provoke jurors or witnesses to any acts of violence in said court, but was intended merely to forcibly express the idea that jurors and witnesses are entitled to protection from any unnecessary or unjust abuse. Relator disclaimed any intention to countenance or encourage disrespect to the court or incite violence by the suggestion that the witnesses and jurors should go armed into said court; that his purpose was merely to call attention to the matter of the treatment of jurors and witnesses in said court, and that he was moved solely by the desire and purpose of aiding said court in the maintenance of order and decorum and in administering the law.

The court heard the matter on the pleadings, being the motion and answer, and adjudged said L. M. Green in contempt of the court, assessing against him a fine of one hundred dollars. The attorneys for relator asked the court for a ruling on his right to introduce testimony as to the truth of facts stated in said answer. The court ruled no testimony was necessary and declined to hear any testimony, for the reason that said answer constituted no defense to the charge of contempt against him; and for the further reason that the court was present in the courtroom, and heard and knew all things that occurred and referred to in said article, and knew as a fact that said article, published by said Green, in so far as the action of the court was concerned, was untrue.

580 On the hearing of this application before us at the Dallas term, testimony was adduced pro and con in regard to said contempt proceedings, and the right of said county judge to adjudge relator guilty of contempt. This is a sufficient statement in order to present the legal questions involved.

We understand relator to contend that the matter about which he was fined was not written with reference to any pending case in said court, and consequently could not and cannot be treated as contemptuous of the court. Furthermore, the same was legitimate criticism of the court and its proceedings and is privileged, being protected under our state constitution, which guarantees the liberty of speech and of the press. On the other hand, the state insists that the subject matter of said article is not legitimate criticism, but is defamatory and denunciatory of the court, and is the subject of contempt; that although said article may not relate to or refer to any case pending before said court, it was defamatory and calculated to scandalize the court itself, and bring it into public disgrace, and so serve to delay, obstruct and embarrass the court in the conduct and trial of all causes. and thus disparage its usefulness as an instrumentality of government.

It may be conceded that the article by its terms did not refer to any particular case then pending before the county judge, or if it did, it is not disclosed what particular case the writer had in view. We are accordingly confronted with the proposition, can the publisher of a newspaper be held guilty of contempt, by using expressions defamatory of a court and its proceedings, which do not relate to any pending cause? Relator has referred us to a number of cases, which he insists are decisive of the question that the court cannot treat as a matter of contempt any criticism, no matter how untrue or defamatory, of the court, which is not uttered with reference to some particular case then pending in the court. We have examined these, and the majority of them would appear to bear out his contention: *State v. Anderson*, 40 Iowa, 207; *Stuart v. People* (Ill.), 3 Scam. 395; *Storey v. People*, 79 Ill. 45, 22 Am. Rep. 158; *Ex parte Hickey* (Miss.), 4 Smedes & M., 751; *Ex parte Wright*, 65 Ind. 504; *Cheadle v. State*, 110 Ind. 301, 58 Am. Rep. 199, 11 N. E. 426; *Ex parte Barry*, 85 Cal. 603, 20 Am. St. Rep. 248, 25 Pac. 256; *Rosewater v. State*, 47 Neb. 630, 66 N. W. 640; *State v. Edwards*, 15 N. Dak. 383, 89 N. W. 1011; *State v. Kaiser*, 20 Or. 50, 25 Pac. 964, 8 L. R. A. 584; *State v. Tugwell*, 19 Wash. 238, 52 Pac. 1056, 43 L. R. A. 717; *People v. Stapleton*, 18 Colo. 568, 33 Pac. 167, 23 L. R. A. 787; *McClatchy v. Superior Court*, 119 Cal. 413, 51 Pac. 696, 39 L. R. A. 691.

In some of the above-enumerated cases there was no question as to the pendency of the case about which the publication was made; consequently the question was not directly involved. Some of them, however, did involve the question. There are cases, however, which maintain the contrary view: *Commonwealth v. Dandridge*, 2 Va. Cas. 408; *Ex parte Moore*, 63 N. C. 397; *Ex parte McLeod*, 120 Fed. 130; ⁵⁸¹ *State v. Morrill*, 16 Ark. 384; *State v. Shepard*, 177 Mo. 205, 99 Am. St. Rep. 624, 76 S. W. 79; *In re Shadwick*, 109 Mich. 588, 67 N. W. 1071. While all of these cases discuss the question elaborately and announce the doctrine that the publication can be contemptuous, although not in regard to a case then pending before the court, still in but two of them was the question directly involved, to wit, *Ex parte Moore* and *Ex parte McLeod*.

So it may be said that a great majority of the American cases require that the publication be with regard to some pending case, before it can be treated as contemptuous.

In this state we have no statute defining contempts of court, and we are accordingly relegated to the doctrine of contempts at common law as applied to our written constitution and the spirit and genius of our institutions. As stated above, we gather from the current of authorities, both those cited and others, that there can be no constructive contempts of court with reference to publications reflecting on the court or the judge thereof, unless the publication is not only of a defamatory character but is untrue, and in addition thereto relates to some particular case then pending, and is calculated to embarrass the court in the trial or disposition thereof. As to other publications not relating to a pending case, no matter how defamatory the language used may be with reference to the court or the judge thereof, this will not constitute a contempt, because it cannot be regarded as calculated to interfere with the administration of justice. If it is true, as has been said, that the principle on which all constructive contempts are allowed is the tendency to degrade the courts, and so impair their usefulness as agencies of government, then it must be conceded that it is difficult to distinguish the evil consequences likely to ensue from denunciatory publications regarding the conduct of courts in cases no longer pending and such publications concerning cases that are pending. To the ordinary understanding the baneful results likely to follow are equally as great in one case as in the other.

However, the rule announced in the great majority of cases, and it may be considered the American doctrine, is, that no matter how defamatory of the court or judge a publication may be, it cannot be regarded as a contempt of court unless it be written and published with reference to a case then pending before the court. We accordingly hold, inasmuch as the matter about which relator was adjudged guilty of contempt of court did not relate to a case then pending before the court, it cannot be treated as a contempt. The relator is accordingly ordered discharged.

Contempt of Court by libelous newspaper publications is discussed in the monographic note to *Percival v. State*, 50 Am. St. Rep. 572-585. Such contempts are classified, defined, and the manner of their punishment described in the recent cases of *State v. Shepperd*, 177 Mo. 209, 99 Am. St. Rep. 624; *Burdett v. Commonwealth*, 103 Va. 838, 106 Am. St. Rep. 916. According to these cases, courts possess inherent power to punish, as for contempt, libelous publications upon their proceedings, pending or past, which tend to degrade the tribunals, destroy public confidence and respect for their judgments, and obstruct the free course of justice.

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DEEDS, Acknowledgment of.—A mortgage signed by a husband and wife, the certificate of the acknowledgment of which declares that personally before the notary public appeared Mary H. Bottego and John H. Bottego, her husband, "known to him to be the person described in and who executed the foregoing instrument, and who severally acknowledged to him that he executed the same," is acknowledged substantially in accordance with the provisions of the statute, and entitled to record. (Mont.) *Trerise v. Bottego*, 521.

Note.

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ADOPTION.

1. **ADOPTION—Decree—Attack—Burden of Proof.**—If a decree of adoption made and rendered in another state is attacked as being repugnant to the law of the state where such attack is made in relation to the difference in ages between the respective parties, the burden of proving such fact is on the person attacking the judgment. (La.) Succession of Caldwell, 341.

2. **ADOPTION—Decree—Collateral Attack.**—A decree of adoption valid where rendered is conclusive against collateral attacks by parties and privies. (La.) Succession of Caldwell, 341.

3. **ADOPTION—Conflict of Laws.**—If a resident of one state obtains a valid decree from a court of competent jurisdiction in another state declaring that he adopted his niece, an adult, and a resident of the latter state as his child, such decree will be given full faith and effect in the former state under the provisions of the national constitution and principles of comity, when its enforcement is not repugnant to the law of that state and does not affect any of its citizens. (La.) Succession of Caldwell, 341.

ADVERTISING.

See Constitutional Law, 7; Municipal Corporations, 6, 7.

AFFIDAVIT.

See Process, 8.

AGENCY.

See Principal and Agent.

ALIENS.

See Death.

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See Divorce.

AMENDMENT OF RECORDS.

See Courts.

ANIMALS.

See Negligence, 2.

APPEAL AND ERROR.

1. **FINAL JUDGMENT, What is.**—An order fixing the compensation of a receiver and allowing him counsel fees may be appealed from as a final judgment. (Mont.) Hickey v. Parrot Silver etc. Co., 510.

2. **APPEAL AND ERROR.**—A Motion Asking the Trial Court to Vacate a Verdict is a motion for a new trial, and from a ruling on that motion no appeal lies to the court of appeals of Maryland. (Md.) Stern v. Bennington, 433.

3. **APPEAL—Constitutionality of Statute.**—The question of the constitutionality of a statute upon which suit is brought may be raised so as to entitle it to review on appeal, by an exception taken to an instruction based upon the provisions of such statute and stating them to be the law. (Ill.) Christy v. Elliott, 196.

4. **APPEAL**.—In Testing the Correctness of the ruling of the trial court in directing a verdict for the defendant, the appellate court must take that view of the facts sustained by evidence which is the most favorable to the plaintiff. (Ark.) *La Fayette v. Merchants' Bank*, 71.

5. **APPEAL**.—Questions Reviewable.—If a case comes before the appellate court under a provision of a state constitution granting appellate jurisdiction of suits involving the constitutionality or legality of any fine or penalty imposed by a municipal corporation, no other question can be inquired into except that as to which jurisdiction is thus specially conferred. Whether the facts were sufficient to justify a conviction cannot be considered. (La.) *City of Crowley v. Ellsworth*, 353.

6. **APPELLATE PRACTICE**.—Waiver of Error.—If an alleged erroneous instruction is not set out in full or in substance in the appellant's brief, the error is waived. (Ind.) *Garrigue v. Kellard*, 324.

7. **APPEAL AND ERROR**.—Remedy Without Injury.—If there is no attempt to deny the truth of testimony given by a witness, and it must therefore be assumed to have been true, no prejudicial error could have been committed by refusing to require him to answer a question asked for the purpose of impeaching him. (Md.) *Deck v. Baltimore etc. R. R. Co.*, 399.

8. **APPELLATE PRACTICE**.—Erroneous Charge.—If the charge given by the trial court is contradictory, irreconcilable, and confusing, it is reversible error. (Tex. Cr. Rep.) *McAlister v. State*, 958.

ARREST.

1. **ARREST**.—Right to Resist Officer.—If an officer has a right to make an arrest and a killing grows out of such arrest, the act of the officer in arresting must not have been in a threatening and menacing manner, and if the officer acted in violation of law, the person whom he was attempting to arrest could legally resist him, if necessary to save his own life, to the extent of taking the officer's life. (Tex. Cr. Rep.) *Vaun v. State*, 961.

2. **ARREST**.—Charge of Court Shifting Burden of Proof.—A charge of the court that if the jury does not believe, from the evidence, that the deceased was in good faith attempting to arrest the accused, shifts the burden of proof, and is reversibly erroneous. (Tex. Cr. Rep.) *Vann v. State*, 961.

ASSIGNMENT.

See Mortgages.

ATTORNEY FEES.

See Attorney and Client; Constitutional Law. 2.

ATTORNEY AND CLIENT.

ATTORNEYS AT LAW.—Contract to Divide Fees—Public Policy.—A contract between an attorney at law and one not a lawyer, providing that the latter shall procure the employment of the former by third persons for the prosecution of suits to be commenced, and shall assist in looking after and procuring witnesses to be used in such suits, in consideration of a share of attorney's fees collected therein, is opposed to public policy and void. (Neb.) *Langdon v. Conlin*, 643.

See Husband and Wife, 10, 11; Receivers; Trial, 2.

AUTOMOBILES.

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BANKRUPTCY.

1. BANKRUPTCY—Setoff of Unmatured Notes.—Notes given by a bankrupt, though not matured at the time of his insolvency, are provable against his estate, and may be set off in an action in a state court by the assignee in bankruptcy upon a claim against the holder of the notes, to an extent necessary to extinguish the claim. (N. Y.) *Frank v. Mercantile Nat. Bank*, 805.

2. BANKRUPTCY—Setoff of Claims Acquired After Insolvency. In an action by an assignee in bankruptcy, the defendant may set off a claim against the estate of the bankrupt acquired after his insolvency, but before the defendant entered into the obligation upon which he is sued. (N. Y.) *Frank v. Mercantile Nat. Bank*, 805.

BANKS AND BANKING.

1. FORGED DRAFT—Recovery of Money Paid.—The drawee of a forged draft who has paid it to a collecting bank, both being ignorant of the forgery, may recover from the bank the amount thus paid as money paid by mistake, when a bill of sale on the back of the draft, also forged, was notice to everyone taking it that the drawee was paying, or would pay, not upon the funds of the drawer in his hands, but out of his own funds, upon the belief that there was a valid bill of sale and a transfer of the property therein described. (Ark.) *La Fayette v. Merchants' Bank*, 71.

2. FORGED CHECK—Laches in Recovering Money Paid.—The fact that the drawees of a forged check who pay it to a collecting bank do not notify the bank of the forgery and the mistake in making payment for six months, does not bar them from recovering back the money from the bank, they being ignorant of the forgery

and the bank not being prejudiced by the delay. (Ark.) *La Fayette v. Merchants' Bank*, 71.

BENEFIT ASSOCIATIONS.

1. MUTUAL BENEFIT ASSOCIATION—Insurance, Interest of Member in.—One to whom, as a member of a mutual benefit insurance association, a certificate issues, stating that, as such member, he is entitled to participate in the benefit fund to an amount specified, to be paid at his death to his heirs, has no property interest in the certificate or the fund. (Neb.) *Warner v. Modern Woodmen of America*, 634.

2. MUTUAL BENEFIT ASSOCIATIONS—Administrators have No Interest in.—On the death of a member of a mutual benefit association to whom a certificate has issued, stating that he is entitled to participate in its fund to an amount specified, to be paid at his death, to his heirs, his administrator cannot maintain any action on the certificate, though the decedent left no heirs and no person entitled to recover on the certificate as such, nor is there any person whom he could have designated as a beneficiary thereunder. The certificate did not constitute any part of the estate of the decedent. (Neb.) *Warner v. Modern Woodmen of America*, 634.

3. MUTUAL BENEFIT ASSOCIATION—Beneficiaries.—A Person not of the Class for whose benefit a mutual benefit association is organized cannot be a beneficiary. (Neb.) *Warner v. Modern Woodmen of America*, 634.

4. MUTUAL BENEFIT ASSOCIATION, Reverting of the Fund to.—Where there is a failure to designate a beneficiary, or a void designation, or the death of the beneficiary occurs before that of the assured, and no new beneficiary is named, the association is not liable, and if no disposition of the fund is provided in the contract with the association, it reverts to the society. (Neb.) *Warner v. Modern Woodmen of America*, 634.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILLS AND NOTES.

In General.

1. BILLS AND NOTES—Renewal—Consideration.—If a married woman becomes surety on her husband's note and when due they execute another note in renewal of the former, the surrender of the old note is sufficient consideration for the new one, and as to the payee, the married woman is a principal on the renewal note. (Ind.) *Garrigue v. Kellar*, 324.

2. BILLS AND NOTES—Delivery by Mailing.—Notes properly signed, sealed, placed in an envelope properly addressed to the payee, and delivered to the United States mail at a certain place with the postage prepaid, are deemed delivered at such time and place. (Ind.) *Garrigue v. Kellar*, 324.

Indorsement and Assignment.

3. NEGOTIABLE INSTRUMENTS.—The Transfer without Indorsement of a Negotiable Instrument destroys its negotiable character, and the assignee takes it subject to such defenses as might have been available against it in the hands of the payee. (Mont.) *Cornish v. Woolverton*, 598.

4. ASSIGNMENT of Non-Negotiable Instrument—Effect of Subsequent Payment to the Assignor.—If the maker of a non-negotiable instrument, without notice of its assignment, in good faith, pays it to the original payee, and takes an acquittance, this constitutes a complete defense to an action by the assignee. (Mont.) *Cornish v. Woolverton*, 598.

Negotiability.

5. NEGOTIABLE INSTRUMENTS—Provisions Destroying Negotiability.—A note, otherwise negotiable in form, bearing interest at the rate of six per cent per annum and referring to interest coupons, but adding that the note and coupons are to draw interest at the rate of twelve per cent per annum after maturity, is non-negotiable. (Mont.) *Cornish v. Woolverton*, 598.

6. NEGOTIABLE INSTRUMENT—When Rendered Non-Negotiable by Reference to Mortgage.—A promissory note, negotiable in form, but declaring that it is secured by a mortgage of even date, recorded in a specified county, must be construed in connection with such mortgage. Hence, if the mortgage contains conditions which render the note uncertain as to the amount to be paid or the time of payment, these must be read into the note, and make it non-negotiable. (Mont.) *Cornish v. Woolverton*, 598.

7. NEGOTIABLE INSTRUMENT, When Rendered Non-Negotiable by a Mortgage.—If a note, otherwise negotiable in form shows on its face that it is secured by mortgage, and such mortgage, as it appears of record, provides that the mortgagor will pay all taxes on the property, all liens and encumbrances on the premises and for insurance, and that on default the mortgagee may make such payment, and that the payments so made shall bear interest at the rate of twelve per cent per annum, and be secured by the mortgage; that the mortgagor will keep the property in repair, commit no waste, keep the property insured, and that on default of the payment of interest when due, or in the performance of any covenant therein, the principal and interest shall become due at the option of the holder, who may proceed to foreclose the mortgage, and that in such proceeding one hundred and fifty dollars attorneys' fee may be allowed, the note is thereby rendered non-negotiable. (Mont.) *Cornish v. Woolverton*, 598.

Conflict of Laws.

8. CONFLICT OF LAWS—Negotiable Instruments.—If a note is executed in one state and payable in another having conflicting laws, all matters bearing upon the execution, the interpretation and validity of the note including the capacity of the parties to contract, are to be determined by the law of the place where the contract is made, and all matters connected with the payment, including presentation, notice, demand, protest and damages for nonpayment, are regulated by the law of the place where, by its terms, the note is to be paid, and all matters respecting the remedy to be pursued, including the bringing of suit, service of process, and admissibility of evidence, depend upon the law of the place where the action is brought. (Ind.) *Garrigue v. Kellar*, 324.

9. CONFLICT OF LAWS—Lex Loci Contractus—Validity.—A note executed in one state by a husband as principal and his wife as surety, and payable at a bank in another state, is valid against her in the latter state, if the law of the state where the note is made permits a married woman to become a surety, although the law of the place of payment does not. (Ind.) *Garrigue v. Kellar*, 324.

10. CONFLICT OF LAW—Intention of Law to Govern Validity.—The fact that a note is made payable in another state is not conclusive evidence, nor does it clearly manifest an intention by the parties that its validity should be governed by the law of that state, when such interpretation would render it wholly void as to one of the makers. (Ind.) *Garrigue v. Kellar*, 324.

11. BILLS AND NOTE—Place of Payment—Tender.—The substantial contract evidenced by a note is the undertaking by the maker to pay the principal sum of money named. The place of payment is an incidental matter, and the maker is not discharged from his principal obligation by an unaccepted tender of the amount owing, at the time and place designated for payment, but by such tender is only released from liability for damages which would otherwise accrue from nonpayment. (Ind.) *Garrigue v. Kellar*, 324.

12. CONFLICT OF LAWS—Bills and Notes.—A note executed in one state, and made payable in another state, is, as to its validity, governed by the laws of the state where made. (Ind.) *Garrigue v. Kellar*, 324.

See Banks and Banking; Bonds, 4-6; Husband and Wife, 1-9.

BILLBOARDS.

See Signs and Billboards.

BLOODHOUNDS.

See Evidence, 4, 5.

BONDS.

Given Under Unconstitutional Law.

1. CONSTITUTIONAL LAW—Statute Declared Unconstitutional—Effect on Bond.—A bond given in pursuance of a statute afterward pronounced unconstitutional is not necessarily rendered invalid by such decision. (Neb.) *Stevenson v. Morgan*, 629.

2. CONSTITUTIONAL LAW—Statute Declared Unconstitutional—Effect on Bond—Consideration.—If a bond executed in pursuance of a statute is otherwise valid, and rests upon a consideration independent of such statute, it may be enforced, although the statute is afterward declared unconstitutional. (Neb.) *Stevenson v. Morgan*, 629.

3. CONSTITUTIONAL LAW—Validity of Bond Given Under Statute Declared Unconstitutional.—If a bond is given on an appeal from a judgment in forcible entry and detainer, recovery may be had thereon, although the statute under which such bond was given was afterward declared unconstitutional, provided the obligor has thereby been enabled to retain possession of the premises. (Neb.) *Stevenson v. Morgan*, 629.

Railway Bonds—Bona Fide Holders.

4. RAILWAY BONDS—Bona Fide Holders—Presumption—Fraud. It is presumed that holders of negotiable railway bonds are bona fide holders for value, but if fraud in the inception of the bonds is shown, the holder, to be entitled to protection as a bona fide holder, must show that he is such and his mere possession of the bonds is insufficient. (Pa.) *Shellenberger v. Altoona etc. R. R. Co.*, 876.

5. RAILWAY BONDS—Holder with Knowledge of Infirmary.—A person who takes a negotiable railway bond with knowledge that

the conditions on which alone the bond was authorized were not fulfilled is not protected, and in his hands the bond is invalid, although the imperfection is in some matter relating to the internal affairs of the company which would be unavailable against a bona fide holder. (Pa.) *Shellenberger v. Altoona etc. R. R. Co.*, 876.

6. RAILWAY BONDS—Purchasers with Notice of Illegality.—If railway bonds have been illegally issued and pledged for a debt the amount of which is less than the face value of the bonds, stockholders in the railway company having notice of all the facts, after having purchased the bonds from the pledgee for substantially the amount required for their redemption, cannot recover from such company more than they have paid. (Pa.) *Shellenberger v. Altoona etc. R. R. Co.*, 876.

BOUNDARIES.

BOUNDARIES—Grant of Tide Lands.—Under the royal grant in 1686 to the city of New York of all waste and vacant lands in the city and on Manhattan Island to low-water mark, the city took the land between high and low water mark in trust for the public; and when the city subsequently conveys to an individual a portion of such lands described as bounded by the Hudson river, the boundary of the grant is presumed to extend only to high-water mark, so that the city retains the tideway and lands under water as trustee. (N. Y.) *Matter of Mayor etc. of New York*, 809.

BUILDING AND LOAN ASSOCIATIONS.

1. LOAN ASSOCIATIONS—Usury.—A loan association by complying with the statute controlling the making of loans by such associations may lawfully contract for a greater compensation, by way of interest and premium, for the use of money than the legal rate fixed by the general interest laws of the state, without committing usury. (Ill.) *Home Building etc. Assn. v. McKay*, 263.

2. LOAN ASSOCIATIONS—Bidders—Usury.—If but one bidder, for a loan appears before a loan association at any stated meeting, the association may lawfully accept his bid, and the contract will not be usurious, though the interest and premiums exceed the highest rate fixed by the general laws of the state. (Ill.) *Home Building etc. Assn. v. McKay*, 263.

3. LOAN ASSOCIATIONS—Usury—Estoppel Against Mortgagee. Although a loan made to one not a stockholder in the loan association is in contravention of the statute and the transaction not exempt from the implication of usury, yet one who bids for a loan from such association, not then being a stockholder, cannot after receiving the loan and becoming a stockholder maintain as a defense to foreclosure of his mortgage that he was not competent to bid for a loan at the time he did so, and that this irregularity taints the loan with usury. (Ill.) *Home Building etc. Assn. v. McKay*, 263.

CARRIERS.

Carriers of Goods.

1. CARRIERS—Damages for Delay of Shipment.—The measure of damages for a delay in transporting perishable goods is the difference between their value when and where they should have been delivered and their value when they were delivered, with interest. (Ark.) *St. Louis etc. Ry. Co. v. Coolidge*, 21.

2. CARRIERS.—Contracts Respecting the Liabilities imposed on carriers by law are valid only when fair and reasonable, and upon a

consideration, usually a reduced rate of freight. (Ark.) *St. Louis etc. Ry. Co. v. Coolidge*, 21.

Connecting Carriers.

3. **CONNECTING CARRIERS—Presumption of Negligence.**—When an initial carrier receives freight in good order, the law presumes that each successive carrier between the first and last receives it in good order; and this presumption, working through to the last carrier, who delivers it in bad order, leaves the responsibility upon him, unless he can show that the damage occurred prior to his receiving the freight. (Ark.) *St. Louis etc. Ry. Co. v. Coolidge*, 21.

4. **INITIAL CARRIER—Delay in Forwarding Perishables.**—An unreasonable delay by an initial carrier in delivering such perishable freight as potatoes to the next carrier in the line of transportation, when the weather is warm, in consequence of which they heat and rot, is negligence. (Ark.) *St. Louis etc. Ry. Co. v. Coolidge*, 21.

5. **CONNECTING CARRIERS—Concurring Negligence.**—Where two connecting carriers are both guilty of an efficient and proximate cause of injury to goods shipped over their lines, either or both may be held responsible therefor. (Ark.) *St. Louis etc. Ry. Co. v. Coolidge*, 21.

Carrier of Passengers.

6. **CARRIER—Duty to Protect Passenger in Dangerous Position.** It is the duty of the carrier to protect the passenger against his or her own negligence, under penalty of the failure to do so being regarded as the proximate cause of a resulting accident and injury to the passenger, when it has been the overcrowding of a railroad train resulting from the mismanagement of the carrier that has forced the passenger to occupy a dangerous position. (La.) *Jackson v. Natchez etc. Ry. Co.*, 366.

7. **CARRIERS—Injury to Passenger—Right of Excursionist.**—Railroad excursionists have a right to return home on the train which took them out, and if, owing to the crowded condition of the cars, the platforms thereof are the safest place they can secure, they have a right to occupy them, and in so doing are not guilty of contributory negligence in case of accident and injury to them. (La.) *Jackson v. Natchez etc. Ry. Co.*, 366.

8. **CARRIERS—Negligence—Failure to Carry Emergency Tools.**—The failure of a railroad company to equip its train with tools usually carried for emergency use in case of wreck is negligence, and if, owing to the absence of such tools, a passenger is not rescued from the wreck as soon as he otherwise would have been, the company is liable in damages for his additional suffering caused by such delay, no matter whether the wreck was or was not caused by the negligence of the company. (La.) *Jackson v. Natchez etc. Ry. Co.*, 366.

9. **CARRIERS—Negligence—Collapse of Bridge.**—A railroad company is liable for an injury to a passenger resulting from the collapse of its bridge unless it can show that the bridge as originally constructed was as safe as the highest degree of care and skill could make a bridge of that class, and that, to the fullest extent that the highest degree of care and foresight could suggest, it was inspected for discovering and remedying any defect that might have developed in it from the operation of the road or other causes, and, in case the defect was latent in the material, then that the material was tested before being put into position. (La.) *Jackson v. Natchez etc. Ry. Co.*, 366.

10. CARRIERS—Injury to One Passenger by Another.—Where a party of intoxicated passengers fire pistols and explode dynamite sticks on a train, and the railway employes, though knowing or having an opportunity to know of such misconduct, make no attempt to preserve order until another passenger is accidentally shot, the railway company is liable for the injuries he sustains. (Tenn.) Nashville etc. R. R. Co. v. Flake, 925.

See Livery-stable Keeper; Railroads.

CHATTEL MORTGAGES.

CHATTEL MORTGAGES—Possession of Mortgaged Property—Claim and Delivery.—A stipulation contained in a chattel mortgage providing that upon the happening of certain contingencies named, "the mortgagee may take possession of the mortgaged property, using all necessary force to do so, and may immediately proceed to sell the same in the manner provided by law," is valid and enforceable, and upon the happening of such contingency the mortgagee may maintain an action of claim and delivery for the recovery of the mortgaged property from an officer claiming to hold it under a writ of attachment levied subsequently to the inception of the mortgage lien. (Idaho.) First National Bank v. Steers, 174.

See Trover, 1.

CONFESSIONS.

See Criminal Law, 13, 14.

CONFLICT OF LAWS.

See Adoption, 3; Bills and Notes, 8-12; Contracts. 6-8.

CONSPIRACY.

1. CONSPIRACY—Time of Entering.—On a trial for crime, if a conspiracy to commit it is established, it makes no difference at what time anyone entered into such conspiracy, as everyone who enters into the common purpose and design is deemed a party to the act which has been done before by the others, and to every other act which may afterward be done by any of the others in furtherance of such common design. (Tex. Cr. Rep.) Smith v. State, 991.

2. CONSPIRACY TO MURDER—Acts and Declarations of Conspirators.—On the trial for murder by conspirators, the evidence must show beyond a reasonable doubt that the conspiracy was formed prior to the killing, otherwise the acts and declarations of the conspirators cannot be considered by the jury. (Tex. Cr. Rep.) Smith v. State, 991.

3. CONSPIRACY—Acts and Declarations of conspirators before the conspiracy was formed, are admissible in evidence only to illustrate the motive, purpose and intent of the co-conspirators forming the conspiracy. (Tex. Cr. Rep.) Smith v. State, 991.

4. CONSPIRACY—Husband and Wife as Co-conspirators.—Husband and wife may be co-conspirators to commit murder, and the acts and declarations of either after such conspiracy is formed are admissible in evidence against the other. (Tex. Cr. Rep.) Smith v. State, 991.

5. CONSPIRACY—Declarations of Co-conspirator.—If the conspiracy is established by proof, declarations of a co-conspirator in furtherance of the common design are admissible against one

conspirators, although made in his absence. (Ind.) *Knox v. State*, 291.

6. **CONSPIRACY—Evidence—Letter of Conspirator.**—A letter found on the person of a co-conspirator and testified to by him as having been received from the accused, is admissible in evidence as a physical fact of an incriminating character. (Ind.) *Knox v. State*, 291.

See Homicide, 9.

CONSTITUTIONAL LAW.

1. **POLICE POWER.**—All Statutory Restrictions of the use of property are imposed upon the theory that they are necessary for the safety, health, or comfort of the public, but a limitation without reason or necessity cannot be enforced. (Pa.) *Bryan v. City of Chester*, 870.

2. **CONSTITUTIONAL LAW.**—“Privileges and Immunities” which are protected by constitutional inhibition concern the personal and private rights of citizens, but do not include within their meaning the right to hold office. (Ill.) *In re Mulford*, 249.

3. **CONSTITUTIONAL LAW—Right to Labor and to Contract for Employment.**—The right to dispose of one's labor and to have the benefit of one's labor contract is incident to the freedom of the individual. Such a right can lawfully be interfered with only by one who is acting in the exercise of some equal or superior right. (Mass.) *Berry v. Donovan*, 499.

4. **CONSTITUTIONAL LAW.**—The State may Change Its Mode of Procedure in its courts for the enforcement of existing contractual obligations so long as it does not thereby impair the substantial right secured by such obligations. (Md.) *Miners' etc. Bank v. Snyder*, 390.

5. **CONSTITUTIONAL LAW—Regulating Sale of Milk.**—Section 66 of the Sanitary Code of the city of New York, which provides that no milk shall be sold in the city without a written permit from the board of health, is constitutional. (N. Y.) *People v. Vandecarr*, 781.

6. **CONSTITUTIONAL LAW—Registration of Plumbers.**—The legislature cannot prevent an association of persons in a partnership from carrying on the plumbing business because some of the partners, who have nothing to do with the plumbing work or its supervision, are not registered as plumbers. (N. Y.) *Schnaier v. Navarre Hotel etc. Co.*, 790.

7. **CONSTITUTIONAL LAW—Business Signs, Prohibiting Maintenance of, When a Taking of Property.**—A rule of park commissioners forbidding the maintenance of business signs so near the parkway as to be plainly visible to the naked eye of persons therein amounts to a taking of property, and cannot be held valid unless compensation is provided. (Mass.) *Commonwealth v. Boston Advertising Co.*, 494.

8. **CONSTITUTIONAL LAW—Local Act Respecting Public Improvement.**—The New Jersey statute of April 22, 1903, which provides a legislative scheme to relieve the Passaic Valley sewerage district by requiring all the sewerage thereof to be discharged into New York bay through a system of main, trunk, and outlet sewers to be constructed by commissioners of executive appointment, is a local law for the prosecution of a public enterprise, and it is not a law to regulate the internal affairs of municipalities, but its effect is to

repeal all prior legislation inconsistent with its provisions. (N. J.) *Van Cleve v. Passaic Valley etc. Commrs.*, 754.

9. CONSTITUTIONAL LAW—Costs.—The legislature has no power to compel a county to pay costs, disbursements and attorney fees in a suit to settle and adjudicate the private rights of persons in and to the use of waters appropriated under the laws of the state. (Idaho.) *Bear Lake Co. v. Budge*, 179.

10. CONSTITUTIONAL LAW—Municipal Local Self-government. Without express constitutional provision neither the legislature nor the governor has power to appoint the permanent officers of a municipality. The latter is entitled to self-government, and its officers must derive power from it. (Tex. Cr. Rep.) *Ex parte Lewis*, 929.

11. CONSTITUTIONAL LAW—Municipalities—Right to Local Self-government.—The state has no right under the guise of its law-making authority, to overturn the principles of local self-government of municipal corporations, and, while it has an undoubted right to create their offices and prescribe their duties, here the law-making functions cease, and the filling of the offices belongs exclusively to the municipality. (Tex. Cr. Rep.) *Ex parte Lewis*, 929.

12. CONSTITUTIONAL LAW—Municipal Corporations—Local Self-government.—The mayor and board of aldermen of a municipality are elective officers, and if appointed by the governor of the state, any ordinance passed by them is without authority, and void. (Tex. Cr. Rep.) *Ex parte Lewis*, 929.

See Bonds, 1-3; Eminent Domain; Municipal Corporations; Process; Taxation.

CONTEMPT.

1. CONTEMPT—Newspaper Comments not on Pending Case.—The publisher of a newspaper cannot be held guilty of contempt of court in using expressions defamatory of such court and its proceedings, unless they relate to some case pending therein. (Tex. Cr. Rep.) *Ex parte Green*, 1035.

2. CONTEMPT by Publications.—There can be no constructive contempt of court with reference to publications reflecting on the court or the judge thereof, unless the publication is both defamatory and untrue, and relates to some particular case then pending and is calculated to embarrass the court in the trial or disposition thereof. (Tex. Cr. Rep.) *Ex parte Green*, 1035.

3. CONTEMPT—Collateral Attack on Judgment or Order.—In proceedings for contempt in failing to obey an order of court, the respondent may question the order he is charged with refusing to obey only in so far as he can show it to be absolutely void, and cannot be heard to say that it is merely erroneous, however flagrant the error may seem to be. Judgments and orders of court cannot be collaterally attacked for mere irregularities. (Ill.) *O'Brien v. People*, 219.

4. CONTEMPT.—Affidavit for Attachment for contempt in violating an injunction should show in what respect the injunction has been violated, but it need not specify the charge with that certainty required in an indictment or a bill of particulars. (Ill.) *O'Brien v. People*, 219.

5. CONTEMPT—Civil Action.—Contempt of court in violating an injunction granted to protect business interests against unlawful acts of the defendants is of a civil nature and the defendants are

not entitled to their discharge upon their sworn answer as in case of a criminal contempt. (Ill.) O'Brien v. People, 219.

6. **CONTEMPT—Criminal and Civil Proceeding.**—If the defendant is attached for contempt of court for a criminal offense and files a sworn answer, that answer, if sufficient to purge him of the alleged contempt, may be taken as true and the defendant discharged. But this rule applies only when the proceeding is brought to vindicate the law or the dignity of the court, and does not apply to acts treated as contempts, for the enforcement of orders and decrees as part of the remedy sought to be enforced. (Ill.) O'Brien v. People, 219.

7. **CONTEMPT—Jury Trial.**—A statute, providing for a trial by jury in all cases where the judgment is to be satisfied by imprisonment does not apply to the case of proceedings for contempt of court, when it is sought to coerce defendant into the performance of the duty which the court has ordered to perform. (Ill.) O'Brien v. People, 219.

See Injunction.

CONTRACTS.

Validity.

1. **CONTRACT to Assign All Property to be Afterward Acquired, When Void as Against Public Policy.**—A Contract by Which a Person is Admitted to an Aged Men's Home to the effect that he will assign to the corporation all property which he may thereafter in any manner acquire is against public policy, and hence not enforceable. (Md.) Aged Men's Home v. Pierce, 450.

2. **CONTRACTS for Labor—Duress.**—Every person is entitled to be protected in the right to enter into contracts for or to labor, or in refusing to do so, as he shall deem best for his own interests, without interference from others, and any such contract executed by a person under circumstances depriving him of his free-will in the matter is voidable for duress. (Ill.) O'Brien v. People, 219.

3. **CONTRACTS for Labor—Coercion of Business.**—No person or combination of persons can legally, by direct or indirect means, obstruct or interfere with another in the conduct of his lawful business, and any attempt to compel an individual, firm or corporation to execute an agreement to conduct his business through certain agencies, or by a particular class of employes, is not only unlawful and actionable, but is also an interference with the exercise of the highest civil right. (Ill.) O'Brien v. People, 219.

4. **CONTRACTS for Labor—Duress—Closed Shop.**—An attempt to coerce a person to sign an agreement to conduct his business by employing only members of a labor union, under a threat of ordering a strike, is unlawful, and such an agreement is voidable for duress, and is violative of the legal rights of both the employer and the nonunion employé. (Ill.) O'Brien v. People, 219.

5. **CONTRACTS for Labor.**—The right to enter into contracts for labor, or to labor, is both a liberty and a property right. (Ill.) O'Brien v. People, 219.

Conflict of Laws.

6. **CONFLICT OF LAWS—Lex Loci Contractus.**—A contract must be construed and its validity determined under the laws of the state where it was executed, unless it can be fairly said that the parties at the time of its execution clearly manifested an intention that it should be governed by the laws of another state. (Ind.) Garrigue v. Kellar, 324.

7. CONFLICT OF LAWS.—Contracts Valid in the state where made are valid everywhere. (Ind.) *Garrigue v. Kellar*, 324.

8. CONFLICT OF LAWS.—Statutory Changes Pendente Lite.—No one has any vested right in any particular remedy or form of procedure. Hence, if, after the bringing of an action, the particular remedy to which the plaintiff resorted is abolished or modified, his remedy is abolished or modified accordingly. (Md.) *Miners' etc. Bank v. Snyder*, 390.

CONVERSION.

See *Trover*.

CORPORATIONS.

In General.

1. CONSTITUTIONAL LAW.—Corporations are not "Citizens" within the meaning of the constitution of the United States, declaring that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states. (Ill.) *In re Estate of Speed*, 189.

2. CORPORATIONS.—Rule of Liability.—Every act of a corporation is done under its charter, in the sense that if there were no corporation it could not perform the act, but if the act is one which might have been done by an individual, no different rule obtains as to liability merely because there is a corporation. (Ill.) *Boyd v. Chicago etc. Ry. Co.*, 253.

3. CORPORATIONS.—Stockholders—Beneficiaries.—In contemplation of law the property and rights of an incorporated company belong to the united association acting in the corporate name, and not to the stockholders. The latter, however, are the real owners, and a technical trust thus arises in their favor which will be protected and enforced by courts of equity. (Neb.) *Home Fire Ins. Co. v. Barber*, 716.

4. CORPORATIONS.—Stockholders, as Such, have no Title to the corporate property which they can convey or encumber in their own names, and this in substance is only another way of saying that the corporation must act through its proper agents and in the prescribed way. (Neb.) *Home Fire Ins. Co. v. Barber*, 716.

5. CORPORATIONS as Distinct from Stockholders.—If a corporation is proceeding at law, or where it is asserting a title to property, or the title to property is involved, the corporation is regarded as a person separate and distinct from its stockholders, or any or all of them. But if it is proceeding in equity to assert rights of an equitable nature, or is seeking relief upon rules or principles of equity, a court of equity will not forget that the stockholders are the real and substantial beneficiaries of a recovery, and if they have no standing in equity, and are not equitably entitled to the remedy sought to be enforced by the corporation in their behalf, the corporation will not be permitted to recover. (Neb.) *Home Fire Ins. Co. v. Barber*, 716.

Stock—Transfer—Execution.

6. CORPORATIONS.—Stock—Equitable Owner—Transfer.—A wife to whom her husband owes money and delivers corporate stock in payment, becomes thereby the equitable owner of the stock, and has the right as against him to have his legal title thereto transferred to her, subject to any existing paramount rights of the corporation and third persons. (Ind.) *Boone v. Van Gorder*, 314.

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7. **CORPORATIONS—Stock—Levy on.**—A sheriff has the right to levy on and sell corporate stock, and for that purpose has a right of access to the corporation books to make the levy and transfer the stock. (Ind.) *Boone v. Van Gorder*, 314.

8. **CORPORATIONS—Stock—Levy on, How Made.**—A levy of execution on corporate stock is not made by seizing the stock certificate, but is made on the shares as registered on the corporation books, and the levy as made is subject to the paramount rights of the corporation and of third parties. (Ind.) *Boone v. Van Gorder*, 314.

9. **CORPORATIONS—Sale of Stock on Execution—Rights of Purchaser.**—The purchaser of corporate stock sold on execution takes the legal title of the judgment debtor subject to equities of which such purchaser has actual or constructive notice. (Ind.) *Boone v. Van Gorder*, 314.

10. **CORPORATIONS—Stock—Sale on Execution—Injunction.**—If the sheriff attempts to sell corporate stock on execution and the unregistered equitable owner thereof seeks to restrain the sale by an injunction, a failure to find that such stock has any value or use to such owner, or that the sale would cause him great or irreparable damage, or that he has no adequate legal remedy, deprives him of the remedy by injunction. (Ind.) *Boone v. Van Gorder*, 314.

Stockholders' Liability—Unpaid Subscriptions.

11. **CONSTITUTIONAL LAW—Statute Changing the Remedies of Creditors of Corporation Against Stockholders.**—If, at the commencement of an action, a creditor has the right to maintain an action against each of its stockholders for double the par value of the stock held by him, and the statute is subsequently amended so as to require creditors, instead of suing separately at law, to unite with the other creditors in a suit against all the stockholders in a court of equity, where the rights of the several creditors and the liabilities of the several stockholders may be ascertained and enforced at the same time, such amendment is a change in the remedy which does not deprive the stockholder of any substantial right, and is constitutional and applicable to the suit already pending. (Md.) *Miners' etc. Bank v. Snyder*, 390.

12. **EQUITY JURISDICTION—Corporations—Unpaid Stock Subscriptions.**—The assignee of an insolvent corporation may maintain a bill in equity against a large number of its stockholders to recover their unpaid stock subscriptions, although all of the unpaid capital stock is insufficient to pay the corporate debts, and no accounting is asked for or involved. (Pa.) *Cook v. Carpenter*, 854.

13. **LIMITATION OF ACTIONS—Corporate Stock Subscriptions.** If a subscription to corporate stock is not presently payable in full, but by its terms is to be payable from time to time as called for by the corporation, the statute of limitations does not begin to run until a call is made, and such call need not be made within the statutory period of limitation from the date of the stock subscription. (Pa.) *Cook v. Carpenter*, 854.

Stockholders' Suits.

14. **CORPORATIONS—Subsequent Stockholders—Attack on Prior Corporate Management.**—A purchaser of stock in a corporation cannot complain of the prior acts and management of the corporation. (Neb.) *Home Fire Ins. Co. v. Barber*, 716.

15. **CORPORATIONS—Right of Stockholder to Sue for Corporate Mismanagement.**—A purchaser of stock in a corporation cannot

attack it by suit for prior acts of mismanagement unless such mismanagement or its effects continue and are injurious to him, or it affects him specially and peculiarly in some other manner. (Neb.) *Home Fire Ins. Co. v. Barber*, 716.

16. CORPORATIONS—Subsequent Stockholder's Right to Sue for Mismanagement.—Stockholders who have acquired their stock and their interest in the corporation from the alleged wrongdoers and through the prior mismanagement of the corporation affairs, have no standing to complain thereof. (Neb.) *Home Fire Ins. Co. v. Barber*, 716.

17. CORPORATIONS—Right to Maintain Suit in Equity.—If a corporation is not asserting, or endeavoring to protect a title to property, it can only maintain a suit in equity as the representative of its stockholders, and if they have no standing in equity to entitle them to the relief sought for their benefit, they cannot obtain such relief, through the corporation or in its name. (Neb.) *Home Fire Ins. Co. v. Barber*, 716.

18. CORPORATIONS—Internal Management—Stockholders' Bill. The right of an individual stockholder to act for the corporation is exceptional, and arises only on a clear showing of special circumstances, among which inability or unwillingness of the corporation itself, demand upon the regular corporate management and refusal to act are imperative requisites, and the refusal by the corporate management must appear affirmatively to be a disregard of duty and not an error of judgment, a nonperformance of a manifest official obligation amounting to a breach of trust. A bill by an individual stockholder acting for the corporation will be dismissed when the charges of fraud and collusion against the officials and former officials of the corporation are merely inferences from insufficient averments of facts. (Pa.) *McCloskey v. Snowden*, 867.

19. CORPORATIONS—Internal Management—Stockholder's Bill. If the act complained of in a stockholder's bill against a corporation affects the complainant solely in his capacity as a member of the corporation, whether it be as a stockholder, director, president or other officer, and is the act of the corporation, whether acting in stockholder's meeting or through its agents, the board of directors, such action is the management of the internal affairs of the corporation, and in case of a foreign corporation, the courts of the state will not take jurisdiction, and it is immaterial that the visible, tangible property of the foreign corporation is situate within the state. (Pa.) *McCloskey v. Snowden*, 867.

Promoters.

20. CORPORATIONS.—A Promoter of a Corporation Stands in a Fiduciary relation to it. (Mass.) *Old Dominion etc. Co. v. Bigelow*, 479.

21. CORPORATIONS—Promoters, When Entitled to the Benefit of Purchases.—If property is bought and paid for with a view to subsequently forming a corporation to which it shall be sold, such corporation, when formed, has no right to the benefit of the purchase, and the purchasers, though they become promoters and stockholders in the corporation, may sell to whosoever they please. (Mass.) *Old Dominion etc. Co. v. Bigelow*, 479.

22. CORPORATIONS.—Promoters of a Corporation seeking to sell property to it must disclose all the facts known to them material to the property and its purchase and see that the corporation has ade-

quate independent advice. (Mass.) *Old Dominion etc. Co. v. Bigelow*, 479.

23. CORPORATIONS—Promoter's Acquiescence Which does not Bar Right to Proceed Against.—The right of a corporation to proceed by suit in equity against promoters who sell its property without a full disclosure of material facts is not lost, because all the stockholders at the time of the sale have full knowledge of the facts and acquiesce in it, if such stockholders consist only of such promoters and their agents and attorneys, and it was part of the scheme at the time of the sale and purchase, afterward carried out, that large issues of stock should be subsequently made in payment of the property, which stock should be sold to the public without any disclosure to the persons who should subscribe for and purchase it. (Mass.) *Old Dominion etc. Co. v. Bigelow*, 479.

24. CORPORATIONS—Promoters, Suit Against Where They Will Participate in the Benefits of a Recovery.—A suit against promoters of a corporation to rescind a sale of property made by them to it without the disclosure of material facts may be sustained, although they, as stockholders, consent to and acquiesce in the sale and will become entitled to their share of the purchase price recovered. (Mass.) *Old Dominion etc. Co. v. Bigelow*, 479.

25. CORPORATIONS—Promoters, Bill, When may be Sustained Against One Without Joining the Executor of the Other.—Where lands stand in the name of one of two promoters of a corporation, and a sale is made by them to it without disclosing material facts, and stock of the corporation is issued in payment, a bill may subsequently be maintained against the one of such promoters who did not hold the legal title to the property for the tortious violation of a duty which they owed to the corporation, because they stood in a fiduciary relation to it, and the defendant may be held liable in solido for the shares received by both promoters. (Mass.) *Old Dominion etc. Co. v. Bigelow*, 479.

Foreign Corporations.

26. CORPORATIONS, FOREIGN.—Statutes Granting Powers, Privileges and Immunities to corporations must be held to apply only to corporations created under the authority of the state, unless the intent that such statutes shall apply to other than domestic corporations is plainly expressed. (Ill.) *In re Estate of Speed*, 189.

27. CONSTITUTIONAL LAW.—Foreign Corporations are not, as to any other state than that of their creation, "persons within its jurisdiction" within the meaning of the fourteenth amendment to the constitution of the United States, until such corporations have complied with the laws of the state authorizing them to do business therein. (Ill.) *In re Estate of Speed*, 189.

Note.

Corporations, acknowledgment of deeds by, certificate of must show that person executing was authorized, 573.

acknowledgment of deeds by, certificate of, what must state, 574.

acknowledgment of deeds by, who may make for, 574-576.

COSTS.

See Constitutional Law, 9; Receivers.

COTENANCY.

See Tenancy in Common.

COUNTERFEITING.

1. COUNTERFEIT COIN—Passing—Evidence.—On a prosecution for knowingly passing as true a counterfeit coin, if the evidence shows that the imitation or resemblance is such as is capable of imposing on persons of ordinary observation, exercising ordinary care, it is sufficient to convict. The evidence is also sufficient if it shows that the alleged counterfeit coin bears such resemblance to the genuine as to be calculated to deceive an honest, sensible, and unsuspecting man of ordinary observation and care dealing with men supposed to be honest. (Tex. Cr. Rep.) Glass v. State, 980.

2. COUNTERFEIT COIN—Passing.—One who passes as a dime a cent piece merely covered with a wash, giving it the color of a dime, may be convicted of passing a counterfeit coin, provided the evidence shows such a resemblance of the cent to a dime as is calculated to impose its genuineness on a person of ordinary observation exercising ordinary care. (Tex. Cr. Rep.) Glass v. State, 980.

COURTS.*Jurisdiction.*

1. JURISDICTION of the Subject Matter does not mean simple jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the class of cases to which that particular case belongs. (Ill.) O'Brien v. People, 219.

2. JURISDICTION does not Depend upon the Rightfulness of the Decision, and is not lost because of an erroneous decision. (Ill.) O'Brien v. People, 219.

Amendment of Records.

3. AMENDMENT OF RECORDS, Authority of Courts to Make.—A court of general and original jurisdiction is authorized to make its records conform to the facts which actually transpired before it. (Md.) Stern v. Bennington, 433.

CREDITORS' BILLS.

CREDITORS' BILLS—Equity Jurisdiction—Remedy at Law. A creditor's bill cannot be maintained to declare fraudulent deeds of property by the debtor to a third person, for a reconveyance of the property to the debtor, for an injunction to restrain him from executing conveyances of such property or in any manner encumbering it, until the claims of the creditor are established. In such case there is a full, complete and adequate remedy at law by sheriff's sale under execution, and purchase of the title, followed by an action of ejectment. (Pa.) Hyde v. Baker, 865.

CRIMINAL LAW.*In General.*

1. CRIMINAL LAW—Advice of Counsel as Defense.—Advice of counsel furnishes no excuse to his client for violating the law, and cannot be relied upon as a defense in either a civil or criminal action. (Tex. Cr. Rep.) Smith v. State, 991.

2. CRIMINAL LAW—Evidence—Intent.—While a person accused and on trial for crime cannot introduce the opinion of attorneys as to his rights in the premises, he may explain why he procured firearms, and what he intended to do with them. (Tex. Cr. Rep.) Smith v. State, 991.

3. CRIMINAL LAW—Review of Motion to Discharge.—The provision of the New Jersey statutes for the review of a denial of a motion to discharge the defendant in a criminal trial, or to direct a verdict of not guilty, at the close of the state's evidence, brings into review only the question whether, upon the evidence as it stood when the motion was made, there was a case for the jury. (N. J.) *State v. Jagers*, 746.

Principal and Accessary.

See Homicide, 10.

4. CRIMINAL LAW—Principal—Accomplice.—A person indicted as a principal cannot be convicted as an accomplice. (Tex. Cr. Rep.) *McAlister v. State*, 958.

5. THEFT—Principals.—The mere concurrence of the minds of persons in pursuance of a previously formed design to commit theft does not alone constitute them principals. To constitute a principal in crime there must be presence or participancy, or doing of some act at the time of the commission of the crime in furtherance of the common design. (Tex. Cr. Rep.) *McAlister v. State*, 958.

6. CRIMINAL LAW—Accomplices.—If the facts are unquestioned, and it is assumed that a witness is an accomplice, the court should so charge the jury, and if the facts are of such character that the failure to instruct the jury that the witness was an accomplice would result injuriously to the defendant, the charge should assume, and so instruct the jury, that the witness was an accomplice. (Tex. Cr. Rep.) *McAlister v. State*, 958.

Evidence in General.

7. CRIMINAL TRIAL—Striking Out Evidence.—If counsel for the defendant in a criminal trial do not object to the introduction of incompetent evidence, and do not move to have it stricken out until the close of the cross-examination of the witness, the error may be cured by the court withdrawing such evidence and instructing the jury to disregard it, notwithstanding the court takes the motion therefor under advisement for a short time, instead of acting immediately after the admission of the testimony. (Colo.) *Johnson v. People*, 85.

8. CRIMINAL LAW—Evidence of Experiments.—In the absence of evidence to show that a person accused of murder knew of the resisting power of sacks of grain to bullets fired therein and of the declarations of any of his codefendants indicating that they knew of such power of resistance, testimony of a witness that after the homicide he fired into one of such sacks of grain, and that the bullets did not go through them, is inadmissible. (Tex. Cr. Rep.) *Smith v. State*, 991.

9. CRIMINAL LAW—Evidence.—The acts and conduct of third persons cannot be introduced in evidence against the accused, unless he has been in some way connected therewith. (Tex. Cr. Rep.) *Clifton v. State*, 983.

Evidence of Tracks.

10. MURDER—Evidence as to Tracks.—On the trial of one accused of murder a witness may testify as to human tracks found upon the ground at the place of the homicide, and to what point they led and the size thereof as they appeared to him, and he may also testify as to the size, shape, or any peculiarity of any track or tracks that he may have seen the accused make after the homicide. (Tex. Cr. Rep.) *Parker v. State*, 1021.

11. MURDER—Evidence as to Tracks.—On a trial for murder a witness may testify, as a circumstance tending in some degree to connect the accused with the offense, that he trailed certain human tracks found by him, from near the scene of the homicide to or near to the home of the accused, and he may describe them and state that the tracks trailed appeared to him to be the same as the tracks found. (Tex. Cr. Rep.) *Parker v. State*, 1021.

Evidence of Attempted Suicide.

12. CRIMINAL LAW—Evidence of Attempted Suicide.—Evidence is admissible to prove that the accused, while in custody, charged with the crime for which he is on trial, attempted to take his own life. (N. J.) *State v. Jagers*, 746.

Confessions.

13. CRIMINAL LAW—Confessions as Evidence.—If one under arrest for crime has made a general statement after being warned that it may be used against him, answers questions propounded to him on a rigid cross-examination by the prosecuting attorney, such answers are not admissible in evidence as a confession. (Tex. Cr. Rep.) *Parker v. State*, 1021.

14. CRIMINAL LAW—Confessions.—If one accused of crime makes a confession under circumstances rendering it inadmissible, but subsequently makes another free from legal objections which substantially agrees with the original one, the admission of the latter is not error. (Colo.) *Andrews v. People*, 76.

Misconduct of Jury.

15. CRIMINAL TRIAL—Misconduct of Jury.—The bare statement of counsel for the accused, unsupported by affidavit, that an incorrect newspaper account of the trial had been read by some of the jurors to the prejudice of the defendant, does not require the court to stop the trial and enter upon an investigation of the charge. (Colo.) *Johnson v. People*, 85.

Verdict.

16. CRIMINAL TRIAL—Impeachment of Verdict.—A juror will not be permitted to impeach his own verdict by affidavit. (Colo.) *Johnson v. People*, 85.

17. VERDICT by Lot.—If, in a criminal case, the jury agree to ascertain the verdict as to the penalty, by each juror setting down on paper the number of years he is in favor of giving the accused in the penitentiary, then adding the total, dividing the result by twelve, the quotient to be the verdict of the jury as to the penalty, a verdict thus reached is arrived at by lot, and is illegal and void. (Tex. Cr. Rep.) *Sanders v. State*, 973.

Sentence—Fine and Imprisonment.

18. CRIMINAL LAW—Postponement of Sentence.—In the absence of a permissive statute, the indefinite postponement of sentence upon one convicted of crime deprives the court of jurisdiction to pronounce sentence at a subsequent term, and is, in effect, a discharge of the prisoner. (Colo.) *Grundel v. People*, 75.

19. FINE AND IMPRISONMENT—Whether Both may be Imposed.—A statute making it a misdemeanor to give or sell liquor to a minor, and imposing a fine as punishment, does not authorize the imposition of imprisonment in addition to a fine. (Tenn.) *Pressley v. State*, 921.

20. **ERRONEOUS SENTENCE**—Correction on Appeal.—When the trial court imposes a fine in a misdemeanor case, and then erroneously adds thereto imprisonment, the supreme court on appeal may modify the judgment by striking out the imprisonment and then affirming at as modified. (Tenn.) *Pressly v. State*, 921.

See Evidence; Witnesses.

Note.

Criminal Prosecution, actions against public officers to prevent, 844.

DAMAGES.

Measure of Damages.

1. **NEGLIGENCE**—Measure of Damages—Instructions.—An instruction "that in determining the question as to whether the defendant was exercising reasonable care and diligence upon the occasion in question you have a right to take into consideration the situation and condition of the parties," is not objectionable as necessarily authorizing the jury to consider the wealth of the defendant and the poverty of the plaintiff in assessing the damages. (Ill.) *Christy v. Elliott*, 196.

2. **DAMAGES** for Breach of Contract to Remove Timber.—The measure of damages for a failure to cut, remove and pay for all the timber on certain land within a specified time, is the difference between the market value of the timber left standing on the land and the contract price at the time of the breach. (Ark.) *Stillwell v. Paepcke-Leicht Lumber Co.*, 42.

3. **DAMAGES** for Conversion of Logs—Evidence.—In an action for the conversion of logs, the defendant may testify concerning the difference between the value of the logs when floating in the water and when lodged in the sand, as such testimony tends to show their value when converted. (Ark.) *Stillwell v. Paepcke-Leicht Lumber Co.*, 42.

Liquidated Damages.

4. **DAMAGES**—Liquidated Damages or Penalty.—Where a contract fixes the amount of damages for a breach of its terms, and the actual damages from a breach would be uncertain and difficult of proof, while the damages fixed appear reasonable, the amount stipulated will be regarded as liquidated damages, rather than a penalty, and therefore enforceable. (Ark.) *Stillwell v. Paepcke-Leicht Lumber Co.*, 42.

5. **DAMAGES**—Liquidated Damages or Penalty.—If a stipulation in a contract to forfeit a fixed sum for a breach of its terms is uncertain, and the sum fixed seems unreasonable, the amount stipulated will be regarded as a penalty, rather than liquidated damages, and therefore not enforceable further than the actual damages sustained. (Ark.) *Stillwell v. Paepcke-Leicht Lumber Co.*, 42.

6. **DAMAGES**—Liquidated Damages and Penalty.—A stipulation in a contract to forfeit a certain sum for a breach of its terms cannot be separated, and a part discarded as a penalty, and the remainder treated as liquidated damages. (Ark.) *Stillwell v. Paepcke-Leicht Lumber Co.*, 42.

See Death.

Note.

Damages, contracts fixing the amount of, competency of the parties to make, 47.

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Damages, liquidated, circumstances of the case as affecting liability for, 53.

- liquidated, construction of contracts is against, 48.
- liquidated, courts, attitude of respecting, 48, 50.
- liquidated, definitions of, 47.
- liquidated, deposits of money as, 58.
- liquidated, difficulty in distinguishing between and penalties, 47.
- liquidated for breach of contracts for personal services, 59.
- liquidated for breach of contracts for the purchase or sale of real property, 61, 62.
- liquidated for breach of contracts for the sale of personal property, 62, 63.
- liquidated for breach of contracts not to follow a specified business, 59, 60.
- liquidated for breach of contracts of leasing, 60, 61.
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- liquidated, for delay in construction of railways, 53.
- liquidated, for delay in delivery of personal property sold, 63.
- liquidated, history of the law relating to, 48.
- liquidated, intention of the parties, when not controlling, 49, 50.
- liquidated, intention to fix by contract must clearly appear, 47.
- liquidated, interpretation to be given language attempting to stipulate for, 51.
- liquidated, magnitude of sums stipulated for as, 52.
- liquidated, stipulations for, common-law rules as to enforcing, 48.
- liquidated, stipulations for, limiting the amount of the recovery, 47.
- liquidated, stipulations for, when not sustainable, 52.
- liquidated, stipulations for, when sustainable, 51, 52.
- liquidated, stipulations for, when the contract contains severable provisions, 56, 57.
- liquidated, stipulations for, when there are several provisions for some of which the damages are readily ascertainable, 57.
- liquidated, tests to determine whether stipulations fixing provide for, 51.
- liquidated, uncertainty in amount of actual damages will sustain, stipulation for, 51.
- liquidated, where contracts are for the payment of money only, 58, 59.
- stipulations, fixing the amount of, when will be regarded as in the nature of a penalty, 49.

DANGEROUS PREMISES.

See Municipal Corporations, 13; Negligence, 2.

DEATH.

DEATH—Action for in Behalf of Aliens.—The benefits of the statute of New York, giving a right of action for wrongful death, may be claimed in behalf of nonresident alien relatives of a person negligently killed in that state. (N. Y.) *Alfson v. Bush Company*, 815.

DEEDS.**Construction.**

1. DEEDS—Construction—Intent.—Courts will give effect to the intent in a deed when it can be discovered and is not in violation of

law, and will construe the grant most strongly against the grantor, in case of doubt, only as a last resort. (Ind.) *Elsae v. Adkins*, 320.

Exceptions and Reservations.

2. **DEEDS—Exceptions—Will.**—A provision in the descriptive clause in a deed that "the grantor reserves the ownership of the well on or near the east line of the lot hereby conveyed," constitutes an exception from the premises conveyed. (Ind.) *Elsae v. Adkins*, 320.

3. **DEEDS.—Exception** is a part excepted from the general terms of that which is granted, and the mere fact that that which is excepted is mentioned as being reserved will not defeat its operation as an exception. (Ind.) *Elsae v. Adkins*, 320.

4. **DEEDS—Exceptions—Repugnancy.**—If the general words of a grant are limited by an exception, the exception is not void for repugnancy. (Ind.) *Elsae v. Adkins*, 320.

5. **DEEDS—Exceptions—Parol Evidence to Locate.**—Parol evidence is admissible to identify the subject matter of an exception in a deed. (Ind.) *Elsae v. Adkins*, 320.

6. **DEEDS—Exceptions—Parol Evidence to Locate.**—Parol evidence is admissible to show that a well excepted from the operation of a deed is on the east line of the lot conveyed. (Ind.) *Elsae v. Adkins*, 320.

7. **DEEDS—Reservation—Exception.**—Although a pleading uses the word "reservation" when referring to a deed, it will be construed as meaning an "exception" when the facts show it to be such. (Ind.) *Elsae v. Adkins*, 320.

8. **DEEDS—Exceptions—Appurtenances.**—An exception of a well from the operation of a deed, excepts all usual and necessary incidents and appurtenances of the well. (Ind.) *Elsae v. Adkins*, 320.

See Acknowledgments.

Note.

Definition of liquidated damages, 47.
of municipal corporations, 138.

DETECTIVES.

See Master and Servant, 20-27.

DIVORCE.

ALIMONY—Termination by Death of Husband.—The obligation to pay a wife alimony during her life terminates on the death of the husband, although, in pursuance of the directions of the court, he gave a mortgage to secure the performance of the decree awarding alimony. (N. Y.) *Wilson v. Hinman*, 820.

DOMICILE.

DOMICILE—Nonresidents.—One who has a permanent abode in one state and comes into another state for a temporary purpose, intending to return to such permanent abode, is a nonresident of the state in which he is temporarily staying. (Ill.) *In re Mulford*, 249.

DURESS.

See Contracts.

EASEMENTS.*In General.*

1. **EASEMENT of Right of Way Over Another's Property** is appurtenant to the particular piece or lot of ground of the dominant owner with which it is granted, and is not personal to the owner authorizing him to use it in connection with other real estate he may own abutting on the right of way. (Pa.) *Schmoele v. Betz*, 845.

2. **EASEMENT of Right of Way—Interference with.**—If the owners of lots abutting on an alley have a right to use it for a passageway and watercourse, the owner of one of such lots, who also owns a theater located on the opposite side of the alley, has no right, against the objection of a lot owner having such easement in the alley, to erect a fire-escape on the wall of his theater overhanging the alley, and such erection may be enjoined. (Pa.) *Schmoele v. Betz*, 845.

3. **EASEMENTS—Obstruction.**—A tenant of land for nine hundred and ninety-nine years, while in possession of the premises, has a right to protect his possession and any easement which he may have in the premises, against third persons by an action at law or a suit in equity. (Pa.) *Schmoele v. Betz*, 845.

Injunction.

4. **EASEMENTS—Injunction—Immaterial Damage.**—The owner of an easement may enjoin a trespass thereon by one not entitled to the use thereof, although the owner's use is not materially impaired. (Pa.) *Schmoele v. Betz*, 845.

5. **EASEMENTS—Injunction—Trespass.**—Equity will direct a removal of an obstruction to an easement and enjoin a continuance of a trespass thereon without proof of actual damages. (Pa.) *Schmoele v. Betz*, 845.

Note.

Ejectment against officers of the state or the United States, 835, 838.

ELECTION.

See Indictment, 4, 5.

EMINENT DOMAIN.*Right to Damages.*

1. **CONSTITUTIONAL LAW—Payment of Claims.**—Where a statute authorizes towns to improve highways, but makes no provision for the payment of damages from changes in the grade, a subsequent statute authorizing the recovery of such damages is not unconstitutional in its application to damages sustained prior to its enactment. (N. Y.) *Matter of Borup*, 796.

2. **EMINENT DOMAIN—Constitutional Law, Right to Damages, When Absolute.**—When by the authority of a statute and proceedings in the exercise of the power of eminent domain land is taken without the possibility of its reverting to its former owner, a statute subsequently enacted providing that the lands and rights taken may be applied in reduction of damages in any suit on account of such taking, is unconstitutional, because it violates a right vested in the owner and holder of the property to have the damages assessed and paid in money. (Mass.) *Hellen v. City of Medford*, 459.

3. **CONSTITUTIONAL LAW—Waiver of Right.**—If a constitutional provision is designed for the protection of the property rights of a person, he may waive the protection and consent to such action

as would be invalid against him if taken against his will. Hence, if he acquires the right to have damages assessed and paid for taking his property in the exercise of the power of eminent domain, and a statute is subsequently enacted depriving him of that right on the abandonment of proceedings, and that the property shall vest in him, he may waive his right to urge the unconstitutionality of the statute by agreeing to the abandonment and that the damages to be assessed shall be small. (Mass.) *Hellen v. City of Medford*, 459.

4. **EMINENT DOMAIN**.—No Measure of Damages can be Adopted, under the New York statute authorizing the recovery of damages for changes in the grade of highways, that will permit the owner of property to recover more than the actual amount of his damages, deducting all benefits properly chargeable to the property. (N. Y.) *Matter of Borup*, 796.

Public Use.

5. **EMINENT DOMAIN**.—Public Use a Judicial Question.—Whether the end sought to be attained by taking private property is a public use is a question to be determined by the courts. (N. J.) *Albright v. Sussex County etc. Commission*, 749.

6. **EMINENT DOMAIN**.—Public Use, What is.—In order that a use may be public, it is not essential that the whole community should be able directly to participate in it, but it is essential that the utility should in a substantial measure concern the public. (N. J.) *Albright v. Sussex County etc. Commission*, 749.

7. **EMINENT DOMAIN**.—Fishing Rights.—The power of eminent domain cannot be exercised to acquire a right to fish in the fresh-water lakes of New Jersey. (N. J.) *Albright v. Sussex County etc. Commission*, 749.

EMPLOYER'S LIABILITY.

See Master and Servant.

ESTATES OF DECEDENTS.

See Executors and Administrators.

EQUITY.

1. **EQUITY JURISDICTION**.—Remedy at Law—Fraud—Equity jurisdiction will not attach where there is a full, complete, and adequate remedy at law, even when fraud is alleged. (Pa.) *Hyde v. Baker*, 865.

2. **EQUITY Jurisdiction of**.—Where money has been received in violation of a fiduciary duty, equity has jurisdiction to compel its restoration. (Mass.) *Old Dominion etc. Co. v. Bigelow*, 479.

3. **EQUITY**.—The Jurisdiction of a court of equity does not depend upon the sufficiency of the bill, and if the court has jurisdiction of the parties and of the subject matter, it does not lose it simply because the cause of action is defectively stated. (Ill.) *O'Brien v. People*, 219.

4. **EQUITY PRACTICE**.—Bill When not Multifarious.—Where no relief is sought in respect to certain allegations in a bill, it is not made multifarious by them. (Mass.) *Old Dominion etc. Co. v. Bigelow*, 479.

5. **EQUITY PRACTICE**.—Prayers of Bill, When not Inconsistent. In a suit against one acting in a fiduciary relation to the complain-

ant, there is nothing inconsistent between the prayer for the rescission of the contract and the prayer for damages. (Mass.) *Old Dominion etc. Co. v. Bigelow*, 479.

EVIDENCE.

In General.

1. **EVIDENCE.**—The Statements of One Accused of crime, made to the sheriff voluntarily and without any inducement, are admissible in evidence. (Ark.) *Hammons v. State*, 66.

2. **EVIDENCE.**—If Negative Evidence amounts to only a scintilla, the jury cannot be allowed to disregard the positive and conclusive evidence which establishes the controverted fact. (Pa.) *Keiser v. Lehigh Valley R. R. Co.*, 872.

Letter from Husband to Wife.

3. **EVIDENCE.**—Letter from Husband to Wife.—Where a man confined in jail writes an incriminatory letter to his wife, which, instead of being delivered to her, and without her connivance, falls into the hands of a third person, it is admissible against him. (Ark.) *Hammons v. State*, 66.

Trailing by Bloodhounds.

4. **EVIDENCE.**—Trailing by Bloodhounds.—If a human track assumed to be that of the person accused of murder, and which the circumstances in evidence tend to show was his track, was pointed out to a bloodhound trained in trailing human tracks and such dog trailed this track from where it was pointed out to him to the residence of the accused, some mile and one-half away, and the course of his pursuit of such track was followed by witnesses, who testified that the dog followed this same track, which they described, evidence of these facts is admissible as showing a circumstance connecting the accused with the killing. (Tex. Cr. Rep.) *Parker v. State*, 1021.

5. **MURDER.**—Trailing with Bloodhounds—Evidence of Qualities of Hound.—On the trial of one accused of murder, whose tracks have been trailed by a bloodhound, a witness is competent to state his knowledge of, and experience with, such dog as being an animal trained and used for the purpose of running down human beings. (Tex. Cr. Rep.) *Parker v. State*, 1021.

Opinion as to Footprints.

6. **MURDER.**—Opinion Evidence as to Tracks.—Before a witness can give his opinion as to the similarity of human tracks as a circumstance of guilt, he must testify to something more than a mere casual observation of the tracks found at the locus in quo, and tracks made by the accused and known to be his. (Tex. Cr. Rep.) *Parker v. State*, 1021.

7. **MURDER.**—Opinion Evidence as to Tracks.—Before a witness can give his opinion as to the similarity of human tracks as a circumstance of guilt, he must have made some measurement of the tracks found upon the ground, and the foot or shoe of the accused, or he must have made some comparison by placing such shoe upon such tracks, or if there are peculiarities in the tracks made and also peculiarities in the shoes known to belong to the accused, the witness can detail such facts and give his opinion as to the similarity between them. (Tex. Cr. Rep.) *Parker v. State*, 1021.

See Conspiracy; Criminal Law; Homicide.

EXCEPTIONS AND RESERVATIONS.

See Deeds.

EXCEPTIONS, BILL OF.

BILL OF EXCEPTIONS—Affidavits to Supplement.—A statute permitting a bill of exceptions to be made by affidavits when the judge refuses or neglects to allow or sign it, does not apply where he settles and authenticates a bill but refuses to insert therein matters relating to his misconduct during the trial which the appellant claims to be error, and therefore such matters cannot be considered by the supreme court on appeal. (Colo.) *Johnson v. People*, 85.

EXECUTIONS.

EXECUTION, Interests Subject to.—Whenever an individual has an interest in property which may be aliened or assigned, that interest, whether legal or equitable, is liable to the payment of his debts. (Md.) *Wenzel v. Powder*, 380.

EXECUTORS AND ADMINISTRATORS.

1. EXECUTORS AND ADMINISTRATORS—Application for in an "Action."—A proceeding for the appointment of an administrator is an "action" within the meaning of that word as used and defined in the statutes. (Idaho) *Gwinn v. Melvin*, 119.

2. EXECUTORS AND ADMINISTRATORS.—Administration of an estate of a decedent is not absolutely necessary when there are no debts against the estate, and especially where the heirs have made a satisfactory distribution among themselves. (Idaho) *Gwinn v. Melvin*, 119.

3. EXECUTORS AND ADMINISTRATORS—Constitutional Law. The right of a person to be appointed and to act as an executor is not a privilege or immunity, the denial whereof is prohibited by constitutional guaranty. (Ill.) *In re Mulford*, 249.

4. EXECUTORS AND ADMINISTRATORS—Nonresidents—Constitutional Law.—The state may decline to confer official power on residents of other states without depriving them of any "privilege" or "immunity," "liberty" or "property," within the meaning of constitutional provisions. And an executor is a public officer within this rule. (Ill.) *In re Mulford*, 249.

4a. EXECUTORS AND ADMINISTRATORS—Nonresidents—Constitutional Law.—A statute providing that no nonresident shall be appointed or act as an executor is not within constitutional guaranty that no person shall be deprived of life, liberty or property without due process of law. (Ill.) *In re Mulford*, 249.

5. EXECUTORS AND ADMINISTRATORS.—Moneys received by an administrator and mingled with his own or other assets sold, wasted or misapplied or converted to his own use are regarded, so far as the rights and powers of an administrator de bonis non are concerned, as already administered. Hence, he acquires no title to such assets and has no right to bring an action against anyone for their recovery, and he cannot, therefore, sue for a devastavit committed by his predecessor in office. (Md.) *Morrow v. Fidelity etc. Co.*, 410.

6. ADMINISTRATOR'S PROCEEDINGS to Recover Property Lost or Misappropriated by Deceased Executor.—If a devastavit is committed by an executor, who thereafter dies, a court of equity may

appoint a trustee to sue on the bond of such executor to recover such portion of the property as was lost, wasted or misapplied by him. (Md.) *Morrow v. Fidelity etc. Co.*, 410.

7. **AN ADMINISTRATOR DE BONIS NON** cannot maintain an action at law to recover for devastavit committed by a deceased executor. (Md.) *Morrow v. Fidelity etc. Co.*, 410.

8. **EXECUTORS AND ADMINISTRATORS.**—The Statute of Limitations Applies to the Time in which letters of administration may be issued, and if application therefor is not made within four years from the date when the applicant's right accrued, the statute is a bar to such appointment on direct attack. (Idaho) *Gwinn v. Melvin*, 119.

EXPERIMENTS.

See Criminal Law, 8.

EXPLOSIVES.

See Municipal Corporations, 3-5.

EXTRADITION.

1. **EXTRADITION—Right of.**—The right of one independent government to demand and receive from another the custody of an offender who has sought an asylum upon its soil, depends upon the existence of treaty stipulations between them, and is measured and restricted by the express provisions of the treaty, and those silent provisions which are necessarily implied. (Ind.) *Knox v. State*, 291.

2. **EXTRADITION—Right of Asylum.**—The right of a person extradited to return to the country from which he was surrendered is not a natural and inherent right of his own, but is based upon the right of his adopted sovereign to afford asylum to the fugitive, and to refuse to give him up to another except upon such terms as it is pleased to impose. (Ind.) *Knox v. State*, 291.

3. **EXTRADITION Between States.**—Principles governing international extradition have no application to interstate extradition. (Ind.) *Knox v. State*, 291.

4. **EXTRADITION—Interstate—Right to Try for Another Crime.** A fugitive from justice when lawfully extradited from one state and returned to another to answer a specific crime may be required to answer another and different criminal charge under the law of that state, before being afforded an opportunity to return to the state from which he has been extradited. (Ind.) *Knox v. State*, 291.

5. **EXTRADITION—Interstate—Trial for Different Crime—Constitutional Law.**—Upon a fugitive's surrender to the state demanding his return from another state, he may be tried in the former state for any other offense than that specified in the requisition for his rendition, and in so trying him against his objection no constitutional right, privilege or immunity is thereby denied him. (Ind.) *Knox v. State*, 291.

FINES.

See Criminal Law, 19, 20.

FIXTURES.

1. **FIXTURES—Priority Between Seller of Chattel and Mortgagee of Realty.**—Where machinery has been so placed in a factory as to become *prima facie* a part of the realty, a secret condition in the contract under which the machinery was purchased that the title

should remain in the seller until the payment of the purchase price, is inoperative as against a subsequent mortgagee of the realty without notice. (Tenn.) *Union Bank etc. Co. v. Fred W. Wolf Co.*, 903.

2. **FIXTURES—Building Materials Before Annexation.**—Doors, mantels, casings, columns, and the like, deposited in a building for the purpose of annexation, but never physically attached to it, are not fixtures so as to pass to a purchaser under a mortgage sale of the premises. (Tenn.) *Blue v. Gunn*, 912.

FORGERY.

1. **FORGERY—Indictment.**—In an indictment for forgery, where there is no similarity of names, it is not necessary to allege that the forged instrument purports to be the act of another than the accused. (Tex. Cr. Rep.) *Huckaby v. State*, 975.

2. **FORGERY—Indictment—Explanatory Averments.**—If the instrument alleged to have been forged does not show on its face that it imports an obligation in regard to money or property, but is the subject of forgery, and can be shown to be such by extrinsic averments, these extrinsic or explanatory averments must be alleged in the indictment. (Tex. Cr. Rep.) *Huckaby v. State*, 975.

3. **FORGERY—Wills—Indictment.**—Although a will cannot be the subject of forgery during the lifetime of the purported declarant, it may become the subject of a prosecution for knowingly having come into the possession of the accused with intent to pass it as true after the declarant's death, and in such prosecution the death of such declarant must be alleged in the indictment and proved at trial. (Tex. Cr. Rep.) *Huckaby v. State*, 975.

4. **FORGERY.**—Wills are not the subject of forgery during the lifetime of the purported declarant. (Tex. Cr. Rep.) *Huckaby v. State*, 975.

See Banks and Banking.

FRAUDULENT CONVEYANCE.

FRAUDULENT CONVEYANCES—Remedy of Creditor.—If it is alleged that the debtor has sold and conveyed his real estate for the purpose of delaying, hindering, or defrauding his creditors, the proper manner in which to test the validity of the transaction is by a sheriff's sale on execution, and a purchase of the title followed by an action of ejectment. (Pa.) *Hyde v. Baker*, 865.

FUTURES.

See Gaming.

GAMING.

1. **CRIMINAL LAW—Dealing in Futures—Indictment.**—An indictment for the crime of dealing in and selling cotton futures need not allege an actual sale. (Tex. Cr. Rep.) *Scales v. State*, 1014.

2. **CRIMINAL LAW—Selling Futures—Indictment—Separate Crimes on Different Days.**—An indictment for selling cotton futures attempting to allege a separate offense on each day that such sales were made, and not setting out in distinct counts the different days upon which each offense occurred, but attempting to charge a separate offense for each day in one count is vicious and not cured by confining the prosecution to one day. (Tex. Cr. Rep.) *Scales v. State*, 1014.

3. CRIMINAL LAW—Selling Futures—Evidence of Actual Delivery.—On a trial for the crime of selling cotton futures the charters of the cotton exchanges with which the accused transacted business are admissible in evidence to show that one belonging to such exchanges was not permitted to make a sale of cotton unless an actual delivery thereof was contemplated. (Tex. Cr. Rep.) *Scales v. State*, 1014.

4. CRIMINAL LAW—Dealing in Futures—Elements of Crime.—In order to constitute the crime of dealing in futures the accused must conduct a business where future contracts are bought and sold within the state. If the evidence shows that the accused received offers for the sale and purchase of staples, and conveyed such offers to persons outside the state where they were accepted and the sale and purchase made, he is not guilty and the jury should be so instructed. (Tex. Cr. Rep.) *Scales v. State*, 1014.

5. CRIMINAL LAW—Dealing in Futures—Necessary Evidence.—Failure on the part of the prosecution to show any sale of staples to be delivered in the future, in which an actual delivery is not contemplated, and that both seller and purchaser so understood the agreement, is fatal to a conviction of the offense of dealing in futures. (Tex. Cr. Rep.) *Scales v. State*, 1014.

6. CRIMINAL LAW—Dealing in Futures—Proof of Wagering Contract.—Before either of the parties to a contract to deal in "futures" can be convicted under a statute making such transaction an offense, the prosecution must show that both parties engaged in a wagering contract. (Tex. Cr. Rep.) *Scales v. State*, 1014.

HABEAS CORPUS.

1. HABEAS CORPUS.—The Constitutionality of a Statute or ordinance cannot be tested on habeas corpus. (Colo.) *People v. District Court*, 98.

2. CONSTITUTIONAL LAW—Municipal Ordinances—Habeas Corpus.—A person restrained of his liberty by virtue of an unconstitutional ordinance is entitled under the writ of habeas corpus to test the constitutionality of such ordinance, without resort to the writ of quo warranto to test the power of a certain official body to pass such ordinance. (Tex. Cr. Rep.) *Ex parte Lewis*, 929.

HACK DRIVERS.

See Municipal Corporations, 8.

HEALTH.

See Constitutional Law, 5, 6.

HIGHWAYS.

Operation of Automobiles.

1. AUTOMOBILES—Rights in Highways.—An owner of an automobile has a right to use the highways, provided he uses reasonable care and caution for the safety of others and does not violate the law of the state. (Ill.) *Christy v. Elliott*, 196.

2. AUTOMOBILES—Duty to Stop—Signals.—The duty of an automobile driver to stop his machine when he sees that horses are frightened does not depend upon his receiving a signal from the person in charge of such horses. (Ill.) *Christy v. Elliott*, 196.

Regulation of Automobiles.

3. **AUTOMOBILES, Regulation of.**—The legislature may, in the exercise of the police power, regulate the driving of automobiles and motorcycles on the public streets. (Mass.) Commonwealth v. Boyd, 464.

4. **AUTOMOBILES, Registration of, and License Fee.**—A statute requiring the registration of automobiles, the payment of a registration fee of two dollars, and the marking of a registered number in Arabic numerals not less than four inches in length, is constitutional. The sum thus required to be paid is not a tax, but a license fee. (Mass.) Commonwealth v. Boyd, 464.

5. **AUTOMOBILES—Constitutional Law.**—A statute which imposes certain reasonable duties upon drivers of automobiles and limits their speed upon public highways is valid as a police regulation and not unconstitutional as class legislation. (Ill.) Christy v. Elliott, 196.

6. **AUTOMOBILES—Regulations—Construction of Statute.**—A statute providing that the driver of an automobile shall stop his machine "whenever it shall appear that any horse driven or ridden by any person is about to become frightened," means whenever, by the exercise of reasonable care and diligence on the part of the automobile driver, it appears to him that such horse is about to become frightened. (Ill.) Christy v. Elliott, 196.

See Municipal Corporations; Officers.

HOMESTEADS.

1. **HOMESTEAD—Widow and Minor Children.**—The constitution of Arkansas contemplates that a widow may acquire a homestead in her own right which will inure to her minor children after her death. (Ark.) Grimes v. Luster, 34.

2. **HOMESTEAD—Widow.**—The Marriage of a widow and her residence with her husband on a homestead previously acquired by her do not affect the homestead nor its devolution to her children. (Ark.) Grimes v. Luster, 34.

3. **HOMESTEADS, Minors cannot Enjoy Two.**—If a man dies possessed of a homestead and leaving a minor child, and his widow acquires another homestead in her own right, marries again, and then dies, the child may claim either homestead but cannot enjoy both. (Ark.) Grimes v. Luster, 34.

4. **HOMESTEADS.—If a Minor Succeeds to Two Homesteads,** he cannot select, waive or abandon either, and it becomes the duty of his guardian, under the superintending control of the court, to make a selection for him. (Ark.) Grimes v. Luster, 34.

5. **HOMESTEADS—Mortgages.**—A mortgage to a loan association to secure a loan of the entire purchase price of property not then in possession of the purchaser covers his entire interest therein, and the fact that he carries out a secret intention to make the property his homestead by moving thereon shortly after his purchase does not create a homestead against such mortgagee. (Ill.) Home Building etc. Assn. v. McKay, 263.

6. **HOMESTEADS—Mortgages.**—Evidence of a conversation between a purchaser and his vendor that the former stated that he intended to occupy the house when purchased as his home is not admissible to establish a homestead therein as against a loan association advancing the purchase price and taking mortgage therefor, when such statement was not made in the presence or hearing

of any agent or officer of such association. (Ill.) *Home Building etc. Assn. v. McKay*, 263.

HOMICIDE.

In General.

1. **HOMICIDE—Manslaughter.**—If a homicide is committed under circumstances which render the mind of the accused incapable of cool reflection, and in a sudden fit of anger, he is not guilty of any higher offense than manslaughter. (Tex. Cr. Rep.) *Vann v. State*, 961.

2. **HOMICIDE.**—Instructions that if the jury believe beyond a reasonable doubt that the shooting by the accused was accidental and not intentional it must acquit, are not objectionable as being too onerous. (Tex. Cr. Rep.) *Scott v. State*, 1032.

In Commission of Robbery.

3. **HOMICIDE in Commission of Robbery—Indictment.**—To sustain a conviction of murder in the first degree based on a homicide committed in an attempt to perpetrate robbery, it is not necessary for the information to allege that the homicide was committed in an attempt to perpetrate robbery. (Colo.) *Andrews v. People*, 76.

4. **HOMICIDE in Commission of Robbery—Malice.**—Under a statute providing that a homicide committed in the perpetration of a felony is murder, which may, if the jury so determine, be punished by death, it is not necessary, when the evidence shows that a homicide has been committed in an attempt to perpetrate robbery which the defendants conspired to commit, to prove any facts from which malice, deliberation, or premeditation may be inferred. (Colo.) *Andrews v. People*, 76.

5. **HOMICIDE—Conspiracy to Commit Robbery.**—If persons conspire to perpetrate a robbery, and in the execution of their plan a homicide is committed, each is responsible for the act of his confederates, although it was not originally intended. (Colo.) *Andrews v. People*, 76.

In Procuring Abortion.

6. **MURDER BY ABORTION—Malice—Indictment.**—Malice is not an essential ingredient of murder committed in procuring an abortion, and the information need not charge that the act was done maliciously or with malice. (Colo.) *Johnson v. People*, 85.

7. **MURDER BY ABORTION—Indictment—Negating Exceptions.**—In charging the crime of murder committed in procuring an abortion, it is not necessary to negative the exceptions stated in the statute as matters of justification. (Colo.) *Johnson v. People*, 85.

8. **MURDER BY ABORTION—Declarations of Deceased.**—On a trial for murder committed in procuring an abortion to which the woman voluntarily submitted, her declarations made to her husband a short time after the operation, to the effect that the defendant had operated on her and procured a miscarriage are admissible in evidence. (Colo.) *Johnson v. People*, 85.

Conspiracy and Accomplices.

9. **MURDER—Conspiracy to Commit—Statements of Conspirators.** In a murder trial where a conspiracy between the accused and another to commit the crime is established, the acts, declarations, and threats of the co-conspirators prior to the killing, though made in

the absence of the defendant, before the conspiracy was formed, are admissible against the defendant to show the animus and purpose actuating defendant in the commission of the crime. (Tex. Cr. Rep.) *Smith v. State*, 991.

10. **HOMICIDE—Accomplice.**—The mere fact that another person went with the accused to make an arrest, with or without lawful authority, does not make him an accomplice to a homicide committed by the accused, but not in contemplation by such persons, nor directly connected with the contemplated act. (Tex. Cr. Rep.) *Scott v. State*, 1032.

Self-defense.

See Arrest.

11. **HOMICIDE—Self-defense—Reasonable Doubt.**—Instructions which require the jury to find affirmatively that the accused did not provoke the difficulty and that the deceased was acting without lawful authority at the time, and that this was known to the accused, before it can acquit, or reduce the crime below that of murder, without coupling such charge with the principle of reasonable doubt, are fatally erroneous. (Tex. Cr. Rep.) *Vann v. State*, 961.

12. **HOMICIDE—Self-defense.**—When the issue of self-defense is raised the court must charge upon the law of self-defense without restricting its charge to the law of provoking the difficulty, and it is flagrant error to refuse a special charge correcting such erroneous general charge. (Tex. Cr. Rep.) *Vann v. State*, 961.

13. **HOMICIDE—Self-defense—Provoking Difficulty.**—The court in instructing the jury on the law of provoking the difficulty, must instruct it that the accused must have said or done something which produced the occasion or provoked the difficulty before he can be held responsible for the result. (Tex. Cr. Rep.) *Vann v. State*, 961.

14. **HOMICIDE—Self-defense.**—The right of self-defense against a man using a six-shooter cannot be fettered by a charge to the jury on the relative size and strength of the two combatants. (Tex. Cr. Rep.) *Vann v. State*, 961.

Intent and Motive.

See ante, 4, 6.

15. **CRIMINAL LAW—Evidence of Intent.**—If the prosecution proposes to show a criminal intent against the accused in procuring firearms, he is entitled to show that his criminal intent, if any, was against another and different person than the one killed. (Tex. Cr. Rep.) *Smith v. State*, 991.

16. **MURDER IN FIRST DEGREE—Necessity of Motive.**—It is not error to instruct the jury that willful, deliberate, and premeditated killing is murder in the first degree, without proof, on the part of the prosecution, of a special motive for the killing. (N. J.) *State v. Jagers*, 746.

Evidence—Res Gestae.

17. **HOMICIDE—Evidence.**—If a person is accused of killing an officer while the latter was in the performance of his legal duty in attempting to evict the accused from premises claimed by him as his homestead, evidence that he had, in writing, designated another and different parcel of land as his homestead is admissible to show a valid foreclosure on the land where the difficulty occurred. (Tex. Cr. Rep.) *Smith v. State*, 991.

18. **HOMICIDE—Malice Toward Particular Person Killed.**—If several persons accused of murder of an officer conspired to resist any officer in the execution of a writ of possession, it is immaterial, as affecting their guilt, whether they had any personal animosity or cherished any malice against the particular officer killed in an attempt to execute such writ. (Tex. Cr. Rep.) *Smith v. State*, 991.

19. **HOMICIDE—Evidence.**—If, prior to a homicide, a judgment of foreclosure has been obtained against the accused, and execution thereon suspended until default in the payment of certain interest thereon to the purchaser thereof, the prosecution is entitled to show that such contingency had happened by the introduction of certain instruments in writing showing that the order of sale and writ of possession under such judgment, and which the deceased attempted to enforce, were not prematurely issued. (Tex. Cr. Rep.) *Smith v. State*, 991.

20. **HOMICIDE—Evidence—Res Gestae.**—If, at the termination of an affray ending in a killing, two officers seized the accused, and it is in doubt as to when he fired the last shot, whether after they seized him or immediately before, a statement made by him at that time relative to the homicide is admissible in evidence as part of the *res gestae*. (Tex. Cr. Rep.) *Vann v. State*, 961.

21. **HOMICIDE—Evidence—Res Gestae.**—A declaration by a person accused of murder, made within five minutes after the killing, that his pistol had been discharged by some person running against him while he was engaged in making an arrest, and upon being informed that he had killed a man, his further declaration that it must be a mistake, but if true, the killing was unintentional and accidental, is admissible in evidence as part of the *res gestae*. (Tex. Cr. Rep.) *Scott v. State*, 1032.

22. **HOMICIDE—Evidence—Self-serving Declarations.**—Declarations and exclamations of the defendant or his co-conspirator, made long after the commission of the homicide, are not *res gestae*, but self-serving, and hence not admissible in evidence. (Tex. Cr. Rep.) *Smith v. State*, 991.

Indictment.

See ante, 3-7.

23. **HOMICIDE—Indictment in Language of Statute.**—The allegations provided by statute are sufficient to support a verdict of murder in the first degree. (Colo.) *Andrews v. People*, 76.

HUSBAND AND WIFE.

Married Woman's Contract of Suretyship.

1. **MARRIED WOMEN—Suretyship.**—Whether or not a married woman is surety or principal on a note or other obligation is to be determined, not from the form of the contract, nor from the basis upon which the transaction is had, but from the inquiry as to whether she received in person, or in benefit to her estate, the consideration upon which the contract depends. (Ind.) *Field v. Campbell*, 301.

2. **MARRIED WOMEN—Suretyship.**—A married woman may borrow money for herself, and her subsequent disposition of it will not invalidate her contract to repay, but she cannot in such transaction by indirection evade the statute prohibiting suretyship by her, and in such manner bind herself. (Ind.) *Field v. Campbell*, 301.

3. **MARRIED WOMEN—Suretyship.**—As the statute puts a married woman under disability as a surety, there can be no recovery upon

her suretyship undertaking, except when the facts are such that the person who accepted it is reasonably justified in supposing, and does suppose, that she is not only a principal in name, but also in fact. (Ind.) *Field v. Campbell*, 301.

4. **MARRIED WOMEN—Suretyship—Knowledge.**—Anyone loaning money to a married woman is bound to know that she cannot become a surety, and he must satisfy himself by active diligence and inquiry that she is in fact a principal. (Ind.) *Field v. Campbell*, 301.

5. **MARRIED WOMEN—Suretyship—Estoppel.**—A mere statement by a married woman that money borrowed by her was for her own use does not estop her from showing that she became a surety therefor, when the lender knew of facts and circumstances calling on him to make more specific and diligent inquiry. (Ind.) *Field v. Campbell*, 301.

6. **MARRIED WOMEN—Suretyship.**—A married woman has no authority to become a principal in a loan made to pay a former suretyship debt. (Ind.) *Field v. Campbell*, 301.

7. **MARRIED WOMEN—Suretyship—Estoppel.**—A married woman, by deceit which actually misleads, may estop herself from denying that in obtaining a loan she became a surety for another. (Ind.) *Field v. Campbell*, 301.

8. **MARRIED WOMAN—Suretyship—Estoppel.**—Unless an estoppel in pais exists a married woman is not bound to repay money obtained by her to pay the debts of another. (Ind.) *Field v. Campbell*, 301.

9. **CONFLICT OF LAWS—Contract of Suretyship of Married Woman.**—A note against a married woman executed by her as surety for her husband in one state where it is valid will be enforced in another state by principle of comity unless this is forbidden by positive law. Such contract is not opposed to good morals or public policy. (Ind.) *Garrigue v. Kellar*, 324.

Married Woman's Employment of Attorney.

10. **MARRIED WOMAN—Capacity to Contract with Attorney.**—A married woman has legal capacity to make a contract with an attorney to procure a divorce, by which she gives him her promissory note for the amount of his fee, and agrees to secure it by a deed of trust on certain land if the title thereto is vested in her by the decree of divorce. (Colo.) *Patrick v. Morrow*, 107.

11. **MARRIED WOMAN—Equitable Lien on Land.**—If a married woman employs an attorney to procure a divorce, gives him her promissory note to cover his compensation, and agrees to secure the note by a deed of trust on certain land if the title thereto is vested in her by the decree of divorce, an equitable lien or mortgage attaches to the property the moment the decree is rendered, which is not affected by her claim of homestead. (Colo.) *Patrick v. Morrow*, 107.

See Acknowledgments, 3; Libel and Slander, 3; Marriage; Witnesses, 4, 5.

INCEST.

1. **INCEST—Accomplice.**—A niece who is also the stepdaughter of a person accused of incest with her, and who did not oppose the acts of carnal intercourse, is an accomplice, although she did not enter into such acts with the same desire, intent and purpose, as did the accused. (Tex. Cr. Rep.) *Clifton v. State*, 983.

2. INCEST—Evidence of Other Acts of Intercourse.—Incest is not a continuous offense and each act of incestuous intercourse constitutes a different offense. Hence, evidence of other acts of incestuous intercourse than those charged in the indictment, is not admissible. (Tex. Cr. Rep.) Clifton v. State, 983.

INDEPENDENT CONTRACTOR.

See Master and Servant, 10-12.

INDICTMENT.

In General.

1. INDICTMENT—Charging in Language of Statute.—If a statute does not set out the facts constituting an offense, or if the language of the statute is so general as to include cases which, though within the terms, are not within the spirit or meaning of the act, it is not sufficient to charge the offense in the words of the statute; but if a statute creates an offense and sets out the acts which constitute the crime, it is sufficient for an indictment to charge the offense in the language of the state. (Ark.) Caldwell v. State, 28.

2. INDICTMENT—Negating Exceptions.—In charging a statutory crime only such exceptions and provisos need be negated as are descriptive of the offense, without regard to their position or location in the statute. (Colo.) Johnson v. People, 85.

Counts and Election.

3. INDICTMENT—Counts in Information.—An information for a crime may consist of different counts. (Ind.) Knox v. State, 291.

4. INDICTMENT—Counts—Election.—A motion to require the prosecution to elect on which count in an information it intends to try is addressed to the sound discretion of the court, and unless there is an abuse of discretion, the ruling will not be reviewed. (Ind.) Knox v. State, 291.

5. INDICTMENT—Counts—Election.—If the several counts in an information for crime are based upon the same essential facts, the doctrine of election upon which to try does not apply. (Ind.) Knox v. State, 291.

See Forgery; Futures; Homicide, 23; Seduction.

INHERITANCE TAX.

See Taxation, 12-16. /

INJUNCTION.

1. INJUNCTION—Violation—Notice.—To render a person amenable to an injunction, it is not necessary that he should have been a party to the suit, so long as he had actual notice of the contents of such injunction. (Ill.) O'Brien v. People, 219.

2. JURISDICTION—Injunction.—If the court has jurisdiction of the parties and the bill alleges acts of the defendants sufficient to give the court jurisdiction to determine its sufficiency, the fact that the court may have erred in sustaining the bill and issuing a temporary injunction, does not affect the duty of all persons having notice to obey the injunction until the order granting it is set aside or reversed by a court of competent jurisdiction. (Ill.) O'Brien v. People, 219.

3. JURISDICTION—Injunction.—Even if the terms of an injunction are broader than the allegations of the bill therefor, that

fact is no defense in a proceeding to punish for contempt in violating such injunction. (Ill.) *O'Brien v. People*, 219.

4. INJUNCTION—Injury to Growing Crops.—If a complaint praying an injunction alleges great and irreparable injury to growing crops, and that the damages cannot be justly estimated, the court has power to order an injunction to restrain the acts complained of. (Idaho) *Wilson v. Eagleson*, 110.

5. UNDERTAKING FOR INJUNCTION—Want of Justification.—An undertaking, regular in form, is not invalid because the sureties did not justify that they were householders or freeholders of the county and state. The justification is no part of the undertaking. (Idaho) *Wilson v. Eagleson*, 110.

See Easements, 4, 5.

INSURANCE.

Fire Insurance.

1. INSURANCE—Sole Ownership—Contract to Convey.—Ownership of property is sole and unconditional, within the meaning of a fire insurance contract, even though the owner has made a contract for the sale of the land, which has not been performed. Under a written contract for the sale of land, the vendor retains the legal title as trustee for the benefit of the vendee. (Ill.) *National Fire Ins. Co. v. Three States Lumber Co.*, 239.

2. INSURANCE—Sole Ownership—Contract to Convey.—A mere contract to convey land at a future time upon the performance of certain acts by the purchaser does not create an equitable title in him and render the title of the proposed vendor less than a sole and unconditional ownership within the meaning of a fire insurance policy. (Ill.) *National Fire Ins. Co. v. Three States Lumber Co.*, 239.

3. INSURANCE—Insurable Interest—Waiver of Condition of Title.—If the insured has an insurable interest in the property, and in good faith applies for insurance thereon, and makes no actual misrepresentation or concealment of his interest therein, and the insurance company refrains from making inquiry concerning his interest and issues a policy to him, accepts and retains his premium, it must be presumed to have knowledge of the condition of his title, and to insure the property with such knowledge. (Ill.) *National Fire Ins. Co. v. Three States Lumber Co.*, 239.

Life Insurance.

4. LIFE INSURANCE—When Becomes Effective.—If a person applies for life insurance and pays an amount equal to the first premium, but the application and the receipt for the money paid stipulate that the insurance is to become effective only when the application is approved and the policy issued, the transaction does not amount to an agreement for preliminary or temporary insurance. (Ark.) *Cooksey v. Mutual Life Ins. Co.*, 26.

5. INSURANCE—Death in Violation of Law.—Where one brings on a personal encounter with another, but abandons it, and, while in good faith retreating to avoid further difficulty, is killed by his adversary, the death is not within the meaning of an insurance policy, exempting against liability for a death in violation or attempted violation of any criminal law. (Ark.) *Supreme Lodge v. Bradley*, 38.

6. INSURANCE, LIFE—Connection with the Sale of Liquors. What is not.—One who keeps a restaurant adjacent to a saloon be-

tween which there is an archway, allowing free passage, and with whom the saloon-keeper boards, is not, though he sometimes, when the latter is at meals or temporarily absent, waits on customers at the bar, without having any interest in the business, connected with the sale of liquors. His statement in an application for life insurance that he is not in any way connected with the sale of ale, wine, or liquor is, therefore, true, and cannot occasion the forfeiture of a policy issued to him. (Mont.) *Collins v. Metropolitan Life Ins. Co.*, 578.

7. INSURANCE, LIFE—Connection with the Sale of Liquor.—Where it is claimed that a policy was forfeited because the assured was connected with the sale of liquor, evidence that he received no compensation for his occasional services at the bar of a saloon-keeper is material as tending to show the exact relation of the assured to the business. (Mont.) *Collins v. Metropolitan Life Ins. Co.*, 578.

Agents of Insurer—Authority and Waiver.

8. INSURANCE—Foreign—Fire—Powers of Agent—Waiver.—If a foreign insurance company appoints an agent within the state and supplies him with blank policies signed by the president and secretary, to be filled up, countersigned, and issued as occasion may require, such agent must be considered as having the powers of a general agent as to a waiver of conditions contained in policies issued by him. (La.) *Richard v. Springfield Fire etc. Ins. Co.*, 359.

9. INSURANCE—Powers of Agents.—An insurance agent having power to make contracts of insurance and to issue policies, binds the insurer by all waivers, representations or other acts within the scope of his business, unless the insured has notice of a limitation of his powers. (La.) *Richard v. Springfield Fire etc. Ins. Co.*, 359.

10. INSURANCE—Powers of Agents—Waiver of Forfeiture—Limitation on Powers.—Insurance agents, whether local or general, with power to make and issue policies of insurance, represent the insurer within the territorial limits to which they are assigned. Their knowledge is imputed to the company and their acts as to waiver of forfeitures bind the insurer within the scope of their employment, and their apparent authority cannot, as to the public, be limited by private instructions unknown to the latter. (La.) *Richard v. Springfield Fire etc. Ins. Co.*, 359.

11. INSURANCE—Fire—Powers of Agent—Waiver of Iron-safe Clause.—An insurance agent with power to make and issue policies has apparent power to waive, prior to loss, a breach of an iron-safe clause by him attached to the policy, resulting from the failure of the insured to make an inventory of stock within a certain time from the date of the issuing of the policy. (La.) *Richard v. Springfield Fire etc. Ins. Co.*, 359.

12. INSURANCE, LIFE—Representations Made in Application and Known by Agent to be Untrue.—If statements made in an application for life insurance are untrue, it is not material that the agent or solicitor knows the true state of facts, if, in the application, the assured agrees that inasmuch as only the home officers of the company have authority to determine whether the policy shall issue and act only on the written statements contained in the application, no statements, promises, or information made or given by him to the person soliciting or taking the application, or by or to any other person shall be binding on the company or in any way affect its rights unless reduced to writing and presented to the officers of the company at the home office. (Mont.) *Collins v. Metropolitan Life Ins. Co.*, 578.

13. INSURANCE, LIFE—Agents, Limitation Upon Authority of. If a policy provides that the contract between the parties is completely set forth therein and in the application, and none of its terms can be varied or modified, nor any forfeiture waived, or premiums in arrears received, except by agreement in writing signed by the president, vice-president, secretary or assistant secretary, whose authority for that purpose will not be delegated, the insured is conclusively presumed to know that no engagement entered into between him and the agent who took the application extending the time for payment of premiums is binding on the insurer, unless brought to its knowledge and ratified by it. (Mont.) *Collins v. Metropolitan Life Ins. Co.*, 578.

Premiums.

14. INSURANCE, LIFE—Waiver of Time of Payment of Premiums.—The fact that one quarterly payment of premium was made two days after it was due and was reported to the insurer within the next sixteen days after due, but reported as made when due, and the last was made to a clerk of the agent sixteen days after due, but the return of which was tendered three days later, does not show that the insurer knew of and ratified an oral agreement between the assured and the agent that the former might make payment of such premiums as late as sixteen or twenty-four days after they became due, nor estop it from tendering a return of the money received by such clerk and claiming a forfeiture. (Mont.) *Collins v. Metropolitan Life Ins. Co.*, 578.

Waiver of Forfeiture.

15. INSURANCE, LIFE—Waiver of Forfeiture in Other Cases.—The fact that an insurer waives forfeitures of policies held by other persons is of no evidentiary value in an action brought to recover on a policy issued on the life of a person not shown to have had any knowledge of such waivers and whose policy was by its terms forfeited for nonpayment of premiums. (Mont.) *Collins v. Metropolitan Life Ins. Co.*, 578.

16. INSURANCE, LIFE—Forfeiture, Waiver of, Knowledge Essential to.—If after a policy has been issued for nonpayment of a premium when due, and such payment is afterward tendered and received by the insurer, fair dealing requires that it be informed of the condition of the assured, and a payment made without such information while he is probably in extremis is fraudulent. (Mont.) *Collins v. Metropolitan Life Ins. Co.*, 578.

See Benefit Associations.

INTERVENTION.

See Parties.

INTOXICATING LIQUORS.

LIQUORS—Sale to Minor—Consent of Parent.—Where a statute makes it unlawful to give or sell liquor to a minor without the consent of a parent, permission given by a mother to a certain person to give to any of her children liquors at any time he may desire, will not avail him as a defense to a prosecution under the statute, for the statute does not contemplate a general consent of that character. (Tenn.) *Pressly v. State*, 921.

IRRIGATION.

See Waters and Watercourses.

JUDGMENTS.

In General.

1. **CONSTITUTIONAL LAW—Jurisdiction—Collateral Attack.**—If a judgment in either a civil or a criminal proceeding is absolutely void, either because there is no constitutional tribunal, or because such tribunal has no jurisdiction of the subject matter, its action can be questioned whenever and wherever it is invoked, either collaterally or otherwise. (Tex. Cr. Rep.) *Ex parte Lewis*, 909.

2. **JUDGMENTS—Notice—Conclusiveness.**—A judgment against a city in an action against it for personal injury of which a city lot owner has notice is conclusive upon him as to the fact, cause and extent of such injury, but not as to his responsibility for such cause of injury. (Neb.) *City of Lincoln v. First Nat. Bank*, 690.

3. **RES JUDICATA—Seeking to Maintain New Suit on Different Grounds.**—A decree dismissing a bill in equity in a suit to enforce an oral trust and for an accounting for moneys claimed by the complainant to have been put into the hands of the defendant to be invested and reinvested for her benefit, is conclusive as a bar to a second suit for the same purpose, though it is sought to be made on grounds different from those mentioned in the former bill. The complainant is bound to bring forth all his grounds of attack at once. (Mass.) *Barnes v. Huntley*, 471.

Nunc Pro Tunc Entry.

4. **JUDGMENT Nunc Pro Tunc, Equity of.**—If a judgment is by the court ordered to be entered, and its clerk, either inadvertently or through a misconception in supposing that recording of the verdict is in effect the entry of a judgment, omits to make the formal entry of the judgment, it is clearly within the jurisdiction of the court to direct the judgment entered as of the date on which it should have been entered. (Md.) *Stern v. Bennington*, 433.

5. **JUDGMENT, Nunc Pro Tunc, Entry of, on What Evidence may be Based.**—Parol evidence is admissible to prove that the court orally directed the clerk to enter judgment, and such evidence, when admitted, warrants an order directing the entry of such judgment nunc pro tunc of the date when it was so orally ordered to be entered. (Md.) *Stern v. Bennington*, 433.

6. **JUDGMENT, Nunc Pro Tunc, Entry of, When Will not be Denied for Laches.**—If, in September, 1903, a judgment is directed to be entered on a verdict, which a clerk, through misapprehension of his duties, fails to enter, and in February, 1904, the defendant moves to strike out the verdict, and in March following the plaintiff moves for the entry of judgment nunc pro tunc as of the date when it was ordered, the motion cannot be denied on the ground that he has been guilty of laches, since the failure of the clerk to do as directed is due to his misapprehension and not to the fault of the plaintiff. (Bd.) *Stern v. Bennington*, 433.

Limitation of Actions.

7. **LIMITATION OF ACTIONS—Judgments.**—The statute of limitations does not begin to run against an action on a city lot owner's liability over to the city for injuries growing out of defects in premises, until the city's liability is fixed by judgment against, or payment by, it. (Neb.) *City of Lincoln v. First Nat. Bank*, 690.

See Appeal and Error.

JURISDICTION.

See Courts; Equity; Process; Venue.

JURY.

See Criminal Law, 15.

LABOR UNIONS.

See Trades Union.

LANDLORD AND TENANT.

1. **LANDLORD AND TENANT, Liability to Children.**—A child whose parents occupy a leased tenement and who is injured by defects therein cannot recover if its parents could not have recovered if injured under the same circumstances. (Mass.) *Phelan v. Fitzpatrick*, 469.

2. **LANDLORD AND TENANT, What Parts Must be Regarded as Portions of the Leased Premises.**—If a leased tenement is situated in the same yard with others, a platform inclosed by a railing and connected by stairs going from one platform to another must be regarded as a portion of the leased premises, where such platform is used by the occupants of the tenement with which it is connected, and one of the lessees injured on such platform by a defect therein is deemed injured by a defect in the leased premises. (Mass.) *Phelan v. Fitzpatrick*, 469.

3. **LANDLORD AND TENANT.**—The Rule of Caveat Emptor Applies in hiring a tenement, and extends to all parts and appurtenances thereof. (Mass.) *Phelan v. Fitzpatrick*, 469.

4. **LANDLORD AND TENANT.**—A Lessee Takes a Tenement in the Condition in which it is when leased to him, and the landlord is under no obligation to subsequently make repairs. (Mass.) *Phelan v. Fitzpatrick*, 469.

5. **LANDLORD AND TENANT.**—The fact that a landlord, after leasing, voluntarily undertook on one occasion, at the request of a lessee, to repair a defective railing does not constitute an admission of liability on his part, nor render him liable when the railing afterward gives way and injures a member of the lessee's family. (Mass.) *Phelan v. Fitzpatrick*, 469.

See Easements, 3.

LEGISLATURE.

See Statutes.

LIBEL AND SLANDER.

1. **SLANDER—Privileged Communications.**—A communication which would otherwise be slanderous and actionable is privileged if made in good faith upon a matter involving an interest or duty of the person making it, though that duty is not strictly legal, but an imperfect obligation to a person having a corresponding interest or duty. (Tex. Cr. Rep.) *Stayton v. State*, 988.

2. **SLANDER—Privileged Communications.**—A statement made by a husband to his neighbor that he was going away, and, at the request of the neighbor, giving as his reason therefor, the infidelity of his wife, is not privileged, as there is no duty or interest on the part of the husband requiring him to make such statement. (Tex. Cr. Rep.) *Stayton v. State*, 988.

3. SLANDER—Prosecution by State—Husband and Wife.—The state may maintain a prosecution against a husband for slander in imputing a want of chastity to his wife. (Tex. Cr. Rep.) *Stayton v. State*, 988.

4. SLANDER—Criminal Prosecution.—Malice is a necessary ingredient of the offense of criminal slander, and the jury must be instructed that unless it finds from the evidence that the imputation arising from the alleged slanderous words was wantonly and maliciously made, although it is shown to be false, it must acquit. (Tex. Cr. Rep.) *Stayton v. State*, 988.

5. SLANDER—Contemporaneous Statements.—A statement made by one charged with slander, if made at the time of, or shortly before or after the alleged slander, although not exactly the same as the one set out in the indictment, is admissible to show with what intent the slanderous words set out in the indictment may have been uttered; but the jury must be instructed that this is the only purpose for which such statement can be introduced. (Tex. Cr. Rep.) *Stayton v. State*, 988.

LICENSES.

See Constitutional Law, 5, 6; Highway, 4.

LIENS.

See Mechanic's Lien.

LIMITATION OF ACTIONS.

LIMITATION OF ACTIONS—Demand.—On an obligation for the payment of money on demand, the statute begins to run at once and suit is a sufficient demand and must be brought within six years; but if the contract is to pay on the future performance of a condition, or the happening of an event, or at a certain time after demand, then a demand is necessary to a right of action and the statute does not begin to run until demand is made. (Pa.) *Cook v. Carpenter* 854.

See Judgment, 7.

LIQUIDATED DAMAGES.

See Damages.

LIVERY-STABLE KEEPER.

1. LIVERY-STABLE KEEPER—Whether Common Carrier.—A livery-stable keeper who lets for hire his conveyances, either with or without drivers, as occasional demands are made upon him by his customers is not a common carrier of passengers. (Tenn.) *McGregor v. Gill*, 919.

2. LIVERY-STABLE KEEPER—Liability for Negligent Driving.—Where a livery-stable keeper lets a conveyance for a particular journey, and exercises reasonable prudence in selecting the team, vehicle, and driver, he is not answerable for injuries sustained by a person riding in the vehicle, occasioned by negligent driving. (Tenn.) *McGregor v. Gill*, 919.

LOCAL GOVERNMENT.

See Constitutional Law, 10-12.

Note.

Mandamus, where the state is the real party in interest, 838.

MARRIAGE.

MARRIAGE CONTRACT with a Person Previously and Still Married.—Where it is provided by statute that one spouse may, after the other has been absent five years, contract a second marriage, a contract to marry a woman whose husband has been absent less than five years is against public policy, and she can maintain no action for its breach, although the marriage is not to take place until the five years prescribed by statute expire or until she procures a divorce. (Tenn.) *Johnson v. Iss*, 891.

See Divorce.

MARRIED WOMEN.

See Husband and Wife.

Note.

Married Woman, acknowledgment of conveyance by, contents of instrument, making known to, when sufficiently shown by, 562-569.

acknowledgment of conveyance by, private examination apart from husband, when sufficiently shown by certificate of, 561, 562, 568.

acknowledgment of conveyance by, when essential to its validity, 529, 530.

MASTER AND SERVANT.

Contract of Employment—Compensation.

1. **CONTRACTS OF EMPLOYMENT—Fixed Period—Continuance—Presumption.**—If persons have contracted for the performance of certain services for a definite period at a fixed salary, and the employment continues beyond the period agreed upon, in the absence of any new contract it will be presumed that the employment continued under the same contract and upon the terms originally fixed. But this presumption must yield to evidence showing a change of terms. (Neb.) *Home Fire Ins. Co. v. Barber*, 716.

2. **CONTRACT OF EMPLOYMENT—Change in Terms—Recovery of Back Salary.**—If an employé of a corporation, after the expiration of a contract fixing his salary at a certain sum per annum, continues in the same employment, without any new agreement, and then voluntarily reduces his own salary to a certain sum per annum, drawing it thereafter on that basis for many years, he is not entitled to recover as back salary the difference between the original sum contracted for and the sum to which he voluntarily reduced his salary. (Neb.) *Home Fire Ins. Co. v. Barber*, 716.

Interference with Contract of Employment and Right to Labor.

3. **CONTRACT for Employment Terminable at Employer's Will, Unlawful Interference with.**—The fact that a contract of employment is terminable at the will of the employer does not affect the employé's right to recover for an unlawful interference with it by a third person, but only affects the amount of damages. (Mass.) *Berry v. Donovan*, 499.

4. **LABOR, Interference with Right of.**—An intentional interference with one's right to labor and to contract for his labor, without lawful justification, is malicious in law, even if it is through good motives and without express malice. (Mass.) *Berry v. Donovan*, 499.

5. **CONTRACT Interfering with Right to Labor, When does not Justify Action Under it.**—A contract between an employer and a

union of employes that he will not retain any person in his employment after receiving notice from such union that such person is objectionable to it from any cause does not justify the interference of an agent and member of such union to bring about the discharge of an employe solely because he does not belong to the union. (Mass.) *Berry v. Donovan*, 499.

Fellow-servants.

6. **FELLOW-SERVANTS**.—A Conductor of a Passenger Train and a brakeman on a freight train are fellow-servants. (Tenn.) *Louisville etc. R. R. Co. v. Dillard*, 894.

7. **FELLOW-SERVANTS**.—Assumption of Risk.—If an employer has exercised due care in the selection of his employes, the danger arising from the negligence of a fellow-servant is a risk which one entering the service voluntarily assumes. (Tenn.) *Louisville etc. R. R. Co. v. Dillard*, 894.

8. **MASTER AND SERVANT**.—Fellow-servants.—If an injury to an employe results from the negligence of the master and a fellow-servant, the fellow-servant doctrine does not release the master from liability. (La.) *Fuller v. Tremont Lumber Co.*, 348.

9. **MASTER AND SERVANT**.—Negligence—Fellow-servants.—If the negligence of a master is combined with the negligence of a fellow-servant in producing the injury, and the negligence of neither alone is the efficient cause, both the master and fellow-servant are liable, and the injured servant may maintain his action against either, or both together. (La.) *Fuller v. Tremont Lumber Co.*, 348.

Independent Railway Contractors.

10. **RAILROADS**.—Independent Contractor.—A railway corporation is liable for the wrongful act of a contractor while exercising, with the assent of the corporation, some chartered power or privilege of the corporation which he could not have exercised independently of its charter, but it is not liable for the wrongful act of an independent contractor not exercising any special power derived from the charter. (Ill.) *Boyd v. Chicago etc. Ry. Co.*, 253.

11. **RAILROADS**.—Construction of Road—Independent Contractor. The construction of a railroad by an independent contractor upon the right of way and property of the railway corporation is not the exercise of any chartered power or privilege by the contractor on behalf of the company, and it is not liable for his negligence. (Ill.) *Boyd v. Chicago etc. Ry. Co.*, 253.

12. **RAILROADS**.—Construction Work—Independent Contractor.—A contractor who has control and direction of the method and means for the performance of the work of constructing a railroad, the railroad company retaining only the right of general supervision and inspection to see that the contract is properly performed, is an independent contractor, and not a servant of the railroad company. (Ill.) *Boyd v. Chicago etc. Ry. Co.*, 253.

Safe Place and Appliances.

13. **RAILROADS**.—Negligence—Safe Roadway.—A railroad company must make and keep its tracks reasonably safe, and if it permits its roadbed and rails to remain out of repair and also permits the use of unsafe brakes on its cars, or loads its cars so that such brakes are useless, and injury to an employe or other person is the result, the injured person, if not at fault, is entitled to damages. (La.) *Fuller v. Tremont Lumber Co.*, 348.

14. MASTER AND SERVANT—Safe Place and Appliances.—A master must furnish his employes reasonably safe appliances and a reasonably safe place to work, and must keep them safe. This rule applies to a railroad company. (La.) *Fuller v. Tremont Lumber Co.*, 348.

Duty to Employees in Railroad Yard.

15. RAILROADS—Care Required in Their Own Yards—Injury to Employé.—If a railroad company is operating its cars within its own yard, it is not bound at all times and under all circumstances to maintain a lookout upon the forward end of every car that is moved. The question of due precaution is one of reasonable sufficiency, and when the precaution taken is sufficient to guard against injury to an employé or to anyone save a person who does inadvertently that which he would otherwise do only with the intention of committing suicide, it cannot be said that such precaution is insufficient. (La.) *Lewis v. Vicksburg etc. Ry. Co.*, 335.

16. RAILROADS—Care Required in Their Own Yards—Injury to Employé—Contributory Negligence.—The failure of a railroad company, operating its cars within the limits of its own yard, when it has taken reasonable precautions for the safety of others, to take every precaution that might have been required in a public and frequented thoroughfare, is slight in connection with the later negligence of its employé, the conditions of whose employment required that he should at all times be on the lookout, within those limits for moving cars, and whose failure to observe that precaution must, under all of the circumstances of the case, be regarded as the proximate cause of his injury. (La.) *Lewis v. Vicksburg etc. Ry. Co.*, 335.

Liability of Master for Act of Servant.

17. MASTER AND SERVANT, Act of the Latter, When Treated as that of the Former.—If a servant is acting at the time in the course of his master's business and for his master's benefit within the scope of his employment, then his act, though wrongful and negligent, is to be treated as that of the master, although no express command or privity of the master is shown. (Md.) *Deck v. Baltimore etc. R. R. Co.*, 399.

18. MASTER AND SERVANT.—Whether the Act of the Servant Complained of was Within the Scope of His Duty while acting in furtherance of his master's business is generally to be determined by the jury as a matter of fact and not by the court as a matter of law. (Md.) *Deck v. Baltimore etc. R. R. Co.*, 399.

19. MASTER AND SERVANT.—The Burden is on the Master to prove that His Servant in Doing the Act Complained of was not engaged in the course of his business, where it may be difficult for the plaintiff to obtain a full and complete proof of the terms of the servant's employment. (Md.) *Deck v. Baltimore etc. R. R. Co.*, 399.

Liability for Shooting by Special Policeman.

20. RAILWAYS, Commission of Policemen and Detectives in the Employ of.—In an action against a railway company for injuries claimed to have been sustained by the plaintiff in being shot by a special policeman or detective in the employ of the defendant, it is proper to prove how and in what capacity the policeman was acting and that he held a commission as policeman from the state. (Md.) *Deck v. Baltimore etc. R. R. Co.*, 399.

21. EVIDENCE of the Employment of a Special Policeman by the Defendant, When Sufficient.—Where a witness testifies that he was

employed and paid by the defendant railway company as a policeman, and his commission held from the state shows that he was appointed special policeman of the railway company, and other witnesses testify to the same effect, the evidence is legally sufficient to prove that such policeman was in the employ of such company. (Md.) *Deck v. Baltimore etc. R. R. Co.*, 399.

22. EVIDENCE of the Shooting of the Plaintiff by an Employé of the Defendant, When Sufficient.—In an action for injuries claimed to have been sustained by the plaintiff by being shot by a special policeman in the employ of the defendant, such shooting is sufficiently proved by showing that such policeman, in the presence of the plaintiff and immediately after the shooting, admitted that he did the shooting. (Md.) *Deck v. Baltimore etc. R. R. Co.*, 399.

23. RAILWAY CORPORATIONS, Proof that a Special Policeman was in the Employ of, at the Time of a Shooting by Him.—Where it appears that a special policeman was present at the time of a shooting, and in fact shot plaintiff, and was then in the employ of the railway corporation, and that plaintiff and his companions had been on the train as trespassers and acting in a disorderly manner, it does not require much testimony to show that such special policeman was there, not on any business of his own, but for the purpose of protecting the company's employés and property. It will not be assumed that he was there for any other purpose than to perform his duty and act within the scope of his authority. (Md.) *Deck v. Baltimore etc. R. R. Co.*, 399.

24. RAILWAY CORPORATIONS—Liability of for Shooting by Employé.—It cannot be said that a railway corporation, because it did not authorize the shooting of the plaintiff by a special policeman in its employ, is not liable for the resulting injury, where it appeared that it was the duty of such policeman to protect the company's trains and property and to look out for all violations of law along its road. (Md.) *Deck v. Baltimore etc. R. R. Co.*, 399.

25. RAILWAY CORPORATIONS, Special Policeman, Presumption as to Authority of.—It must be presumed that a special policeman employed by a railway corporation has some implied authority and duties, even if none are expressly proved, and it may be inferred from the general nature of the employment that it was his duty to remove trespassers from train. (Md.) *Deck v. Baltimore etc. R. R. Co.*, 399.

26. RAILWAY CORPORATIONS, Special Policemen, When Must be Assumed to be Employés of.—Where a special policeman, though commissioned by the state, was employed and paid by a railway corporation and was acting as its policeman or detective, he must be assumed to have been acting as an employé of such corporation and not as an officer of the state at the time of the shooting by him of a person who had been trespassing on a train. (Md.) *Deck v. Baltimore etc. R. R. Co.*, 399.

27. RAILWAY CORPORATION, Liability of for Shooting by Its Policemen.—If it appears by the evidence that the plaintiff, while trespassing on a train of the defendant railway corporation, was ordered therefrom, and immediately after leaving the train was shot by a policeman in the employ of the defendant corporation, this evidence is legally sufficient to justify the submission of the cause to the jury when the action is by the person so injured against such corporation to recover for his injury. (Md.) *Deck v. Baltimore etc. R. R. Co.*, 399.

MECHANIC'S LIEN.

1. **MECHANIC'S LIEN Under Contract With Persons Who Subsequently Acquired Title.**—If one negotiating for the purchase of land contracts for the erection of a building thereon, he, on acquiring title and consenting to the continuance of the work, ratifies what was done preceding his acquisition of the title, and as against him the lien is enforceable for the whole amount of the contract remaining unpaid. (Mass.) *Rochford v. Rochford*, 465.

2. **MECHANIC'S LIEN, Conflict Between and Mortgages.**—As against a mortgagee no lien attaches unless the contract out of which it springs was made after the mortgagor became the owner, for the legal title fixed by his ownership is the terminus from which encumbrancers must reckon their rank to liens on the land. (Mass.) *Rochford v. Rochford*, 465.

3. **MECHANICS' LIENS, Conflict Between and Purchase Money Mortgages.**—If one contracts for the erection of a house on land of which he is not then the owner, and afterward and during the progress of the work acquires title to the land and contemporaneously executes a mortgage to his vendor, the lien of the mortgage is not subordinate to the lien of the contractor who erected the building. (Mass.) *Rochford v. Rochford*, 465.

MILK.

See Constitutional Law, 5.

MINES AND MINERALS.

1. **MINING CLAIMS—Adverse Claims, Suits to Determine Effect of as Against the United States.**—To a suit under the Revised Statutes of the United States to determine adverse claims to mining lands, the government is not a party, and is not bound by the judgment, except to the extent that it determines which of the contending claimants is entitled to the possession. The adjudication in the state court is not conclusive of the prevailing party's right to the property as against the United States, nor does it divest the government's title. (Mont.) *Butte Land etc. Co. v. Merriman*, 590.

2. **MINING LANDS—Adverse Claims, Effect on Third Parties of Suits to Determine.**—A judgment in a suit in a state court under section 2326 of the statutes of Montana to determine adverse claims to mining lands is not conclusive except between the parties before the court and those in privity with them, and does not preclude third parties from subsequently maintaining that there existed a known lode of rock in place, bearing gold, copper, or other valuable minerals to which they had acquired title by locating the same under the laws of the United States. (Mont.) *Butte Land etc. Co. v. Merriman*, 590.

MORTGAGES.

1. **A MORTGAGE Does not Convey the Legal Title**, but is a mere lien to secure the performance of the contract to which it is incident. (Mont.) *Cornish v. Woolverton*, 598.

2. **A MORTGAGE is a Conveyance within the meaning of the recording laws of Montana.** (Mont.) *Cornish v. Woolverton*, 598.

3. **MORTGAGE, Assignor of, Duty of to the Mortgagor and Others.**—One who purchases the indebtedness secured by a mortgage on real property and takes an assignment which he places on record, does not owe any further duty to the mortgagor or his successor in interest or others dealing with the property. Hence, his failure

to give actual notice of the assignment, and his delay to foreclose the mortgage for any period less than the full time allowed by the statute of limitations, do not estop him from asserting his mortgage indebtedness and lien against a successor in interest of the original mortgagor, who has, in the meantime, paid the indebtedness to the original mortgagee without actual notice of the assignment. (Mont.) *Cornish v. Woolverton*, 598.

4. **MORTGAGES.**—The title to a mortgage passes to the assignee on the assignment of the obligation secured by it. (Mont.) *Cornish v. Woolverton*, 598.

5. **MORTGAGE.**—The Record of the Assignment of a Mortgagee Imparts Notice to all persons dealing with the assignor in any capacity whatever. Hence, payment to him after such assignment, unless he continues to hold the evidence of the deed, does not discharge the mortgage. (Mont.) *Cornish v. Woolverton*, 598.

6. **MORTGAGE.**—Notice of Assignment of.—One who purchases real property which is subject to a mortgage, after the assignment of such mortgage has been filed for record, is charged with notice thereof, and cannot satisfy the mortgage debt to the assignor. (Mont.) *Cornish v. Woolverton*, 598.

7. **MORTGAGE, Assignment of.**—The Release of a Mortgage by the Original Mortgagee After the Assignment from him to another has been filed for record is ineffective, and all persons dealing with the property are chargeable with notice that such is the case. (Mont.) *Cornish v. Woolverton*, 598.

8. **MORTGAGE, Assignee of, When not Estopped from Enforcing Notwithstanding Payment Made to His Assignor.**—The fact that the assignee of a mortgage, after placing his assignment on record, permits his assignor to collect interest coupons, does not show that such assignor is entitled to receive payment of the principal and discharge the mortgage debt, nor does it estop the assignee from subsequently enforcing the mortgage, though payment thereof in full has been made to the original mortgagee by one having no actual notice of the assignment. (Mont.) *Cornish v. Woolverton*, 598.

See Bills and Notes, 5-7; Chattel Mortgage; Fixtures.

MUNICIPAL CORPORATIONS.

Ordinances.

1. **MUNICIPAL CORPORATIONS.**—Municipal Ordinances are not illegal because the reasons for their enactment are not given therein, nor because they punish as a nuisance what they do not expressly declare to be such. (La.) *City of Crowley v. Ellsworth*, 353.

2. **MUNICIPAL CORPORATIONS.**—Municipal Ordinances which apply alike to all persons, firms, or corporations engaged in the business legislated against are not discriminatory, and every presumption is indulged in favor of their fairness. (La.) *City of Crowley v. Ellsworth*, 353.

Regulation of Keeping Explosives.

3. **MUNICIPAL CORPORATIONS.**—Ordinances Regulating Keeping of Explosives.—Authority in a municipality to regulate the storage of combustible and inflammable materials within its limits includes power to prevent the storage of refined and other explosive oils within such limits. (La.) *City of Crowley v. Ellsworth*, 353.

4. **MUNICIPAL CORPORATIONS.**—Ordinances—Special and General—Repeal.—A special ordinance granting to a particular person

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permission to store refined oil within the limits of an incorporated city is repealed by a subsequent general ordinance making such storage of oils a criminal offense. (La.) *City of Crowley v. Ellsworth*, 353.

5. MUNICIPAL CORPORATIONS—Ordinance Prohibiting Storage of Explosives—Constitutional Law.—An ordinance prohibiting the storage of explosive oils in large quantities within the city limits is not unconstitutional as depriving a person of his property without due process of law, when circumstances justify its enactment as a police regulation. (La.) *City of Crowley v. Ellsworth*, 353.

Regulation of Billboards.

6. MUNICIPAL CORPORATIONS—Ordinances Forbidding Billboards.—Under the police power of a municipality it may prohibit the erection of insecure billboards within its limits, prevent the exhibition from secure ones of immoral or indecent advertisements or pictures, and protect the community from any actual nuisance resulting from the use of them (Pa.) *Bryan v. City of Chester*, 870.

7. MUNICIPAL CORPORATIONS—Ordinances—Billboards on Private Property.—A municipal corporation has no right, in the exercise of its police power or otherwise, to enact an ordinance forbidding citizens within its limits from erecting secure billboards on their own property, merely because such boards are unsightly or may constitute a nuisance. (Pa.) *Bryan v. City of Chester*, 870.

Hack Drivers' Ordinance.

8. MUNICIPAL CORPORATIONS—Hack Drivers' Ordinance.—A municipal ordinance prohibiting hack drivers, hotel runners, and kindred classes of people from taking a stand at a certain place within the city limits, for the purpose of soliciting the patronage of passengers who come in on different railroad trains, and authorizing policemen to arrest without warrant whenever a violation of such ordinance was committed in their view, is valid. (Tex. Cr. Rep.) *Vann v. State*, 961.

Abutting Owner's Tide to Streets.

9. PUBLIC STREETS—Title of Abutting Owners.—The title and legal possession of the owner or occupant of land abutting on a street is presumed to extend to the middle thereof, subject only to the public easement. (N. J.) *Friedman v. Snare etc. Co.*, 764.

Obstruction of Streets.

10. PUBLIC STREET—Obstruction.—No Private Action on account of an act obstructing a public and common right will lie for damages of the same kind as those sustained by the general public, even though the inconvenience and injury to the plaintiff are greater in degree than to other members of the public; but an action will lie for peculiar or special damage of a kind different from that suffered by the general public, even though such damage is small, or though not confined to the plaintiff but also suffered by many others. (Ark.) *Little Rock etc. R. R. Co. v. Newman*, 17.

11. PUBLIC STREET—Obstruction, Private Action for.—One whose property does not abut on that part of a street where a railroad track is laid, the railroad not preventing travel in the street nor barring access to his premises, cannot recover damages therefor. (Ark.) *Little Rock etc. R. R. Co. v. Newman*, 17.

Placing Dangerous Building Materials in Streets.

12. PUBLIC STREETS—Right to Place Building Material Therein. Land owners have the right to deposit in the street building materials required in the improvement of their abutting property. This right, however, must be reasonably exercised, and is subject to regulation in the public interest. (N. J.) *Friedman v. Snare etc. Co.*, 764.

13. PUBLIC STREETS—Placing Dangerous Building Materials Therein.—If the owner of property abutting on a street, or his agent standing in his right, deposits therein building materials attractive to children as a place to play or rest, he owes no duty to so arrange the materials that they will be safe for a child using them as a playground or resting place. (N. J.) *Friedman v. Snare etc. Co.*, 764.

Defective Streets and Sidewalks.

14. NEGLIGENCE, CONTRIBUTORY—Knowledge of Defective Sidewalk.—The fact that a person undertakes to pass over a sidewalk with a previous knowledge of a defect therein is not per se contributory negligence which will defeat a recovery for an injury, and whether such act is contributory negligence or not is a fact for the jury to determine. (Idaho) *Carson v. City of Genesee*, 127.

15. NEGLIGENCE, CONTRIBUTORY—Defective Streets or Sidewalks.—Previous knowledge of a dangerous place in a street or sidewalk is not per se evidence of such negligence as will preclude a recovery for an injury therefrom, except in those cases where the known defect is so great as to prevent a reasonably cautious person from attempting to pass over such street or sidewalk in the usual manner. (Idaho) *Carson v. City of Genesee*, 127.

16. MUNICIPAL CORPORATIONS—Liability for Defective Streets and Sidewalks.—Municipal Corporations, incorporated under general laws granting to them exclusive control over their streets, avenues, and alleys, are liable in damages for a negligent discharge of the duty of keeping such streets and alleys in a reasonably safe condition for the use of travelers in the usual modes. (Idaho) *Carson v. City of Genesee*, 127.

See Constitutional Law; Officers.

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MURDER.

See Homicide.

NEGLIGENCE.

1. **NEGLIGENCE of Third Person.**—If an injury is the result of the negligence of the defendant and that of a third person, the plaintiff, who is free from negligence, may recover if the negligence of the defendant was an efficient cause of the injury. (Ill.) *Christy v. Elliott*, 196.

2. **DANGEROUS PREMISES—Trespassing Animals.**—A manufacturer who keeps his premises inclosed, save for an entrance for railway cars, is not liable for the death of a domestic animal which strays upon the premises and eats deleterious substances stored there for use. (Tenn.) *Tennessee Chemical Co. v. Henry*, 892.

3. **NEGLIGENCE—Parent and Child.**—A Girl Nine Years of Age is of sufficient maturity to be allowed to use the public ways to go to and from school without negligence being imputed to her parents, and she must exercise the degree of care reasonably to be expected of a child of her years. (Mass.) *Young v. Small*, 457.

4. **NEGLIGENCE of Child Which Will Bar Its Recovery.**—If a girl, nine years of age, playing a game in a public street, runs across it without thinking of teams which may be thereon, and is struck and knocked down by a horse attached to a wagon, she, by the ordinary standard of care used by children of her age, must be deemed to have been negligent, and cannot recover for her injury. (Mass.) *Young v. Small*, 457.

5. PERSONAL INJURY—Liability for Shooting.—It is proper to refuse an instruction that the plaintiff cannot recover unless the jury find that the defendant intentionally shot him, where the right of the plaintiff is not founded on the actual intention of the defendant, but on his reckless and wanton conduct as alleged in the complaint. (Md.) *Deck v. Baltimore etc. R. R. Co.*, 399.

6. NEGLIGENCE.—Plea of Contributory Negligence, when properly pleaded in the alternative, does not admit the negligence charged in the complaint. (La.) *Jackson v. Natchez etc. Ry. Co.*, 366.

See Damages; Death.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NOTICE.

NOTICE—Recorded Instruments.—Any instrument affecting title, which is properly recorded, is absolute notice to everyone subsequently dealing with such title, irrespective of whether or not such person has examined the records, or even had an opportunity to make an examination. (Ind.) *Field v. Campbell*, 301.

See Principal and Agent.

NUISANCE.

NUISANCE—Liability for Notice of.—A person who comes into possession of city land as grantee or lessee, with a nuisance already existing on it, is not liable for the continuance of the nuisance and personal injury arising therefrom until his attention has been called to it and he has been requested to abate it, and to render him liable, even if he has notice of the nuisance, it must be shown that his possession and control of the premises were such as to cast upon him the duty of actively providing for the public safety. (Neb.) *City of Lincoln v. First Nat. Bank*, 690.

NUNC PRO TUNC.

See Judgments, 4-7.

OFFICERS.

1. PUBLIC OFFICERS, Personal Liability of.—A Highway Surveyor is not liable at the common law to an action for negligently omitting to perform the duties of his office or for performing them in such a negligent manner as to fail to give the public the benefits which they ought to receive in the enjoyment of good roads. His only liability for this kind of negligence is statutory. (Mass.) *Moynihan v. Todd*, 473.

2. MUNICIPAL OFFICERS, Liability of.—Unless under some special statutory provision, a public officer can have no greater exemption from liability than is granted to a city or town which neglects to perform the public duties imposed upon it. (Mass.) *Moynihan v. Todd*, 473.

3. PUBLIC OFFICERS, Nonliability of.—A public officer while performing duties imposed solely for the benefit of the public is not liable for the mere failure to do that which is required by statute. Negligence that is nothing more than omission or nonfeasance creates no liability. (Mass.) *Moynihan v. Todd*, 473.

4. PUBLIC OFFICER, Liability of for Misfeasance.—For a personal act of misfeasance a public officer is liable to one injured by it, though engaged in the performance of a public duty; he is not liable for acts of misfeasance of his servant or agent, except when the work is not entirely public, but is in part for profit or when some element of pecuniary advantage enters into it. (Mass.) *Moynihan v. Todd*, 473.

5. MUNICIPAL OFFICERS, Liability of.—If the superintendent of streets of a town is personally negligent in causing rock to be blasted without taking proper precautions for the safety of persons rightfully in the vicinity, he is answerable to persons injured thereby, but is not liable if the negligence was that of his servants or agents. (Mass.) *Moynihan v. Todd*, 473.

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ORDINANCES.

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Partnership, acknowledgment of deeds by, form of and who may make, 577.

PARTIES.

1. INTERVENTION IN EQUITY.—The right of intervention, in the absence of statute, is controlled by the general rules in equity as to the answer of the proper parties. (Ill.) *Wightman v. Evanston Yaryan Co.*, 258.

2. INTERVENTION IN EQUITY.—Parties having an interest in the subject matter of a suit in equity, and who are either necessary or proper parties to such suit, if not made parties by the plaintiff, may come in by way of application to intervene and be made parties complainant or defendant, to the end that their interests may be adjudicated and protected. (Ill.) *Wightman v. Evanston Yaryan Co.*, 258.

3. INTERVENTION—Foreclosure—Simple Contract, Creditors.—Persons holding unexpired contracts with a corporation have no such direct interest as entitles them to intervene in a suit in equity to foreclose a trust deed given to secure bonds issued by such corporation. (Ill.) *Wightman v. Evanston Yaryan Co.*, 258.

4. INTERVENTION IN EQUITY—Interest Required.—The interest which enables a person to intervene in a suit in equity must be one created by a claim or lien upon the property in suit, or some part thereof, of such direct and immediate character that the intervener will gain or lose by the direct legal operation of the judgment therein. (Ill.) *Wightman v. Evanston Yaryan Co.*, 258.

PENALTY.

See Damages.

PLEADING.

PRACTICE.—A Demurrer to a Whole Bill, in so far as it seeks a rescission, is in effect an assignment of causes of demurrer to the whole bill, and will be so treated. (Mass.) *Old Dominion etc. Co. v. Bigelow*, 479.

See Equity.

PLUMBERS.

See Constitutional Law, 6.

POLICEMAN.

See Master and Servant, 20-27.

POSSESSION, WRIT OF.

WRIT OF POSSESSION, When Functus Officio.—If a writ of possession is issued, the sheriff has the right to serve it as many times as is necessary to remove the defendant or one claiming under him until the day he is required to return the writ, and it does not become functus officio until the day required for its return. (Tex. Cr. Rep.) *Smith v. State*, 991.

PRINCIPAL AND AGENT.

1. **PRINCIPAL AND AGENT.**—One dealing with a supposed agent is bound to ascertain the scope of his authority. Otherwise he assumes the risk and suffer the consequences. (Mont.) *Cornish v. Woolverton*, 598.

2. **PRINCIPAL AND AGENT**—Recorded Instruments as Notice.—Actual notice to an agent arising from the fact that a certain instrument is properly recorded, is actual notice to his principal. (Ind.) *Field v. Campbell*, 301.

3. **PRINCIPAL AND AGENT.**—Notice to or Knowledge of an agent within the scope of his authority is notice or knowledge of his principal. (Ind.) *Field v. Campbell*, 301.

PRINCIPAL AND SURETY.

See Bonds; Husband and Wife, 1-9; Injunction, 5.

PRIVILEGED COMMUNICATION.

See Evidence, 3.

PROBATE MATTERS.

See Executors and Administrators.

PROCESS.*Exemption from Service.*

1. **PROCESS, CIVIL**—Exemption of Legislature from Service.—Members of the state legislature are not exempt from the service upon them of ordinary civil process at any time. ((Neb.) *Berlet v. Weary*, 616.

2. **PROCESS**—Members of Legislature—Exemption from Service. A member of the legislature is not exempt from the service of summons upon him in a civil case, at the seat of government during the legislative session. (Neb.) *Berlet v. Weary*, 616.

Constructive Service.

3. **CONSTITUTIONAL LAW**—Constructive Service of Process.—The remedy by due course of law guaranteed by constitutional provisions requires that before there is a judicial determination affecting any adversary right of persons in property, process to obtain jurisdiction of the person claiming such right shall be issued and served personally, except that the legislature may provide for a substituted or constructive service to be made when actual service is

impracticable, but in order to justify constructive service some necessity therefor must appear. (Idaho) *Bear Lake Co. v. Budge*, 179.

4. CONSTITUTIONAL LAW—Constructive Service of Process.—A statute which provides for constructive service of summons in certain actions, but fails to require personal service thereof in such actions on known defendants residing within the county or state, is void as being in conflict with constitutional provisions requiring that no person shall be deprived of life, liberty or property except by due process of law. (Idaho) *Bear Lake Co. v. Budge*, 179.

5. CONSTITUTIONAL LAW—Constructive Service of Process.—A constitutional provision declaring that no person shall be deprived of life, liberty or property without due process of law, prohibits the legislature from dispensing with personal service of summons in actions to quiet title or settle private adverse rights to property, when such service is practicable and usual under the general laws of the state. (Idaho) *Bear Lake Co. v. Budge*, 179.

6. CONSTITUTIONAL LAW—Constructive Service of Process.—A statute dispensing with personal service of summons on known resident defendants in certain cases to quiet title or to settle private adverse rights to property and providing for constructive service upon all defendants in such actions, is unconstitutional as a special law for special cases, contrary to the general law providing for the service of summons, and as violative of a constitutional provision that all laws relating to courts shall be general and of uniform operation throughout the state and that the organized judicial powers, proceedings and practices of all the courts of the same class or grade shall be uniform. (Idaho) *Bear Lake Co. v. Budge*, 179.

7. CONSTITUTIONAL LAW—Police Power—Constructive Service of Process.—Under the police power of the state the legislature has no power to authorize a public officer to bring suit to settle the rights of conflicting claimants to private property in certain cases and to provide for the service of notice or summons by publication upon known resident defendants. (Idaho) *Bear Lake Co. v. Budge*, 179.

Affidavit for Service by Publication.

8. PROCESS—Affidavit for Service by Publication.—Under a statute providing that an order may be made for service by publication upon a defendant who is a nonresident of the state, provided "the plaintiff has been or will be unable with due diligence to make personal service" within the state, an affidavit which avers that a defendant resides in an adjoining state, but which discloses no effort to find or serve him, and no reason why such effort if made would be useless, is insufficient to authorize an order for publication. (N. Y.) *Kennedy v. Lamb*, 800.

PROMOTERS.

See Corporations, 20-25.

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- actions against to compel refunding of taxes or licenses collected, 841, 842.
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- actions against to prevent enforcement of taxes, 843.
- actions against to prevent enforcement of unconstitutional statutes, 836.
- actions against to prevent infringement of patents, 836.
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- actions against to prevent misappropriation of public funds, 841.
- actions against to prevent revocation of license to do business, 843.
- actions against to which the state is a necessary party, 832.
- actions against, when deemed to be against the state, 832, 833, 837.
- contracts of the state or United States cannot be enforced by suits against, 834, 837.
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- mandamus against, when not maintainable because the state is the real party, 838.
- of the state or the United States, when subject to private actions, 831.
- trespass and other wrongs, liability for, 831, 832, 835.

QUO WARRANTO.

CONSTITUTIONAL LAW—Quo Warranto.—The proceeding in quo warranto will not lie to determine the constitutionality of a municipal law, but the proper mode to challenge such law is to interpose an objection as a defense to the enforcement of the ordinance. (Tex. Cr. Rep.) *Ex Parte Lewis*, 929.

RAILROADS.

Excessive Speed.

1. **RAILROADS—Negligence—Speed—Schedule Time.**—It is not negligence to run a fast passenger train at the rate of thirty-five miles an hour, past midnight and twenty-five minutes behind schedule time. (Pa.) *Keiser v. Lehigh Valley R. R. Co.*, 872.

2. **RAILROADS—Excessive Speed—Evidence.**—If the exact rate of speed of a fast passenger train, as shown by its schedule and fixed by the train record made by the conductor on the train at the time, was thirty-five miles an hour, which is not excessive, the testimony of a witness, who states that the train was running very fast, but not stating how fast, and fixing no standard by which the speed of

the train can be ascertained, is of no value as showing an excessive rate of speed. (Pa.) *Keiser v. Lehigh Valley R. R. Co.*, 872.

Crossings and Negligence Thereat.

3. **RAILWAYS, Effect of Open Gates at Crossings.**—The fact that gates are open at a crossing, where it is the duty of a railway to keep them closed when a train is approaching, amounts to a statement and notice to the public that the line is at that time safe for crossing, and is evidence of negligence to go to the jury. (Md.) *Northern Cent. Ry. Co. v. State*, 439.

4. **RAILWAYS, Open Gates at Crossing, Care to be Exercised Notwithstanding.**—Though a railway corporation has placed safety gates and stationed a watchman at a crossing, this does not relieve a person about to cross the track of the duty of looking and listening for trains as he approaches and goes over the crossing, and if had he looked and listened he must have seen or heard an approaching engine by the exercise of ordinary care to avoid injury, he cannot recover if injured. (Md.) *Northern Cent. Ry. Co. v. State*, 439.

5. **RAILWAYS, Weight to be Given Testimony That a Bell at a Crossing was not Heard to Ring.**—It is proper to instruct the jury that the testimony of witnesses that they did not hear a bell rung as a locomotive approached a railway crossing is not entitled to be regarded by the jury as of as great probative value as is the positive evidence that it was so rung. (Md.) *Northern Cent. Ry. Co. v. State*, 439.

6. **RAILWAYS.—Testimony of Witnesses That They Did not Hear a Bell Bung** as a locomotive approached a crossing is evidence that it was not rung which the jury should not be instructed to disregard, where such witnesses were at a place and under circumstances where they feel sure they would have heard it had it been rung. (Md.) *Northern Cent. Ry. Co. v. State*, 439.

7. **RAILROADS—Signals at Overhead Crossings.**—The law imposes no absolute duty upon a railway company to warn travelers of the approach of trains at a place where its road crosses a highway on an overhead bridge. If the place is dangerous, the company must give such warning to travelers in the highway; but whether, as a matter of fact, the place is dangerous, is a question for the jury. (Tenn.) *Louisville etc. R. R. Co. v. Sawyer*, 881.

8. **RAILROADS—Negligence at Crossings—Evidence.**—If it is sought to charge a railroad company with negligence at a crossing in failing to give due warning of the approach of the train, evidence negative in character of witnesses who did not hear the bell ring nor the whistle blow, and amounting to only a scintilla, cannot prevail against positive evidence conclusively establishing that such warning signals were given. (Pa.) *Keiser v. Lehigh Valley R. R. Co.*, 872.

See Bonds, 4-6; Carriers; Master and Servant.

RECEIVERS.

1. **RECEIVER, Effect of Reversal of Order Appointing—Compensation.**—Where a receiver is legally appointed, he is entitled to compensation for services rendered by him, though the order of appointment is subsequently reversed. (Mont.) *Hickey v. Parrot Silver etc. Co.*, 510.

2. **RECEIVER.—The Compensation of a Receiver is Taxable Costs,** and while primarily chargeable to, and payable out of, the prop-

erty or funds in his hands, is, nevertheless, in the absence of exceptional facts, ultimately taxable to the losing party whose wrong occasioned the appointment. (Mont.) *Hickey v. Parrot Silver etc. Co.*, 510.

3. **RECEIVER, Fixing Compensation of.**—The court upon the discharge of a receiver before the conclusion of the action, may fix his compensation and adjudge payment thereof against the party at whose instance he was appointed. (Mont.) *Hickey v. Parrot Silver etc. Co.*, 510.

4. **RECEIVER, Compensation of, When cannot be Paid Out of Funds in His Hands.**—If a receiver obtains possession of money or property under an order which is afterward reversed, and he is required to restore the money to the person entitled thereto, he cannot claim compensation out of the funds in his hands, but must look therefor to the party who procured his appointment. (Mont.) *Hickey v. Parrot Silver etc. Co.*, 510.

5. **RECEIVER.**—On the Reversal of an Order Appointing a Receiver, his authority is gone, and it then becomes his duty immediately to render a final report and demand his formal discharge. (Mont.) *Hickey v. Parrot Silver etc. Co.*, 510.

6. **A RECEIVER IS ENTITLED to the Benefit of Counsel**, as a matter of right, when the nature of the trust requires it. (Mont.) *Hickey v. Parrot Silver etc. Co.*, 510.

6a. **RECEIVER—Compensation of Counsel for.**—A receiver cannot make any contract of hiring or agreement for the compensation of his counsel which is binding on the court; for it is the function of the court to determine both the necessity of counsel and the amount of compensation to be allowed therefor. (Mont.) *Hickey v. Parrot Silver etc. Co.*, 510.

7. **A RECEIVER IS ENTITLED to Compensation for the Services Rendered by Him**, and the circumstances and environment of the particular receivership are proper to be considered in determining the amount of the compensation. (Mont.) *Hickey v. Parrot Silver etc. Co.*, 510.

8. **RECEIVER, Compensation, Amount of.**—The compensation of a receiver should not be greater than would be his compensation for doing the same amount and character of work when employed by an individual. If required to give a bond, that should be taken into consideration. (Mont.) *Hickey v. Parrot Silver etc. Co.*, 510.

9. **RECEIVERS.**—In Fixing the Compensation of a Receiver, the considerations which should control are the value of the property in controversy; the particular benefit derived from the receiver's efforts and attention; time, labor, and skill required, and experience in the proper performance of the duties imposed; their fair value measured by common business standards; and the degree of integrity and dispatch with which the work of the receivership is conducted. (Mont.) *Hickey v. Parrot Silver etc. Co.*, 510.

10. **RECEIVERS.**—It is the Duty of a Receiver to Transact His Business in Such a Manner, and to keep his books and vouchers in such a shape, that they may be ready for examination at any time. (Mont.) *Hickey v. Parrot Silver etc. Co.*, 510.

11. **RECEIVER—Costs Due to His Negligence.**—If costs are caused by the negligence of a receiver, he cannot maintain a claim for his reimbursement out of the trust fund nor from the party who caused his wrongful appointment. (Mont.) *Hickey v. Parrot Silver etc. Co.*, 510.

12. RECEIVER—Attorney's Fees, Party Procuring Wrongful Appointment, When not Liable for.—If, after the reversal of an order appointing a receiver, the defendant and the receiver enter into a stipulation that the former's objections to the latter's accounts may be referred to and heard by a referee, the party procuring the wrongful appointment of such receiver, but who did not join in such stipulation and hearing, is not liable for the compensation of the receiver's attorneys thereat and in preparing therefor. (Mont.) *Hickey v. Parrot Silver etc. Co.*, 510.

13. RECEIVERS—Reversal of Order Appointing—Compensation After.—A receiver is not entitled to compensation or allowance for any new business transacted after the filing of a remittitur showing the reversal of the order appointing him. When the remittitur is filed, the expense of the receivership terminates in so far as it can be charged against the trust funds or against the party procuring the appointment of the receiver. (Mont.) *Hickey v. Parrot Silver etc. Co.*, 510.

14. RECEIVERS—Attorney's Fees After Reversal.—After the reversal of an order appointing him, a receiver has no authority to employ counsel whose compensation can be charged against the trust fund or against the party procuring the wrongful appointment of the receiver. (Mont.) *Hickey v. Parrot Silver etc. Co.*, 510.

15. RECEIVER—Fixing Compensation of and of His Attorney, When may be Made Without Evidence.—Evidence relative to the appointment of a receiver and the fees of his counsel may be admitted for the purpose of informing the court as to what is just and reasonable under the circumstances, but where the court has personal knowledge of all that has been done by the attorneys, it is not always necessary to hear evidence respecting the amount to be allowed them. The court is presumed to know the value of attorneys' services, and it is for its own enlightenment that such evidence is heard. (Mont.) *Hickey v. Parrot Silver etc. Co.*, 510.

RECORDS.

See Mortgages; Notice; Principal and Agent.

REPLEVIN.

REPLEVIN—Equitable Lien as Defense.—The defendant in replevin may interpose the defense of an equitable lien on the property, and have the case transferred to equity for a determination of the issue. (Ark.) *American Soda Fountain Co. v. Futrall*, 64.

RESERVATIONS AND EXOEPTIONS.

See Deeds.

RES GESTAE.

See Homicide, 17-22.

RIPARIAN RIGHTS.

See Waters and Watercourses.

SEDUCTION.

1. SEDUCTION—The Crime of Seduction was unknown to the common law. (Ark.) *Caldwell v. State*, 28.

2. SEDUCTION—Indictment—Allegation of Chastity.—If a statute creating the crime of seduction makes no reference to the chastity of the woman, the state is not required to allege and prove her chastity as an element of the crime. (Ark.) *Caldwell v. State*, 28.

SELF-DEFENSE.

See Homicide, 11-14.

SENTENCE.

See Criminal Law, 18.

SHERIFF.

See Possession, Writ of.

SIGNS AND BILLBOARDS.

See Constitutional Law, 7; Municipal Corporations, 6, 7.

SLANDER.

See Libel and Slander.

Note.

Specific Performance, actions against a state or its officers to compel, 834.

SPENDTHRIFT TRUSTS.

See Trusts.

STATES.

1. STATE—Immunity from Suits.—A state of the Union, being a sovereign, cannot be sued, except with its own consent. (N. Y.) *Sanders v. Saxton*, 826.

2. STATE OFFICERS—Immunity from Suit.—Although a state cannot be subjected to hostile legislation at the instance of an individual, this immunity cannot be claimed by its officers. They can be held responsible for illegal trespasses or torts on the rights of an individual, even though they act or assume to act under the authority and pursuant to the directions of the state. (N. Y.) *Sanders v. Saxton*, 826.

3. STATE Suit Against Officer to Cancel Tax Deed.—The owner and possessor of land cannot maintain an action against the commissioner of the state land office and the comptroller of the state, they not having committed or threatened to commit any illegal act jeopardizing the plaintiff's rights, to cancel and remove tax deeds executed by the comptroller to the state on sales of the land for unpaid taxes, for the state is a necessary party to the action, and it has not consented to being sued. (N. Y.) *Sanders v. Saxton*, 826.

Note.

States, actions against are not maintainable without their consent, 831.

immunity of from actions cannot be waived by officers of, 831.

STATUTES.

Enactment of Statutes.

1. STATUTES, Governor's Signature Inadvertently Attached to is not an Approval.—If a governor signs a bill by inadvertence and

under a misapprehension as to what paper it is, and without having gone through the mental operation of approving it, and immediately thereafter, and before the bill leaves the executive chamber, he erases his signature, such bill does not thereby become a law, and the evidence of the governor is admissible to prove these facts. (Md.) *Alleghany Co. v. Warfield*, 446.

2. ENACTMENT OF STATUTES—Legislative Journals.—In determining whether the constitution has been complied with in the passage of bills, resort may be had to the legislative journals. If it affirmatively appears therefrom, either expressly or by necessary implication, that the constitution has not been observed, the bill is not valid; but if they are merely silent on this question, it must be presumed that the fundamental law has in all respects been followed. (Colo.) *Andrews v. People*, 76.

3. ENACTMENT OF STATUTES—Parol Evidence.—The recitals of legislative journals, or the presumptions, which attach to their silence, cannot be contradicted by verbal statements. (Colo.) *Andrews v. People*, 76.

4. ENACTMENT OF STATUTES—Vote by Ayes and Nays.—The constitutional requirement that the vote on the passage of a bill must be taken by ayes and nays does not apply to a motion to reconsider the action taken on the passage of a bill. (Colo.) *Andrews v. People*, 76.

Title of Act.

5. CONSTITUTIONAL LAW—Automobiles—Title of Act.—The title of an act entitled "An act to regulate the speed of automobiles and other horseless conveyances upon the public streets, roads and highways of the state," is sufficient to embrace the subject as to when an automobile driver may be required to bring his machine to a full stop. (Ill.) *Christy v. Elliott*, 196.

STOCK AND STOCKHOLDERS.

See Corporations.

STRIKES.

See Trades Union.

SUBROGATION.

SUBROGATION to Rights of State on Payment of Taxes.—The purchaser at a mortgage foreclosure sale is entitled to be subrogated to the rights of the state when he has redeemed the land from tax sales. (Colo.) *Northern Investment Co. v. Frey Real Estate etc. Co.*, 104.

SUICIDE

See Criminal Law, 12.

SUMMONS.

See Process.

SURETYSHIP.

See Principal and Surety.

TAXATION.*Delegation of Power to Tax.*

1. **CONSTITUTIONAL LAW—Local Improvement—Taxation.**—The provisions of the New Jersey act of April 22, 1903, authorizing the levy of a tax, for public improvements to relieve the Passaic Valley sewerage district from pollution, on all people and property within an area not coterminous with the Passaic Valley district, for an amount to be determined by an executive commission, is unconstitutional, since it contemplates a delegation of the power of taxation, and the sewerage district is not a political district of the state, and, if it were, could not be invested with power to levy a tax beyond its own limits. (N. J.) *Van Cleve v. Passaic Valley etc. Commrs.*, 754.

2. **CONSTITUTIONAL LAW—Delegation of Power of Taxation.**—The legislature can delegate the taxing power only to political districts of the state, to be exercised within their respective limits; and some power of local self-government is essential to every political district. (N. J.) *Van Cleve v. Passaic Valley etc. Commrs.*, 754.

3. **CONSTITUTIONAL LAW—Delegation of Power to Tax.**—Where the legislature delegates the power to determine the amount of a tax to be levied in a district, such district must be coterminous with, and not extend beyond the limits of, a district to which some right of self-government is given. (N. J.) *Van Cleve Passaic Valley etc. Commrs.*, 754.

4. **CONSTITUTIONAL LAW—Delegation of Power to Taxation.**—The legislature has no power to delegate to another body, having no governmental functions, the authority to determine in its judgment and discretion the amount to be raised by taxation. (N. J.) *Van Cleve v. Passaic Valley etc. Commrs.*, 754.

Situs of Personality.

5. **TAXATION—Situs of Notes.**—The state has power to treat promissory notes of a nonresident, which are permanently kept in the hands of an agent within the state, as personal property within the state for the purpose of taxation. (Ind.) *Buck v. Beach*, 272.

6. **TAXATION—Situs of Personal Property—Power of State.**—It does not militate against the power of the state to tax personal property which has a definite and permanent situs therein, that another state, by reason of its jurisdiction over the owner or otherwise, is also exercising a like power. (Ind.) *Buck v. Beach*, 272.

7. **TAXATION—Situs of Personality of Nonresident.**—Where a resident of one state owning a single business has for the purpose of transacting it, split it up between two other states, the state which not only furnishes protection, but which has within it practically at all times the concrete evidences of the indebtedness created in such business that alone, so far as the credit is concerned, is subject to taxation, may be treated as the proper situs for the assessment and taxation of such evidences of indebtedness. (Ind.) *Buck v. Beach*, 272.

8. **TAXATION—Situs of Personality—Avoidance of Taxation.**—If the tangible evidences of a nonresident's investments are kept within one state permanently in the hands of an agent for the purpose of escaping taxation elsewhere, their situs, for the purpose of taxation, is in the state where they are thus kept. (Ind.) *Buck v. Beach*, 272.

9. **TAXATION—Situs of Personality—Avoidance of Taxation.**—If promissory notes of a nonresident are permanently kept within one

state, their situs, for the purpose of taxation, is in that state, and their liability to taxation therein cannot be avoided by temporarily removing them from such state each year prior to assessment day. (Ind.) *Buck v. Beach*, 272.

10. TAXATION—Situs of Personalty—Burden of Proof.—As to any personal property having a definite and established situs within the state, the burden of proof is on the person objecting to its assessment to point out some reason compelling the conclusion that it is not subject to taxation in such state. (Ind.) *Buck v. Beach*, 272.

Exemption of Property.

11. TAXATION—Constitutional Law.—A statute which exempts from taxation property of residents of the state, "actually and permanently invested in business in another state," does not affect the taxation by the state of the personal property of a nonresident permanently kept within the state, and is not unconstitutional as creating a discrimination in favor of the residents of the state. (Ind.) *Buck v. Beach*, 272.

Inheritance Tax.

12. INHERITANCE TAXES are not laid upon the property inherited or devised, but upon the right to take the property by devise or descent. This right owes its existence to statutory enactment and is subject to legislative abrogation or regulation. (Ill.) *In Re Estate of Speed*, 189.

13. INHERITANCE TAXES, Regulation of Amount of.—In laying an inheritance tax the legislature may consider the relation which the person or corporation given the right of succession sustains to the deceased, to the property or to the state, and may regulate the amount of the tax to be required in view of such relation. (Ill.) *In Re Estate of Speed*, 189.

14. INHERITANCE TAXES—Distinction Between Classes.—If the constitutional principle that taxes must be uniform as to the classes upon which they operate is observed, the legislature may lay taxes upon the right of one class of persons and corporations to succeed to property of deceased persons and exempt the right of other classes of persons or corporations from such taxation. (Ill.) *In Re Estate of Speed*, 189.

15. INHERITANCE TAXES—Constitutional Law.—A statute exempting from an inheritance tax property devised to the use of religious, educational or charitable institutions or corporations, does not violate constitutional requirements of uniformity of taxation by reason of a failure to extend immunity to foreign corporations. (Ill.) *In Re Estate of Speed*, 189.

16. INHERITANCE TAXES—Foreign Corporations.—A statute exempting from an inheritance tax property devised to the use of a religious, educational or charitable corporation, having no power to make dividends or distribute profits, does not apply to foreign corporations. (Ill.) *In Re Estate of Speed*, 189.

See *States*, 3.

TENANCY IN COMMON.

COTENANCY IN WATER—When does not Exist.—When two persons act together in appropriating water and in constructing a ditch, under an agreement that each is to have one-half of the water and apply his half to his separate estate and land, they are not tenants in common. (Am. St. Rep., Vol. 108—71)

ants in common in the water right, and either may change his place of use or point of diversion, if the change does not damage or infringe the right of the other. (Colo.) *City of Telluride v. Davis*, 101.

TRADES UNION.

LABOR, Interference with Which is Against Public Policy.—An attempt to force all employes to combine in unions is against the policy of the law, because it amounts to a monopoly. (Mass.) *Berry v. Donovan*, 499.

See Contracts, 2-5; Master and Servant, 3-5.

TRIAL.

1. JURY TRIAL—Instructions Contradictory in Terms.—An instruction to the jury to the effect that if they find that the defendant recklessly and wantonly shot the plaintiff, they must find for him, unless the shooting was done in self-defense, is erroneous, because the proposition so stated appears to be a contradiction in terms. (Md.) *Dick v. Baltimore etc. R. R. Co.*, 399.

2. TRIAL—Argument of Counsel—Remarks of Court.—It is proper for the court, or for the attorney for the prosecution, to enjoin upon the jury not to arrive at the verdict by lot or chance. (Tex. Cr. Rep.) *Scott v. State*, 1032.

See Criminal Law.

TROVER.

1. TROVER—Conversion of Mortgaged Chattel.—Where the mortgagor of a soda fountain trades it in part payment for a new one to a person having notice of the mortgage, the new fountain is impressed with an equitable lien in favor of the mortgages to the extent of the value of the old one. (Ark.) *American Soda Fountain Co. v. Futrall*, 64.

2. TROVER.—The Measure of Liability for converting a chattel is its value at the time and place of the conversion. (Ark.) *American Soda Fountain Co. v. Futrall*, 64.

TRUSTS.

1. TRUSTS, Creation of so that Property is not Subject to Execution.—Whenever the founder of a trust is the absolute owner of the property disposed of, and has a right to prescribe the terms on which his bounty shall be enjoyed, he may provide in direct terms that the property shall go to his beneficiaries to the exclusion of the latter's alienees and creditors. (Md.) *Wenzel v. Powder*, 380.

2. TRUST OF INCOME for Support, When Belongs Absolutely to the Beneficiary.—When the whole income or a definite sum is given a beneficiary for his support, the whole belongs to him and is to be applied by him at his discretion, and the expression of the purpose for which it is given is not deemed to be an expression of an intention that the right to secure it shall not be inalienable, but when the right given is that of support out of a fund which is given to another, the right is in its nature inalienable, and the intention of the donor that it shall not be alieneed is presumed. (Md.) *Wenzel v. Powder*, 380.

3. SPENDTHRIFT TRUSTS, When not Created by a Gift for Support.—If property is conveyed in trust, so that the trustee shall take the rents and profits and apply them to the support and main-

tenance of designated persons during their lives, the beneficiaries have the right to the whole of the fund thus created and not a mere right to support out of it, the trust created is not a spendthrift trust, but the interest of the beneficiaries is assignable and may be subjected to the payment of their debts by proceedings in equity. (Md.) *Wenzel v. Powder*, 380.

4. **TRUST FOR SUPPORT, When Belongs to the Beneficiaries Absolutely.**—If a deed gives the whole income for the support and maintenance of the beneficiaries, the whole belongs to them, and the statement of the purpose for which it has been given cannot be deemed to be the expression of an intention that it shall not be alienable. (Md.) *Wenzel v. Powder*, 380.

5. **TRUST, When does not Terminate.**—If property is conveyed to be held in trust to receive the rents and profits and apply them for the support and maintenance of H. and his wife and children during the lives of H. and his wife, and after their death the property to belong to their children, share and share alike, the child of any deceased child to take only its parent's share, and H. dies leaving two daughters, after which the interest of the widow is conveyed to one of them, the trust does not terminate, because there is a contingent limitation over in favor of the children of the daughters who may come into being during the life of the widow. (Md.) *Wenzel v. Powder*, 380.

Note.

Trusts, spendthrift, American law of, 382.

spendthrift, wills creating need not declare in direct terms that the property is not subject to execution, 383.
when executory and when executed, 382.

United States, actions against are not maintainable without its consent, 831.

immunity of from actions cannot be waived by officers of, 831.

USURY.

USURY must be Specially Pleaded as a defense, and the fact wherein it is alleged the usury charged consists must be specifically alleged, and the proof must be confined to the allegations. (Ill.) *Home Building etc. Assn. v. McKay*, 263.

See Building and Loan Associations.

VENDOR AND VENDEE.

VENDOR AND PURCHASER—Contract to Sell.—Possession of land under a contract for personal services in cutting timber and making lumber for the owner in possession as his agent merely, and not as vendee, although the contract provides that when all of the timber is made into lumber, the person thus in possession will be entitled to a conveyance of the land remaining unsold, provided certain conditions have been fulfilled. (Ill.) *National Fire Ins. Co. v. Three States Lumber Co.*, 239.

VENUE.

CHANGE OF VENUE—Discretion of Court.—Whether a change of venue shall be granted in a criminal case rests in the sound discretion of the court, and its action will not be disturbed

unless it appears that such discretion was abused to the prejudice of the applicant. (Colo.) *Andrews v. People*, 76.

VERDICT.

See Criminal Law, 16, 17.

WATERS AND WATERCOURSES.

1. **WATERS—Riparian Rights.**—Running water is *publici juris*, and one riparian owner is not permitted to monopolize all the water of a running stream when there are other riparian proprietors who need and may use it also, nor has any riparian owner an absolute right to insist that every drop of the water shall flow past his land exactly as it would in a state of nature. (Neb.) *Meng v. Coffee*, 697.

2. **WATERS—Riparian Rights.**—A riparian owner has no absolute and exclusive right to the flow of all the water of the stream in its natural state, but only a right to the benefit and advantage of the water flowing past his land so far as consistent with a like right in all other riparian owners. (Neb.) *Meng v. Coffee*, 697.

3. **WATERS—Riparian Rights—Irrigation.**—A riparian owner may take water from the stream for the purposes of irrigation, and the only limitation upon such right is that it must be exercised reasonably with due regard to the rights of others under the circumstances of each particular case. (Neb.) *Meng v. Coffee*, 697.

4. **WATERS—Riparian Rights—Regulation of Use.**—In regulating the use of water by riparian owners, the law distinguishes between those modes of use which ordinarily involve the taking of small quantities and but little interference with the stream, and those which necessarily involve the taking or diversion of large quantities and a considerable interference with its ordinary course and flow. (Neb.) *Meng v. Coffee*, 697.

5. **WATERS—Riparian Rights—Equality in Use.**—The purpose of the law is to secure equality in the use of the water by riparian owners, as near as may be, by requiring each to exercise his rights reasonably and with due regard to the rights of other riparian owners to apply the water to the same or other purposes. (Neb.) *Meng v. Coffee*, 697.

6. **WATERS—Riparian Rights—Irrigation—Reasonable Use.**—What is a reasonable use of the water of a stream for irrigation purposes is largely a question of fact, and one which may be viewed with some liberality in semi-arid regions, where use for such purposes necessarily involves much loss. (Neb.) *Meng v. Coffee*, 697.

7. **WATERS—Riparian Rights—Irrigation.**—The uses which an upper riparian owner may make of a stream for the purposes of irrigation must be judged in determining whether they are reasonable, with reference to the size, situation, and character of the stream, the uses to which its waters may be put by other riparian owners, the season of the year and the nature of the region as to aridity. The circumstances differ in different cases, and what use is reasonable must be largely a question of fact in each case. (Neb.) *Meng v. Coffee*, 697.

8. **WATERS—Riparian Rights—Use for Irrigation.**—An upper riparian owner, in using the water of a stream for irrigation, must not waste, needlessly diminish, nor wholly consume it, to the injury of other like owners, nor so as to prevent a reasonable use of it by them also. (Neb.) *Meng v. Coffee*, 697.

9. **WATERS—Riparian Rights—Irrigation—Appropriation of Water by "Squatter's Right,"** not recognized by law or custom, does not give to the settler on public land who has appropriated water in that way for a less period than that fixed by statute an exclusive right to the water as against other settlers upon the stream. (Neb.) *Meng v. Coffee*, 697.

10. **WATERS—Riparian Rights—Settler's Appropriation of Water—Tacking to Establish Prescriptive Right.**—The period during which a settler upon government land maintains an irrigation ditch under "squatter's right," and afterward under a homestead entry, prior to obtaining patent to his land, may be counted by him in making out the statutory period of prescription as against a subsequent settler and patentee from the government on the same stream. (Neb.) *Meng v. Coffee*, 697.

11. **WATERS—Riparian Rights—Adverse User.**—An upper riparian owner acquires no right to divert or dissipate the whole stream by making such use thereof as will still leave water for the lower riparian owner. So long as there is sufficient water for all, there is no adverse user. (Neb.) *Meng v. Coffee*, 697.

12. **WATERS—Riparian Rights—Adverse User—Dry Seasons.**—Only a continuous and adverse user of the whole stream for the statutory period of prescription will give an upper riparian owner a right to take out a greater proportion of the water of such stream in time of a dry season than he has habitually taken out in other and former seasons. (Neb.) *Meng v. Coffee*, 697.

13. **WATERS—Riparian Rights.**—The common-law rule of riparian proprietorship as to water rights, and not the civil-law rule of appropriation of water, prevails in Nebraska. (Neb.) *Crawford Co. v. Hathaway*, 647.

14. **WATERS—Riparian Rights.**—At common law every riparian proprietor, as an incident to his estate, is entitled to the natural flow of the water of streams running through or by his land, undiminished in quantity and unimpaired in quality, although all the riparian owners have a right to the reasonable use of the water for the ordinary purposes of life, and any unlawful diversion thereof is an actionable wrong. (Neb.) *Crawford Co. v. Hathaway*, 647.

15. **WATERS—Riparian Rights—Vested Rights.**—The right of a riparian owner as such to the water of a stream running through his land is property, and when vested can be destroyed or impaired only in the interest of the general public, upon full compensation and in accordance with established law. (Neb.) *Crawford Co. v. Hathaway*, 647.

16. **WATERS—Riparian Rights—Property Rights.**—The riparian right to the use of water flowing in a natural watercourse is a property right, to protect which the owner may resort to any and all instrumentalities which may be employed for the protection of private property rights generally. (Neb.) *Crawford Co. v. Hathaway*, 647.

17. **WATERS—Riparian Rights—Property Right.**—A riparian owner's right to the use of the flow of the stream running through or by his land is a property right inseparably annexed to the soil, and not an easement or appurtenance. (Neb.) *Crawford Co. v. Hathaway*, 647.

18. **WATERS—Riparian Rights—Appropriation for Public Use.**—A statute authorizing and regulating the appropriation of the waters of the state for irrigation and other purposes, declared thereby to be a public use, is valid, and in making appropriations of water

as contemplated by the statute, a riparian owner whose property rights in water are taken or impaired is entitled to compensation for his injury actually sustained, to be recovered in a suitable action. (Neb.) Crawford Co. v. Hathaway, 647.

19. **WATERS—Riparian Rights.**—A riparian owner has a right only to enjoy the advantage of a reasonable use of the stream as it flows by his land, subject to a like right belonging to all other riparian owners. The riparian property interest in the water is usufructuary, and the use must in all cases be reasonable. (Neb.) Crawford Co. v. Hathaway, 647.

20. **WATERS—Riparian Rights—Irrigation—Appropriation—Damages.**—The mere fact that a riparian owner is deprived of the full flow of the stream adjacent to his land by the appropriation of water therefrom for irrigation furnishes no basis for compensatory damages. Merely diminishing the volume of water in the stream does not deprive the owner of property for which he can lay claim to a pecuniary compensation. At most, the naked right to the full flow of the stream and its loss by diminishing the volume of water when appropriated for irrigation purposes can result only in *damnum absque injuria*. (Neb.) Crawford Co. v. Hathaway, 647.

21. **WATERS—Riparian Rights—Damages for Appropriation for Irrigation.**—To entitle a riparian owner to compensation for water appropriated for irrigation, he must suffer an actual loss or injury to the use of the water which the law recognizes as belonging to him, and to deprive him of which is to take from him a substantial property right. It must be such a taking or damage as materially depreciates the value of the real estate of which such water forms a part. (Neb.) Crawford Co. v. Hathaway, 647.

22. **WATERS—Riparian Rights—Irrigation.**—Ordinarily, the riparian property right in water is limited to the use of the water of the stream for domestic purposes, and, if applied to the irrigation of riparian lands, a reasonable use for such purposes in view of an equal right of use belonging to all other riparian proprietors, fixes the basis for compensation where there has been a deprivation of such right by the appropriation of the water for a public use. (Neb.) Crawford Co. v. Hathaway, 647.

23. **WATERS—Riparian Rights to the use of the water of a stream for irrigation purposes apply to riparian lands only.** (Neb.) Crawford Co. v. Hathaway, 647.

24. **WATERS—Riparian Rights—Nonriparian Lands.**—Riparian rights to a reasonable use of the water of a stream cannot be enlarged or extended by the acquisition of the title to lands contiguous to the riparian land, nor can a riparian owner, as such, rightfully divert to nonriparian lands water which he has a right to use on riparian land, but which he does not use. (Neb.) Crawford Co. v. Hathaway, 647.

25. **WATERS.—Land to be Riparian must have the stream flowing over it or along its borders.** (Neb.) Crawford Co. v. Hathaway, 647.

26. **WATERS.—Extent of Riparian Land cannot, in any event, exceed the area acquired by a single entry or purchase from the government.** (Neb.) Crawford Co. v. Hathaway, 647.

27. **WATERS—Riparian Rights—Appropriation.**—The two doctrines of water rights, namely, that of priority of appropriation and that of riparian ownership, may both exist in the same state at the same time. (Neb.) Crawford Co. v. Hathaway, 647.

22. WATERS—Riparian Rights.—The common-law rule of riparian rights is underlying and fundamental and takes precedence of appropriation of water if prior in point of time. (Neb.) Crawford Co. v. Hathaway, 647.

29. WATERS—Riparian Rights—Appropriation.—The appropriator of water acquires title by appropriation and application to some beneficial use, of which he cannot be deprived except in some of the modes prescribed by law. (Neb.) Crawford Co. v. Hathaway, 647.

30. WATERS—Conflicting Water Rights—Priority.—The time when either a riparian right or an appropriator's right accrues must determine the superiority of title as between conflicting claimants. (Neb.) Crawford Co. v. Hathaway, 647.

31. WATERS—Irrigation Legislation.—A statute regulating the appropriation of water for irrigation may abrogate the law of private riparian rights as theretofore existing, and may substitute therefor a law providing for the appropriation of the public waters of the state and their application to beneficial uses, but such statute does not have the effect of abolishing vested rights of riparian owners, and affects only such rights as may be acquired in future. (Neb.) Crawford Co. v. Hathaway, 647.

32. WATERS—Appropriation—Vested Rights.—Whether an appropriator of water has acquired rights which are in their nature vested, and which, when once acquired, become a superior title, and give the better right to the use of such water than that of a riparian owner whose title is acquired subsequently, must depend on the facts and circumstances as disclosed in any particular case. (Neb.) Crawford Co. v. Hathaway, 647.

33. WATERS—Appropriation—Prior Rights.—Every appropriator of water who has applied it to a beneficial use contemplated by law has acquired a vested interest therein which gives him a superior title to the use of the water over the riparian proprietor whose right has been acquired subsequently thereto, or who has lost his right once acquired, by either grant or prescription. (Neb.) Crawford Co. v. Hathaway, 647.

34. WATERS AND WATER RIGHTS—Suit in Equity to Determine.—If a large number of persons claim the right to use or divert the water of a stream, some by virtue of riparian rights, others by appropriation, prescription, or otherwise, a suit in equity to determine such rights, and enjoin infringement, under color thereof, of rights acquired under irrigation legislation, may be maintained to avoid a multiplicity of suits. (Neb.) Crawford Co. v. Hathaway, 647.

35. WATER AND WATER RIGHTS—Suit in Equity to Settle Conflicting Claims—Offer to do Equity.—Plaintiff in a suit in equity in the nature of a bill of peace to protect his water rights, and determine and define conflicting rights to claims upon the waters of the same stream, may offer to do equity by compensating riparian owners whose rights are affected by the construction and operation of a canal under his appropriation, and in this way the amounts due the several persons claiming rights by way of damages may become a proper subject of inquiry and adjudication therein. (Neb.) Crawford Co. v. Hathaway, 647.

36. WATERS—Riparian Rights—Domestic Use.—The common law distinguishes between those modes of use of water, which ordinarily involve a taking of small quantities thereof, and but little interference with the stream, and those which necessarily involve a taking or diversion of large quantities and a considerable interference

with its ordinary flow. The use of the stream in the ordinary way by a riparian owner for drinking and cooking purposes and for watering his stock is a domestic use. This right of the riparian owner is preserved to him as against other appropriations of water for other uses by canals, ditches and pipe-lines, whereby large quantities of water would be abstracted. (Neb.) Crawford Co. v. Hathaway, 647.

37. **WATERS—Riparian Rights.**—The common law does not give to the riparian owner an absolute and exclusive right to all the flow of the water from a stream in its natural state, but only the right to the benefit, advantage, and use of the water flowing past his land in so far as it is consistent with a like right in all other riparian owners. (Neb.) Crawford Co. v. Hathaway, 647.

38. **WATERS—Riparian Rights—Flood Waters.**—A riparian owner having a vested right to the use of the water of a stream as against an appropriator is not entitled to an injunction to prevent the diversion of the flood or storm waters of the stream to a beneficial use. (Neb.) Crawford Co. v. Hathaway, 647.

39. **WATERS—Riparian Rights—Adverse User.**—There is no such thing as a prescriptive right of a lower riparian owner to receive water of a stream as against upper owners. The riparian owner is entitled to the reasonable use and enjoyment of the water of the stream and to insist that the water come to his land to be so used and enjoyed. He may by prescription acquire a right to use and divert the water beyond that which the common law would give him, but he gets this right only by adverse user, and if he diverts water which otherwise would flow down to a lower owner, that use is adverse. (Neb.) Crawford Co. v. Hathaway, 647.

40. **WATERS—Riparian Rights—Prescriptive Right.**—A lower riparian owner can acquire no prescriptive right to receive water as against upper like owners, and thus enable him to prevent reasonable use of it by them. (Neb.) Crawford Co. v. Hathaway, 647.

WILLS.

1. **WILLS.**—What will constitute a valid will or a valid attestation of a will is a legislative question, and the only legitimate function of a court is to declare and enforce the law as enacted by the legislature. (Ill.) Calkins v. Calkins, 233.

2. **WILLS—Execution—Presence of Testator.**—"In the presence of the testator," as applied to subscribing witnesses to his will, means contiguity with an uninterrupted view between the testator and such witnesses, so that he can, if he wants to, see the act of attestation, whether in the same room or not. (Ill.) Calkins v. Calkins, 233.

3. **WILLS.**—Attestation of a will is the act of witnessing the actual execution of the instrument, and subscribing the name of the witness in the testimony of that fact. (Ill.) Calkins v. Calkins, 233.

4. **WILLS—Subscribing Witness.**—A valid will must be signed by the subscribing witness in the presence of the testator, and it is not sufficient that they merely acknowledge their signatures in the presence of the testator. (Ill.) Calkins v. Calkins, 233.

5. **WILLS.**—Attestation of a will is not in the presence of the testator, although the witnesses are in the same room and close to him if some material obstacle prevents him from knowing of his own knowledge, or perceiving by his senses, the act of attestation. (Ill.) Calkins v. Calkins, 233.

6. WILLS—Attestation.—A will is not legally attested nor sufficiently executed, if the subscribing witnesses sign their names to the will where it is impossible for the testator to have conscious personal knowledge of their act, and is merely told that it has been done in another room, although he has requested them to sign, saw them take the will into the adjoining room, and saw their signatures on the will afterward. (Ill.) *Calkins v. Calkins*, 233.

7. WILLS—Proof of.—Attesting Witness to a will must be a subscribing witness, and it is not competent to prove a will by a person who was present and witnessed its execution but did not sign as an attesting witness. (Ill.) *Calkins v. Calkins*, 233.

WITNESSES.

In General.

1. MURDER—Evidence—Accused as Witness.—The fact that a person accused of murder had married the principal witness for the prosecution on the day before his trial began is a legitimate subject of inquiry, and he may be required to state that fact while testifying in his own behalf, even though he married her for the purpose of suppressing her testimony. (Tex. Cr. Rep.) *Moore v. State*, 952.

2. WITNESSES—Refreshing Memory.—A witness for the prosecution in a criminal case may have his memory refreshed by having read to him a prior statement made and signed by him in the same case before the grand jury. (Tex. Cr. Rep.) *Smith v. State*, 991.

3. CRIMINAL LAW—Production of Witnesses.—A person accused of crime is not required to issue process for witnesses unless he desires to do so, and the fact that he does not cannot be used as a criminative fact against him. (Tex. Cr. Rep.) *Clifton v. State*, 980.

Husband and Wife.

See Evidence, 3.

4. WITNESSES—Competency of Wife of Accused.—After the marriage ceremony is performed, no matter when or what the motive was or may be, the woman is prohibited from testifying against her husband, except when the offense is by the husband against her person. (Tex. Cr. Rep.) *Moore v. State*, 952.

5. WITNESSES—Competency of Wife of Accused.—After a person accused of murder has testified that he married the principal witness for the prosecution on the day before the trial, it is reversible error to call her to the witness-stand, and against objection, allow her to testify as to the time and circumstances surrounding her marriage to the accused, when it is evident that she is called and placed upon the witness-stand to show that the accused married her to suppress her testimony and to compel him to object to her testimony after it has been clearly established that she is his wife. (Tex. Cr. Rep.) *Moore v. State*, 952.

Impeachment.

6. WITNESSES—Impeachment.—The answer of one witness to the opinion of another witness cannot be used to impeach the former. (Tex. Cr. Rep.) *Vann v. State*, 961.

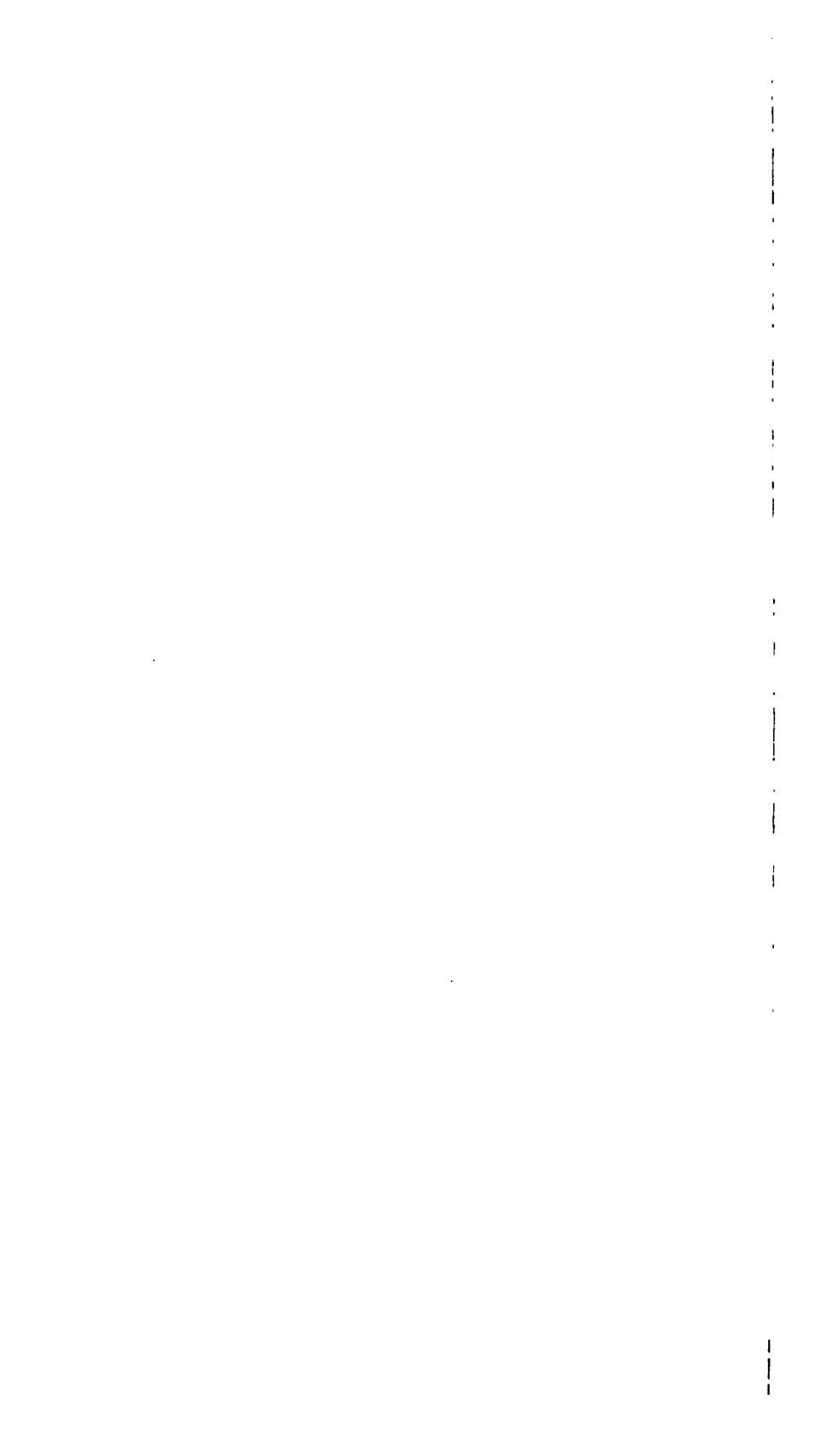
7. WITNESS.—In Impeaching the Credit of a Witness, the Examination Must be Confined to His General Reputation and not be permitted to extend to particular facts. (Md.) *Deck v. Baltimore etc. R. R. Co.*, 399.

8. **CRIMINAL LAW—Evidence—Impeachment of Witness.**—The opinion of a witness as to who committed a particular crime is inadmissible and cannot form the basis for his impeachment. The admission of such evidence over the objection of the accused is reversible error. (Tex. Cr. Rep.) *Parker v. State*, 1021.

See Appeal and Error, 7; Evidence; Willa.

WRIT OF POSSESSION.

See Possession, Writ of.



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